

**Recognizing the Assemblage:  
Palestinian Bedouin of the Naqab in Dialectic with Israeli Law**

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## ABSTRACT

In the five case studies, we examine how Israel, as a collection of individuated interests given expression in the form a state, is in a dialectic of recognition with the Naqab Bedouin community. Recognition happens on a few registers. Palestinians from the Naqab seek recognition for their particular identity and lifeways. They seek legal recognition for their living spaces. And they seek these things from the Israeli state, the sovereign. But the struggle for recognition from the sovereign is fraught, particularly in settler colonial situations like this one, in part because it pivots around a *particular identity* for which *autonomy* or *freedom* is sought. Identities in law tend to be, after all, static, constrictive and generalizing.

The five case studies concern a land ownership case, a crop-spraying case, the eviction of Bedouin from Umm al-Hieran, discriminatory land allocation in the Wine Path Plan case and the vaccinations case. Four of the five case studies concern land, which speaks to the centrality of land in the dialectic between Naqab Palestinian Bedouin citizens and the Israeli state. The dissertation is principally informed by the theoretical frameworks of critical race theory, postcolonial theory and feminist theory, but is at the same time theoretically and methodologically eclectic, and beyond just using theory to validate phenomena, this dissertation attempts to understand *why* phenomena come to be phenomena – whether it be ‘Bedouin’ as identity or the organized, legal struggle for recognition – what makes these phenomena identifiable, stable states of being?

After aggregating the individual conclusions to the case studies, the dissertation finally posits the question, how might we imagine freedom for the Naqab Bedouin community given that their social justice struggle continues to be confined to a particular identity?

## **ACKNOWLEDGEMENTS**

To Nuri and the Palestinian community of the Naqab – for opening your homes, your hearts and for sharing your stories. I hope this dissertation does your steadfastness justice. To my supervisor, Susan, for her patience and insight while accompanying me on this rather long journey. To my family – the dynamic Katie and Jaleel – for, in spite of yourselves, being those constants when things were in flux.

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## **Introduction**

“We stopped being ‘Bedouin’ a long time ago”.

These were the words spoken to me by a prominent human rights lawyer, Morad al-Sane’, when I first set out to conduct fieldwork in the Naqab and was asking about his tribal affiliation. My initial inquiry for the dissertation was to ask how law, in its entanglements with Palestinian Naqab ‘Bedouin’ society, shapes, constructs and is the site of contestation for ideologies and *identities*.

Morad’s words were jarring, and they haunted me for years. How could the subject of my inquiry, ‘Bedouin’ from the Naqab, be said (by someone I had identified as the same) to not exist, or at least to no longer be relevant to the task I had assigned it? What did that mean for the assumptions, hypotheses and research that were built around the term, ‘Bedouin’? I will attempt at an initial deconstruction of the dilemma in this Introduction, and then in a more thoroughgoing way over the length of the dissertation’s six chapters.

The reality in the Naqab could quite summarily be concluded as being a legal battle between Bedouin and the State over rights to land use, possession and ownership following the establishment of the State of Israel in 1948. So, if we take our cue from most contemporary scholarship on the Naqab Bedouin, we could set the frame for our discussion around the fact that one hundred thousand Arab Bedouin live in some three dozen villages that are not recognized by the state (even though they existed prior to the establishment of the state in 1948) where they are denied basic amenities such as water, electricity, adequate educational and medical services. Another one hundred thousand live in development towns that are recognized by the state but are among the poorest recognized localities in all of the country. As the state seeks to assert its sovereignty over the land that it has colonized, it ought to displace the natives that existed there prior, hence the attempts to transfer and concentrate them from their unrecognized zones of habitation to the recognized ones.

We could then cite the Planning and Building Law of 1965 as the legal basis for why homes are routinely demolished, particularly in the three dozen unrecognized villages, or look at more recent legal maneuvers in the Praver Plan to regulate Bedouin settlement in the Naqab. We could look back to Ottoman and Mandatory legislation and case law to establish certain prescriptive or ownership rights in the present under Israeli law. We could also attempt to chiefly frame the

dilemma as one stemming from property law specifically informed by the logic of settler colonialism and draw analogies with other settler colonial societies like Australia and Canada. These evaluations, and solutions, would be the crux of the story to tell if a strictly jurisprudential analysis is adopted. However, as critical legal studies (CLS) scholar Roberto Unger clarifies for us, legal rules and principles do not appear out of nowhere, rather they are created in a specific historical context at a specific historical moment.<sup>1</sup> For this reason, the specific contexts and arrangements that critical legal studies, feminist theory and critical race theory alert us to, are summoned in every legal case study I analyse.

### What this dissertation attempts

What this dissertation attempts to do is go beyond the typical scholarship on the ‘Naqab Bedouin’ subject, which has largely been descriptive, stating the legal or political arguments as they appear, and mostly failing to show the subject’s intersections with, and enfolded within, other theoretical streams.<sup>2</sup>

That said, in calling on other theoretical perspectives, this dissertation does not limit itself to describing the way law aligns or ‘makes’ citizen subjects of the Bedouin. And while it does “analyze how settler colonial legality appears when encountered from their lives”,<sup>3</sup> meaning it is as much about the subjects themselves – their lifeways and affective investments – as it is a commentary on the modalities of and the operational rationales for settler colonial law, it is not just about settler colonial law. The dissertation does not simply posit that constellations of forces and moving power bases are at play in the settler colonial encounter, as (post)colonial theory would insist. Rather, what it attempts to do is look at how and why phenomena come to be phenomena – whether it be ‘Bedouin’ as population category or identity, ‘vaccination compliance’ as practice and ideal, or the organized legal struggle for recognition by the Bedouin community – what makes these phenomena identifiable, stable states of being?

Specifically, this dissertation looks at precarity, agency and performativity in the milieu of race, class, citizenship, security and health. Four of the five case studies concern land, which although

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<sup>1</sup> Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, Mass.: Harvard University Press, 1986)

<sup>2</sup> See Ahmad Amara, Ismael Abu-Saad, and Oren Yiftachel (eds.), *Indigenous (In)Justice: Human Rights Law and Bedouin Arabs in the Naqab/Negev* (Cambridge, MA: Harvard University Press, 2013)

<sup>3</sup> Elizabeth A. Povinelli, *Geontologies: A Requiem to Late Liberalism* (Durham & London: Duke University Press, 2016) at 23.

may not be their primary preoccupation, are nevertheless informed by issues around land – its ownership, the agricultural use and possession of – and also the dispossession, destruction and eviction from land. The fact that the majority of the case studies are, to varying degrees, embedded in the scene of contestations over land, speaks to the centrality of land in the dialectic between Naqab Palestinian Bedouin citizens and the Israeli state.

The five case studies open with vignettes of individuals embedded in a particular legal dilemma. They are not ethnographic explorations, per se, if only because they take a shorter form. The vignettes tease out perceptions, behaviours and affective investments in situations and events directly related to the particular case, and the constellation of situations that we can identify as making Bedouin lifeways.

### On Theory

Clinton Bailey, a leading ethnographer on Bedouin culture in the Naqab and Sinai, writes that until the nineteenth century, Bedouin were as dependant on reading the stars for predicting the weather, travel, and animal husbandry, as their ancestors were several generations ago in the Arabian Peninsula.<sup>4</sup> I would like to draw in this metaphor of star-gazing to illustrate for the reader how I recommend they approach the dissertation, specifically with regard to how the different theories, or constellations, coalesce as they lead up to the final, and concluding discussion on recognition, our Polaris (*al-Jidi*, in Arabic), or north star.

The dissertation is methodologically eclectic. I take my cue from Duncan Kennedy's own method in *Critique of Adjudication*<sup>5</sup> in that I draw in different theories – chiefly critical race theory, postcolonial theory and feminist theory, and methods – such as technical legal analysis, jurisprudence and deconstruction – because no one theory or method can claim to represent the subject of my inquiry – Naqab Bedouin in Israeli law. All these theories and methods have been subject to critique and to claim that a theory or set of theories can accurately represent the subject would be false because it would conflate representation with 'truth'. What I've chosen to do in star-mapping this dissertation is to mull on particular theoretical streams when traversing a particular constellation. Therefore, I appropriate spatial theory in the chapter on the Wine Path Plan because

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<sup>4</sup> Clinton Bailey, "Bedouin Star-Lore in Sinai and the Negev" (1974) 37:3 *Bulletin of the School of Oriental and African Studies* (University of London) 580-596

<sup>5</sup> Duncan Kennedy, *A Critique of Adjudication: fin de siècle* (Cambridge, Massachusetts; London, England: Harvard University Press, 1997).

spatiality is at the crux of the legal discussion. Yet, spatial theory is ensconced in the chief theories that guide this dissertation – CRT, PCT and feminist theory. Similarly, digging deeper into the legal decision in the *Abu Mdeghem* crop-spraying case, we see that violence is not just what is represented as violence, but that which escapes representation as well, and this is where the phenomenon of structural violence becomes so relevant. Yet, the concept of structural violence furthers the discussion and reveals further sides to the main theoretical frames. It is hoped that in moving from one chapter to the next, the reader is able to understand deeper dimensions of what it means to be Bedouin in Israeli law, towards the concluding discussion on what it means to be ‘recognized’ as the same. Each chapter, and its eclectic theories and methods, attempts to guide that journey.

So, back to star-gazing. If Polaris is our north-star, the concluding chapter on recognition, then Canopus (*Suhayl*, in Arabic) comes to stand in for security, as that which orients the reader to the south, is always looming and attempting to hide like the spectre of security.<sup>6</sup> *Thurayya*, or Pleiades, as a star that signifies what is to come,<sup>7</sup> could be taken to represent ‘affect’, the circulation of emotions always implicit to a situation but not necessarily knowable or nameable. And just as when stars are juxtaposed to one another, when concepts or theories intersect, a different reading is possible than when stars or concepts/theories are read alone. So, for example, when Sirius hangs over Canopus, which happens in late February because they are on the same meridian, the Bedouin know that spring is about to rear its head.<sup>8</sup> Similarly, how does security’s intersections with liberty/liberalism or equality tell us *something more* about security? If concepts or phenomena are stars, then theories can be the constellations, and both stars and constellations help us traverse the different chapters in our journey to Polaris, or a conclusion on recognition.

### Identity, Racialization and Constructs

So what does ‘Bedouin’ mean, anyway? Why was the US-educated lawyer from Laqiya insistent in his refusal to carry the label in the way I had deployed it?

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<sup>6</sup> The saying is, “Filan zay nijm as-Suhayl-yitla' wiy'aiwid 'al-adh-dhayl”, meaning “So-and-so is like Canopus; rises and immediately returns on his tail”. Clinton Bailey, “Bedouin Star-Lore in Sinai and the Negev” (1974) 37:3 *Bulletin of the School of Oriental and African Studies* (University of London) 580-596 at 583

<sup>7</sup> *Wasm ath- Thurayya*, ' the sign of the Pleiades ' or simply al-wasm ' the sign ', is reckoned to last for 75 days from the end of October and is a sign for the rains that fall in its duration, *ibid.* at 585

<sup>8</sup> Thus the Bedouin traditionally said: “Al-Burbarah, limma tasir li-Suhayl rishi 'Ishi wala hu 'ishi Awwal rabi' wi akhar ishti”, meaning “When Sirius hangs over Canopus like a bucket-rope At the very beginning of evening 'Tis the last of winter and the first of spring,”, *ibid.* at 586.

The word Bedouin has its origins in the word 'badiah', the Arabic word for desert, so that a 'badawi' (Arabic for 'Bedouin') was a desert dweller. 'Bedouin' also signifies a life that is 'bidai', meaning essential and basic, so that the lives Bedouin lived were marked by simplicity. The word Bedouin has also come to mean those who lived a nomadic/semi-nomadic lifestyle. As a result of these characterizations, Palestinians from the Naqab were identified, or themselves largely identified, as 'Bedouin' prior to the first half of the 20<sup>th</sup> century.

Since then, however, they have been fully sedentarized. The community no longer undertake seasonal migrations, while a significant portion live lives with modern amenities outside a typical desert environment. Accordingly, they live lives that traverse the boundaries of what it means to be 'Bedouin'. Nevertheless, the term is still deployed, both by those who self-identify as such, and by the Israeli authorities.

The Israeli legal system consistently refers to the population as 'Bedouin'. This ascription to a population of a racial category, its racialization, defines the contours of what this population is (and what it can be) in the law. Therefore, as the case studies reveal, in ascribing to the population that it is 'Bedouin', taken to mean essentially and naturally 'nomadic', the courts make the argument that the community does not have a tangible connection to the land that would give rise to certain rights to it.

In the same vein, the court deliberations and decisions frequently mark the Bedouin as a community always in transition from the traditional to the modern. In defining the Bedouin as such, the courts simultaneously mark the Israeli state, and its legal and executive arms, as facilitating that transition to modernity, from the unplanned and unrecognized villages to recognized development towns.

So, we can see how the naming of the community as 'Bedouin' facilitates the nation-building goals of freeing up the land and demographic reorganization in a settler colonial society. At the same time, the persistence of the term 'Bedouin' can also be attributed to its adoption by the community and the larger Palestinian population itself.

The self-identification as Bedouin allows the community to ascribe uniqueness and value to their particular situation, which is different in many (but not all) ways from other Palestinian citizens of

Israel. It is also an identity that resonates with Orientalist conceptions of the Bedouin – the noble warrior, the chivalrous, the brave and the hospitable.

As critical theorists have shown us, identity, like race and gender, is a social construct and an invention of modernity.<sup>9</sup> As much as Palestinian identity in the earlier twentieth century was a product of anti-colonial convictions and pragmatic drives for autonomy<sup>10</sup> so too Jewish, Israeli identity was constructed as a homogenizing identity around an essentially very heterogeneous polity.<sup>11</sup>

Therefore, minority or indigenous population groups or gender non-normative identities are marginalized in majority, heteronormative populations. The former are excluded from certain goods and services and as a result also have slimmer life chances. This means that we cannot end the conversation at ‘gender/race/[fill in other non-normative identity] is a social construct’. Rather, we are called to deploy these alternative, non-normative, subaltern identities in a way that Gayatri Spivak has termed ‘strategic essentialism’. That is, we should act as if essentialism were true for political expediency and collective action.

One particularly central way of collective organizing for the community has been around the theme of ‘recognition’.

### On recognition

Palestinians from the Naqab seek recognition for their particular identity and lifeways. They seek legal recognition for their living spaces. And they seek these things from the Israeli state, the sovereign. But the struggle for recognition from the sovereign is fraught, particularly in a settler colonial situation.

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<sup>9</sup> David Theo Goldberg, “Introduction: Racial Subjects,” *Racist Culture: Philosophy and the Politics of Meaning* (Oxford: Blackwell, 1993) at 3, Donald S. Moore, *Suffering for Territory: Race, Place and Power in Zimbabwe* (London and Durham: Duke University Press, 2006) at 12-15, Stuart Hall, “The West and the Rest” in Stuart Hall and Bram Gieben (eds.), *Formations of Modernity* (Cambridge: Polity, 1992) 275-320.

<sup>10</sup> Salim Tamari, *Jerusalem 1948: The Arab Neighbourhoods and their Fate in the War* (Jerusalem: Institute for Jerusalem Studies, 1999), David Theo Goldberg, *The Threat of Race: Reflections of Racial Neoliberalism* (Oxford: Blackwell, 2009) at 106 [Goldberg, *The Threat of Race*]

<sup>11</sup> Goldberg, *The Threat of Race*, *ibid.* at 113

This dissertation explores the theme of recognition as it springs up in the five case studies and I explore the dilemmas associated with the dialectic in depth in the final chapter. Specifically, the discussion around recognition is grounded in Hegel's treatment of the same, which speaks to identity, to conflict between competing identities and to the possibilities of mutual recognition.

Briefly stated, then, Hegel's dialectic of recognition conceptualises how in the process of recognition, a self-consciousness encounters another self-consciousness. In seeing the second self-consciousness the first self-consciousness comes out of itself. Self-consciousness sees in the other its own self, it thereby supersedes the other, becomes equal to itself and subsequently becomes certain in its being for self. This being for self is the exclusion from itself of everything else, "it is not attached to any specific *existence*... it is not attached to life".<sup>12</sup>

The dialectic is a critique of social relations of domination and is undertaken in the name of equality, even though one could read 'recognition' as always coming too late, realized after the effects of domination and subjugation.<sup>13</sup>

But the dialectic of recognition prompts anxiety when considering Naqab Bedouin. So, for example, Povinelli<sup>14</sup> and Markell<sup>15</sup> warn that when indigenous or multicultural communities seek recognition from the sovereign, they also bind themselves into being permanently spatially, temporally and metaphysically isolated within their racialized enclaves. Charles Taylor cautions that 'misrecognition' can cause those subject to it to internalize a depreciatory view of themselves, chaining themselves with a crippling self-hatred that prevents them from taking advantage of new opportunities.<sup>16</sup> Certainly, as human existence is always a becoming, it is unable to fit, with its doubts and irritations and moral conundrums, into the fixed legal forms and modern dialectics prescribed by 'recognition'.

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<sup>12</sup> G.W.F. Hegel, *Phenomenology of the Spirit*, (trans. A.V. Miller) (Oxford: Oxford University Press, 1977) at 113 [Hegel, *Phenomenology of Spirit*].

<sup>13</sup> Patchen Markell, *Bound by Recognition* (Princeton, N.J.: Princeton University Press, 2003) at 92-95 [Markell, *Bound by Recognition*]

<sup>14</sup> Elizabeth A. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham and London: Duke University Press, 2002) [Povinelli, *Cunning of Recognition*]

<sup>15</sup> Markell, *Bound by Recognition*, *supra* note 13

<sup>16</sup> Charles Taylor, "The Politics of Recognition" in Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (New Jersey: Princeton University Press, 1994) at 25-26

This dissertation begins with Nuri al-'Oqbi's story. Nuri is a social justice activist who is seeking legal recognition for the ownership of family lands in al-'Araqib and Zahaliqah. In seeking recognition for the same from the courts, he risks closing for good the final chapter in his life-long struggle to gain 'recognition' should he lose the case. On the flip side, however, he also has his whole life's work to gain.

This forces me to pose the question that Lauren Berlant asks in *Cruel Optimism*, "Why do people stay attached to conventional good-life fantasies—say, of enduring reciprocity in couples, families, political systems, institutions, markets, and at work—when the evidence of their instability, fragility, and dear cost abounds?"<sup>17</sup> Similarly, why would the community continue to push for legal recognition from a settler colonial state, when all branches of government have repeatedly shown incapacity to really apprehend, make intelligible and recognize Bedouin lifeways?

### I, too, evolve

The following chapters were researched and written over nine years. The fieldwork component, which was a core component of this dissertation, began in September 2010. It involved, among other things, Hebrew study for half a year, participant observation, interviews, and ethnographic research around six legal cases in the Naqab, even though in the end I chose to focus on only five. Each case involved meetings with at least six individual stakeholders in a case (among them Naqab Bedouin petitioners/respondents, local authorities, community leaders, lawyers, judges, government officials, students, academics and activists). In addition, I undertook extensive research at Ben Gurion University - the only institution where a lot of relevant literature on the Naqab Bedouin is located, and also co-created with a fellow doctoral student an online study group for students and professors in an attempt to breathe more theory into the research being conducted around Naqab Bedouin. My fieldwork also included conducting archival research at local archives, including the IDF (Israel Defence Forces) archives, the latter which I won't forget too easily, if only because one of the guards at the archives remarked to a senior employee that my wife, who is Palestinian with Israeli citizenship, ought not to be there, because she was Palestinian. My wife had accompanied me to help with the identification and translation of documents into Hebrew. Contrary to the guard's insistence, the IDF archives are open to all Israeli citizens, Palestinian or

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<sup>17</sup> Lauren Berlant, *Cruel Optimism* (Durham and London: Duke University Press, 2011) at 2.

otherwise, though in any case, the majority of the archival material remains classified and so not available to the public.<sup>18</sup>

Over the length of the dissertation, I lived in the unrecognized Bedouin village of Khirbet al-Hura in Nuri's home. I acquired Israeli citizenship and also gave birth to a son, who, too, acquired Israeli citizenship. I worked on an Israeli organic farm at the moshav, Kfar Yehoshua, and I even instituted an online fundraising system for Adalah: The Legal Center for Arab Minority Rights in Israel.<sup>19</sup> My experience over the past decade reveals to me that research projects like this one are indeed chiefly about the individuals and the larger Naqab Bedouin community and the settler colonial legal system, but in a way not insignificant, at the same time are also a personal journey, where one's situatedness in Israel/Palestine, entangles me in a network of competing ideas, situations, events, affects and identities, so that I too evolve as the dissertation itself does. Over the span of a decade, my orientation towards identity, exemplified in the question I posed to Morad about Bedouin tribal identity, had morphed into something else; something far more circumspect, and particularly in the context of social justice struggles where identity politics tend to be front and center.

### The five case studies

Complexity theory holds that in order to understand reality, we should not work on general abstraction and attempt to fit that to explain complex social situations or individuals. Rather, we ought to look at the complexity of relations at the level of the individual and understand the relational networks that make individuals to have a fuller understanding of what is the subject.<sup>20</sup> As the dissertation progresses, this is what I set out to do for each case study.

Chapter 1 is about Nuri al-'Oqbi and concerns his ownership claims over five strips of land in al-'Araqib and Zahiliqah. In 1948, the State took possession of the lands of Zahiliqah and in its place built Moshav Talmei Bilu for Israeli Jews. In 1956, the state expropriated the lands of al-'Araqib under the relevant legal provisions. Nuri's case is appropriate to launch this dissertation, because I would like to first sketch Bedouin lifeways, and his work as a social justice activist for all of his

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<sup>18</sup> Ofer Aderet, "The classified treasure Israel will never fully reveal" *Ha'aretz* (July 7, 2013), online: <https://www.haaretz.com/.premium-the-treasure-israel-will-never-fully-reveal-1.5292067>

<sup>19</sup> The latter, after all fieldwork research was completed and most of the dissertation, save the final chapter, was written up.

<sup>20</sup> For a helpful account of assemblage and complexity theory, see Nick Srnicek, *Assemblage theory, complexity and contentious politics: The political ontology of Gilles Deleuze*, Master's Thesis (unpublished) (London: University of Western Ontario, 2007) [Srnicek, *Assmeblage Theory*]

adult life is an appropriate lens through which to do that. Lifeways refer to ways of being and organizing in a native community that are both about tangible, recognizable practices as much as they are about affect, the somehow unknowable and undefinable circulation of emotions that makes the subject and binds subjects to each other. The chapter grapples with settler colonial legal rules of evidence, procedure and the court as a site of deliberation for competing native-state narratives, and what that means for the courts' ability to apprehend and make intelligible Bedouin lifeways.

The next chapter looks at a crop-spraying case in Bedouin unrecognized villages and dives deeper into the legal rules, those birthed in that moment of rupture in sovereignty around the years 1947-1949, that influence the ability of the courts to make Bedouin testimony intelligible. Here we will unpack the concept of 'structural violence', as put forth by Galtung and Farmer,<sup>21</sup> and given a contemporary interpretation in Murdocca's exploration of the Kashechewan water crisis. Structural violence is systemic violence by those that belong to a certain social order directed at persons, preventing them from achieving their potential. However, being structural, the forms of violence are not recognizable as distinct events that rupture the ordinary flow of life; as a result, the violence is not often named, and those responsible are not always known. This chapter pursues the question, 'What does the phenomenon of structural violence mean for legal decisions that are received positively?' The court ruled to ban the method of aerial spraying of crops. But it did not address the larger phenomenon of dispossession of the Bedouin community from lands they laid historical claim to. At the tail-end of the chapter, I undertake a deconstructivist reading of the decision, inspired by the work of Derrida and Spivak, to imagine how the court could have reached a more far-reaching decision, possibly one more deserving of the label of 'a positive decision'.

The third chapter, focused as it is on land, like the chapters before it, is a ripe opening to explore 'spatial theory', drawing on Henry Lefebvre and Doreen Massey. Here, I build on the identification of silences of human suffering (Nuri's case) and structural violence (the crop-spraying case) in Israeli adjudication to explore how several other elements of 'space' - particularly the 'social' and lived aspects of it - are also silenced and the implications of such silencing for Naqab Bedouins' interactions with it. This is a chapter that unpacks how forms of Bedouin agency materialize in Atir and Umm al-Hieran, the sister Bedouin villages threatened with destruction to make way for a

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<sup>21</sup> Johan Galtung, "Violence, Peace, Peace Research" (1969) *Journal of Peace Research* 6(3): 167-91, Paul Farmer, "An Anthropology of Structural Violence", Sidney W. Mintz Lecture 2001, (2004) *Current Anthropology* 45(3): 305-25.

Jewish community and a forest in their place. The findings also push back against the idea that Bedouins are primarily “suspended in space” as explored by Ronen Shamir, or even just hanging in the interstices between zoe and bios as seen in Agamben’s work on *homo sacer*, but rather are in a dialectic with space, via the Lefebvrian notion of lived space.

The fourth chapter is a deep meditation on liberty and security, and how the two are in fact co-constituted. Why was Israel’s court generally regarded, particularly during the era of former Chief Justice Aharon Barak, as an example of legal liberalism? What have the implications of adjudication on the basis of fundamental principles, as put forth by Barak, meant for Palestinian citizens of Israel? If *both* equality and security are deemed by Barak to be fundamental principles, what basic guarantees to equality do Palestinians enjoy?

It is worth asking why I choose to spend an entire chapter on liberalism, that which has been the subject of extensive critique by the three principal theoretical streams I employ in this dissertation. Once more, I take my cue from Duncan Kennedy and the coda he employs for critiquing law.<sup>22</sup> Therefore, if the Israeli courts are generally identified as a site for legal liberalism, it makes sense to identify, as Kennedy proposes, the qualities and characteristics exclusive to Israeli law on one hand and legal liberalism on the other. Thereafter, in the spirit of chiasmic inversion,<sup>23</sup> we attempt to show the inherent tensions between the two when it comes to the common denominators of ‘accommodating minorities’, ‘recognizing the right to self-determination’, and possibly most crucially, for our definition of ‘liberty’. Next, we put these distinctions aside to meditate on why these distinctions persist, despite the identifiable tensions between the two. That is, why does the phenomenon whereby the Israeli court is identified as a liberal court come to be a stable state of being, in spite of the inherent contradictions that we identified via our chiasmic inversion? This is where our principal theories explain what is served when such distinctions escape being named, and this facilitates our movement further towards drawing conclusions on the phenomenon of recognition.

The fifth chapter centers around a legal amendment that would cut child allowance payments to families that did not meet the essential vaccination requirements set by the state. The amendment

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<sup>22</sup> Duncan Kennedy, “A Semiotics of Critique” (2001) 22 *Cardozo Law Review* 1147-1189 at 1189

<sup>23</sup> In rhetoric, chiasmus is when two or more phrases are presented and then presented again in reverse order to make a larger point. Derrida’s work in deconstruction employs this method. See *ibid*.

threatened to disparately impact Naqab Bedouin families as they had inadequate access to well-baby clinics where such vaccinations were administered. Being about vaccines and the promotion of the health of the child and the social body, the case is a rather unique prism through which one can explore how 'life' generally is conceived, lived, made to conform, regulated and biopolitically governed in the community. Further, it sheds light on how life is made recognizable and how *different forms of recognition* manifest. As it deals with the issues of birth, vaccination, life and medicine, as well as the performativity and agency of Naqab Bedouin mothers, the case is a rather telling example of 'assemblage', the coming together of disparate elements into a unity.

In fact, assemblage theory informs the dissertation as a whole. This is because as we attempt to aggregate our conclusions in Nuri's land ownership case, the crop-spraying case, the Umm al-Hieran evictions, the discriminatory allocation of land in the Wine Path Plan case and the vaccinations case, assemblage theory allows us to draw in heterogeneous elements – theories, methods, concepts – into a unity to make conclusions about recognition, which is done in the sixth and concluding chapter.

The dissertation is not without its conundrums. How do five women in Bir al-Mashash, while bombs drop around them, come to stand in for Bedouin women's approach to vaccinations or performativity around the same? In the same case, what I had identified as the most pressing problem was not similarly diagnosed by the women. The vaccination amendment was not problematic for the women because it closed down possibilities for different ethical choices (to vaccinate, vaccinate partially or not to vaccinate), but rather because it threatened to cut off a crucial lifeline (child allowance) for mothers and their children and to exacerbate an already arduous life. Would it really matter that the aluminium content *may* have had a detrimental effect on their children if at the same time they carried the very real fear that a Gazan-sourced bomb could seriously injure their children? My own situatedness prevented me from appreciating where my subject's energies and affective investments really lay, and I don't believe that that is something, or could be something, fully resolved.

Further, how did my own gravitation towards 'Naqab Bedouin' as a subject of study, because I saw a community that resembled the community of my birth and childhood, influence my preconceptions of and inclinations towards that particular identity, or indeed 'identity' as a concept? These are just some of the challenges in the research methodology that I try to work through in the dissertation.

Despair. The present moment is marked by despair, and uncertainty for Naqab Bedouin. The Praver Plan could be implemented very soon, on a wide scale and with considerable force, thereby displacing tens of thousands of Naqab Bedouin from their historical lands. Looking further afield, we see that the Palestinian national movement is in disarray, Israeli settlement expansion in the West Bank and Jerusalem is continuing apace, most stakeholders have given up on the negotiations around a two-state solution, while the spectre of a larger regional war, possibly centering around Syria, continually looms over the heads of all those in Israel/Palestine.

When the faces of racialization, the denial of liberties, both quotidian and fundamental, and the absence of hope rear their head, the call for ethical relationality doesn't cease. That is, part of what we are working through in this dissertation is appreciating a form of ethical relationality ensconced in Bedouin being within the milieu of Bedouin lifeways. The dissertation concludes with some suggestions for the same.

The ethical relationality that this dissertation prescribes in the concluding chapter can be found in Povinelli's call to "look elsewhere from where we are standing,"<sup>24</sup> not only to sense those similarly maligned by constellations of power that malign, but also to develop an ethical relationality to the outside. That is, it is heeding to Spivak's call to "to unseat oneself to ethically reseal oneself", it is the Levinasian "infinite right of the other", Judith Butler's "comporting oneself beyond oneself...of being dispossessed from sovereignty and nation in response to the claims made by those one does not fully know and did not fully choose".<sup>25</sup> And it is the affective current that we sense when we perform a particular reading of Palestinian poet, Mahmoud Darwish's "Passport", where he writes,

*Don't ask the trees for their names  
Don't ask the valleys who their mother is  
From my forehead bursts the sword of light  
And from my hand springs the water of the river  
All the hearts of the people are my identity<sup>26</sup>*

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<sup>24</sup> Elizabeth A. Povinelli, *Geontologies: A Requiem to Late Liberalism* (Durham & London: Duke University Press, 2016) at 13.

<sup>25</sup> Judith Butler, *Parting Ways: Jewishness and the Critique of Zionism* (Columbia University Press, 2012) at 9 [Butler, *Parting Ways*]

<sup>26</sup> Mahmoud Darwish, "Passport" (undated), online: <http://www.adabna.com/diwan/a/1266>

## Chapter 1 - The Case Study of Nuri al-'Oqbi and Bedouin Lifeways

### **Introduction**

Nuri Sliman Mohammad al-'Oqbi was born on January 20 1942 and grew up with his immediate and extended family in al-'Araqib. Nuri is a prominent social justice activist who has dedicated his life to seeking recognition for his family's historical use, possession and ownership of lands in al-'Araqib. In doing so, Nuri has sought a form of recognition where not only his family's, but the wider Naqab Bedouin community's historical forms of living are respected so that present ways in which they organize themselves and choose to live can be accorded protection by the state. Because Nuri's land claims struggle has spanned a lifetime of over seven decades I think his lens is a fitting one to look through when exploring the dialectic of recognition between the Israeli sovereign and the Naqab Bedouin.

As the somewhat linear history of this chapter sketches, Nuri made three significant returns to al-'Araqib to lands he claims are his family's ancestral property. He also has land ownership claims in nearby Zahiliqah that his father inherited after his grandfather passed away in the summer of 1945 and are also the subject of Nuri's land ownership case under study.

This chapter is an apt launching point to demonstrate Bedouin lifeways, and how those lifeways are recognized and apprehended by the Israeli courts. By lifeway I refer to that which is common to other indigenous cultures, a diverse and "ongoing creative practice that is simultaneously rational, affective, intentional, and ethical,"<sup>27</sup> a way of organizing in the community that is an alignment of our metaphysical being – both spiritual and physical – with that of the natural world.<sup>28</sup>

Glen Sean Coulthard has referred to such indigenous ways of being and organizing as 'grounded normativity', which are "the modalities of Indigenous land-connected practices and longstanding experiential knowledge that inform and structure our ethical engagements with the world and our relationships with human and nonhuman others over time".<sup>29</sup>

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<sup>27</sup> John A. Grim, "Introduction" in John A. Grim (ed.), *Indigenous Traditions and Ecology: The Interbeing of Cosmology and Community* (Harvard University Press, 2001)

<sup>28</sup> For more on the Anishinabeg lifeway, see Winona LaDuke, "Minobimaatisiwin: The Good Life" (1992) 16(4) *Cultural Survival Quarterly* 69–71

<sup>29</sup> Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 13

Being affective, Bedouin lifeways, as much as they can be demarcated and known, are also an amalgamation of what exists in the intimate. Affect, although often conflated with 'emotion', is after all, *not* emotion. Unlike emotion, affect is not recognizable, knowable or defined.<sup>30</sup> As Kathleen Stewart writes, affects are surging capacities to affect and be affected in a continual motion of relations, scenes and emergences. And they happen in impulses, sensations and expectations.<sup>31</sup> How does this obtuse movement of affect in indigenous lifeways influence the ability of the law to recognize and apprehend all that is in fact at stake in a land claims case? Also, are these fleeting currents of affect the only significant factor in determining whether specifically Bedouin indigenous lifeways can be apprehended by the Israeli courts, or may there be other significant elements at play?

### The early years

Nuri's family grew their own food and were generally self-sufficient in al-'Araqib. Agriculture enabled the family to make a living off their produce, as they grew wheat and barley in the winter and cucumber, berries, pumpkin and watermelons in the summer. They also had fruit and nut trees which gave them almonds, figs, grapes and pomegranate. The land they farmed was organized around a central water source, known as 'batn il-sada'. They grew cactus and trees around their water source, and in receding order from the water source, they grew fruits, vegetables, lentils, tobacco and on the outermost perimeter, corn. In communal spaces, when animals were taken out to pasture, the community made use of two kinds of shade trees, the thorny 'sidr' (Christ's Thorn Jujube) that carried little fruit called 'doma', and 'ithl' (Tamarisk) which with its numerous, slender branches and spike-like racemes, generated a gentle breeze for whoever was sitting in its shade.

The presence of the al-'Oqbi tribe dates back centuries, with one of the earliest written records in the *Dafteri Mufassel*, an Ottoman tax register that records the taxes on wheat, barley and summer crops that the tribe paid to the Ottoman authorities in 1596.<sup>32</sup>

### The Nakba and the First Displacement

The 'Nakba' – meaning 'catastrophe' – led to the displacement of 750,000 Palestinians and the destruction of hundreds of Palestinian villages during the founding of the state of Israel between

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<sup>30</sup> Brian Massumi, "The Autonomy of Affect" (1995) 31 *Cultural Critique* 83-109 at 88

<sup>31</sup> Kathleen Stewart, *Ordinary Affects* (Durham & London: Duke University Press, 2007) at 1-3.

<sup>32</sup> Salman Abu Sitta, "The Denied Inheritance: Palestinian Land Ownership in Beer Sheba", Paper presented to the International Fact Finding Mission (London: Palestine Land Society, 2009) at 5

1947 and 1948.<sup>33</sup> The city of Beersheba, the cultural and economic capital of the Naqab at the time, fell to Zionist forces on October 21 1948.<sup>34</sup> Thereafter, the majority of the tribes were expelled or forced to flee for fear of repercussions;<sup>35</sup> such was the fate of Nuri's uncle, organizer of the local resistance, Ibrahim Mohammad al-'Oqbi. By 1953 only some ten percent of the Naqab's original inhabitants remained within the borders of what became Israel.<sup>36</sup>

Following Beersheba's fall, six-year old Nuri was propped on the back of a donkey destined for Jabal al-Kohleh, near today's Kibbutz Lahav. However, he and his family were able to return to their lands later that year through the assistance of a relative. Salman Al-Huzayyel, married to Nuri's paternal aunt Wadha Mohammad al-'Oqbi, enjoyed good relations with the Zionist authorities and his intervention enabled the family to return to their home after a three month absence. Salman Al-Huzayyel was also responsible for convincing Nuri's father to remain within the new borders of Israel and on his land.<sup>37</sup> In July 1949, an order from Avraham Shemesh of the military government demanded the immediate eviction of al-'Araqib's residents and their relocation to a small portion of land which the authorities had deemed their 'original living space'.

#### The Post-1948 Early Years in Al-'Araqib

Nuri's family, however, was not evicted in 1949 but remained in al-'Araqib. As Nuri's paternal uncle, Ibrahim, belonged to the resistance and was forced to flee, the Israeli authorities no longer recognized Ibrahim as being the Sheikh of the tribe and instead bestowed that recognition on Nuri's father. The tribal court serving the Naqab Bedouin community was moved from Beersheba into Nuri's father's home in 1949. In 1949, his parents, along with many others in the tribe, were

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<sup>33</sup> Benny Morris, *The Birth of the Palestinian Refugee Problem Revisited* (2d ed.) (Cambridge: Cambridge University Press, 2004)

<sup>34</sup> 'Aref Abu-Rabi'a, *A Bedouin Century: education and development among the Negev tribes in the 20th century* (New York : Berghahn Books, 2001) at 58, Ahmad Abu Khusa, *Mausw'at Qabayil Beer al-Saba' wa- 'Ashairiha al-Raiysiah* (Amman: Sherkat al-Sharq al-Awsat le-Teba'a, 1994) (Arabic) at 274-286 [Abu Khusa, *Qabayil Beer al-Saba'*], Mustafa Murad al-Dabbagh, *Biladuna Filastin (Our Country, Palestine)* (Beirut: Dar al-Tali'a, 1991) (Arabic) at 360.

<sup>35</sup> Rosalyn Higgins, "The Middle East vol. I", *United Nations Peace Keeping 1946-1967, Documents and Commentary* (London: Oxford University Press, 1969) at 147-149, Emanuel Marx and Moshe Sela, "Situation of the Negev's Bedouin", Appendix No. 1. *Ben-Mayer's Team for Evacuation and Resettlement of the Bedouin* (Tel Aviv: TAHAL, 1980), Ahmad Abu Khusa, *Mausw'at Qabayil Beer al-Saba' wa- 'Ashairiha al-Raiysiah* (Amman: Sherkat al-Sharq al-Awsat le-Teba'a, 1994) (Arabic) at 7-75, 'Aref Abu Rabi'a, *A Bedouin Century: education and development among the Negev tribes in the 20th century* (New York : Berghahn Books, 2001) at 93, 'Aref Abu Rabi'a, "The Bedouin Refugees in the Negev" (1994) 14:6 *Refuge* at 15.

<sup>36</sup> 'Aref Abu Rabi'a, *The Negev Bedouin and Livestock Rearing: Social, Economic and Political Aspects* (Oxford: Berg, 1994) at 8, Emanuel Marx, *Bedouin of the Negev* (New York: Praeger, 1967) at 12.

<sup>37</sup> Protocol of Proceedings from December 7 2009, *Suleiman Mohammad Salem al-'Oqbi v. State of Israel [2012] DC 7161/06*.

granted the right to vote for the Israeli Knesset. 1949, Nuri recalls, was the year of an extraordinary harvest. In that year, the family received orders from the Military Administration to report on their produce, including if the produce originated from the land of those who were forced to leave al-'Araqib. The family also paid taxes on their crop to the new Israeli government. Israeli military presence in the vicinity also meant more encounters between the settler soldiers and the native Bedouin. Nuri relates how soldiers, following firing practice, would come by the tribe's living space for a taste of Arab hospitality – roasted sheep, home-grown figs and fresh tea.<sup>38</sup>

### The Second Displacement and Life in Khirbet al-Hura

In 1951, the remaining residents of al-'Araqib were forced to leave the area because a military order deemed that their presence undermined the security of Israeli soldiers who needed to move freely in the area. Nuri's father, Sheikh Sliman, was cajoled over many months to pack up his belongings and move. The military governor who regularly summoned Sheikh Sliman told him that it would be futile to oppose the order – “There are no grounds on which you can oppose this order.”<sup>39</sup> Then, in November 1951, army trucks forcibly loaded the tribe's belongings and deposited them in Khirbet al-Hura, while the people and animals trailed behind. The military administration had deemed Khirbet al-Hura their new home.

The land possessed and farmed by the al-'Oqbi tribe members who remained in and became citizens of Israel spanned 19,000 dunams.<sup>40</sup> The family was informed by the military authorities that their move to Khirbet al-Hura was a temporary measure, and would last a period of six months. The tribe was also promised 20,000 dunams of agricultural land in Khirbet al-Hura in exchange for what they had to forego in al-'Araqib. However, upon forced relocation to Hura, the tribe learnt that the land granted to them by the military administration did in fact belong to other Bedouin farmers. The administration, therefore, had no authority according to Bedouin custom to grant that land to the al-'Oqbi tribe. As the land in Khirbet al-Hura was not theirs, the al-'Oqbi tribe followed Bedouin

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<sup>38</sup> Interview with Nuri al-'Oqbi, Khirbet al-Hura (October 20 2010), Protocol of Proceedings from December 7 2009, *Suleiman Mohammad Salem al-'Oqbi v. State of Israel* [2012] DC 7161/06.

<sup>39</sup> Nuri al-'Oqbi, *Waiting for Justice: A Document – The Story of the el-Okbi Tribe in Israel* (April 2004) at 125 [al-'Oqbi, *Waiting for Justice*]

<sup>40</sup> *Ibid.* at 123. This was all made up of personal ownership and did not include shared grazing and well water land. Interview with Nuri al-'Oqbi, Khirbet al-Hura (March 2 2011, April 6 2011)

custom and refused to consider it their own.<sup>41</sup> However, they did work on a portion of the land that belonged to the absentees, roughly 6,000 dunams.<sup>42</sup>

The al-'Oqbi tribe was subject, as was the entire Palestinian community, to Military Administration rule until 1966. Palestinians from the Naqab were concentrated in a 'siyag' in the northeastern Naqab during this time.<sup>43</sup> There were strict restrictions on freedom of movement, with movement even within the siyag requiring a permit from the military governor. Khirbet al-Hura lacked schools, unlike al-'Araqib, which meant that in most cases children were not able to access education until 1966 when military rule ended. Nuri's father was persistent in demanding a return to the family's land in al-'Araqib as he was verbally promised as much by the military authorities. However, the persistent demands caused him to fall out of favour with the authorities and they withdrew the official recognition that they had granted him as the sheikh of the al-'Oqbi tribe.<sup>44</sup> Baruch Hakim, a Jewish, Israeli activist in the former left-wing Israeli party, Mapam, who had raised Nuri for a few years at various kibbutzim at the request of Nuri's father, noted that, to the authorities, Nuri's father was himself "very left-wing. He had his own ideas and he didn't want to be an informer".<sup>45</sup>

In 1954, the family attempted to return to their home in al-'Araqib. As a result, military governor Sasson Bar Tzvi tried to have Nuri's father imprisoned. Once more, through the intervention of Sheikh Salman Al-Huzayyel who enjoyed good relations with the authorities, Nuri's father was released but only on condition that he not attempt to return to al-'Araqib.<sup>46</sup> The reality slowly sunk in for the al-'Oqbi family. Khirbet al-Hura, the village intended to be the site of a temporary six-month relocation, had become their permanent home. Subsequently, the land at the al-'Oqbi tribe's disposal was reduced to 5,000 dunams of farm land and 1,000 dunams of pasture. Around 1971, the tribe's land holdings were further reduced to only a thousand dunams. The rationale was that those

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<sup>41</sup> al-'Oqbi, *Waiting for Justice*, *supra* note 39 at 122

<sup>42</sup> Interview with Nuri al-'Oqbi, Khirbet al-Hura (March 2 2011, April 6 2011).

<sup>43</sup> 'Aref Abu-Rabi'a, *A Bedouin Century: education and development among the Negev tribes in the 20th century* (New York : Berghahn Books, 2001) at 93. For an early and critical study of the Military Administration imposed on Arabs in Israel from 1948-1966 see Sabri Jiryis, *The Arabs in Israel* (Beirut: The Institute for Palestine Studies, 1968). For a detailed study on the life of the Naqab community during the Military Administration years, see Mansour Nasasra, *The Naqab Bedouin and the Israeli Military Government 1948-1967*, PhD Dissertation (University of Exeter, College of Social Sciences and International Studies, 2011)

<sup>44</sup> al-'Oqbi, *Waiting for Justice*, *supra* note 39 at 121.

<sup>45</sup> Aviva Lori, "Tribal Lands – Part 2", *Haaretz* (July 14 2006), online: <http://www.haaretz.com/news/tribal-lands-cont-1.193077>

<sup>46</sup> Protocol of Proceedings from December 7 2009, *Suleiman Mohammad Salem al-'Oqbi v. State of Israel* [2012] DC 7161/06.

under 40 in the tribe do not need their own land, and could be employed by Israeli Jews in agriculture and construction.<sup>47</sup> Today, the al-'Oqbi tribe no longer work their own land in agriculture as they used to. The vast majority of the thousand-strong tribe live in the unrecognized Bedouin village of Khirbet al-Hura and in the financially distressed mixed Arab-Jewish city of Lydd, a fifteen-minute drive from Israel's economic center, Tel Aviv.

### The Seventies and the Second Return to al-'Araqib

Nuri's father did not keep the promise he made to the authorities to not return to his land in al-'Araqib. In October 1973, he and Nuri embarked on a return to farming their land after they filed a land claim in August that year. The land claim was filed with the Land Settlement Officer in the Ministry of Justice, in keeping with the Land Rights Settlement Ordinance (1969) which entitled Bedouin to register their claim to Naqab land; a process that occurred in the seventies.<sup>48</sup>

Coincidentally, after they had begun sowing seeds anew, the 'Yom Kippur', or 'October War', began. They were accused by the state of squatting and attempting to steal government land. The state initiated a lengthy legal process against Nuri, spanning roughly six years. In the end, an agreement was reached whereby Nuri was allowed to farm 250 dunams in al-'Araqib and some 300 dunams in the Hura area. However, the latter belonged to the Abu Kaf tribe and so Nuri, again in keeping with the dictates of Bedouin custom, refused to use it, and in the end he was left with only 250 dunams in al-'Araqib.<sup>49</sup> The land arrangement procedure over Nuri's claims is still ongoing.

### Nuri's Run-ins with the Criminal Justice System

In the 1960s, Nuri moved to Lydd and in 1964 opened a garage at a time when Lydd lacked an industrial zone from which he could operate. Several decades later, in December 2010, he was sentenced for operating the garage without a license as well as for other violations against the Planning and Building Law (1965), such as building without a permit.<sup>50</sup>

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<sup>47</sup> al-'Oqbi, *Waiting for Justice*, *supra* note 39 at 120

<sup>48</sup> See Human Rights Watch, *Off the Map: Land and Housing Rights Violations in Israel's Unrecognized Bedouin Villages* (2008) at 18-20

<sup>49</sup> al-'Oqbi, *Waiting for Justice*, *supra* note 39 at 120, Protocol of Proceedings from December 7 2009, *Suleiman Mohammad Salem al-'Oqbi v. State of Israel* [2012] DC 7161/06.

<sup>50</sup> Nuri asserts that others in his situation, who have operated a business in a residential zone, received a license from the municipality and that the Lydd municipality's refusal to issue him a license stemmed from his critical stance of the municipality's policies towards Palestinians in the community, particularly their policy of home demolitions. The Ramleh Magistrate Court sentenced him to seven months in prison. After a month in prison, his appeal was granted. Judge Stoller deemed the Magistrate court's sentence 'excessive' and reduced the sentence to five months,

Nuri was also imprisoned for thirteen days in 1979 for protesting the expropriation of Naqab Bedouin land in Tal al-Malah. The expropriation of Bedouin land took place so that the government could use it to relocate a military airport and an army base after their withdrawal from the Egyptian Sinai.<sup>51</sup> His arrest was on the grounds that he encouraged other demonstrators to attack the police, though recorded evidence speaks to the contrary. To protest what he saw as an illegal arrest, he went on a hunger strike.<sup>52</sup>

### Nuri returns to al-'Araqib for a third time

On April 14 2006, Nuri erected a tent, poured a cement floor and began his strike on his family's lands in al-'Araqib. This was done on the Passover seder, because as Nuri explains, "On Passover the Jewish people emerged from slavery to freedom, that's why I built my tent on the holiday...I also want to emerge to freedom."<sup>53</sup> The decision to settle on his land was made following the Supreme Court's (sitting as a Court of Administrative Appeals) rejection of an appeal to enable the al-'Oqbi tribe to build a rural agricultural settlement on its historical lands. The Green Patrol, policemen and Border Patrol, at the request of the Israel Lands Administration (ILA),<sup>54</sup> on a number of occasions arrested Nuri, demolished his tent, and confiscated personal belongings following his protest. Ultimately, Judge Eyal Baumgart of the Be'er Sheva Magistrate's Court rejected the request of the ILA to keep Nuri off of his land in al-'Araqib.<sup>55</sup>

However, in February 2010, Nuri's fortunes changed once more. He was arrested for an entire week. He was charged with forty criminal counts of invasion, uprooting trees and violations of an order for being present on the said lands in al-'Araqib. The court issued him an 'exclusion order',

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which was later commuted to community service. As community service, Nuri worked daily at a religious school in Lydd, an hour's drive from his home in Khirbet al-Hura, from early in the morning until two in the afternoon. Nasser Rego, "Courts of Racial Rule: The Imprisonment of Human Rights Defender Nuri al-'Oqbi", *Palestine Chronicle* (January 3 2011), online: [http://palestinechronicle.com/view\\_article\\_details.php?id=16526](http://palestinechronicle.com/view_article_details.php?id=16526)

<sup>51</sup> Some 750 families were forced to leave their lands, eighty percent of which was being used for agricultural purposes. Ghazi Falah, "Israeli State Policy toward Bedouin Sedentarization in the Negev" (1989) 18:2 *Journal of Palestine Studies* 71 at 80. Also, the compensation offered to the Bedouin was 2-15 percent of what was offered to Jewish settlers to leave the Sinai. Penny Maddrell, *The Bedouin of the Negev* (London: Minority Rights Group, 1990) at 11.

<sup>52</sup> Interview with Nuri al-'Oqbi, Khirbet al-Hura (October 21 2010).

<sup>53</sup> Aviva Lori, "Tribal Lands", *Haaretz* (July 14 2006), online: <http://www.haaretz.co.il/hasite/spages/738380.html>

<sup>54</sup> The ILA manages 93% of the land in Israel. They enjoy quasi-governmental status, undertake land acquisition on behalf of the State and represent the government in land acquisition. Oren Yiftachel, *Planning as Control: Policy and Resistance in a Deeply Divided Society* (Exeter: Pergamon, 1995) at 135

<sup>55</sup> *Supra* note 53

preventing him from being within ten kilometres of the land in al-'Araqib without also being in the presence of a guarantor. In addition, in another decision of a magistrate court in June 2010 (which he has appealed) he has been ordered to pay the Israel Lands Administration (ILA) roughly NIS 300,000 (US\$ 85,000) for expenses the ILA incurred in demolishing his tent and uprooting his land in al-'Araqib since he staged his protest there in 2006.<sup>56</sup>

Today, Nuri splits his time between Khirbet al-Hura in the Naqab and Lydd, an hour's drive north. Having been relocated by the government in 1951 to Khirbet al-Hura, his current location in the town is not part of the 'recognized' Hura, but an unrecognized village that stands across the road from it. It is called Khirbet al-Hura (meaning 'ruins of Hura'). It was at his home in the 'ruins of Hura' where we held most of our meetings.

#### At home in Khirbet al-Hura

Although I'd been to his home over a dozen times since August 2010, I always struggled to pinpoint its location. Off road and unmarked, Khirbet al-Hura lacks a paved entrance. Accordingly, visitors travelling by car have to carefully manoeuvre off the Route 31 highway onto the shoulder. They then have to follow three hundred metres of asphalt sprinklings to arrive at Nuri's home. If I can help it, I avoid visiting after sundown.

Nuri's home is adjacent to the community's mosque. In fact, he donated the land on which the mosque was constructed. The mosque's plastic blue dome, however, gathers dust by his home. Residents were warned by the authorities that the mosque faced immediate demolition if the roof remained in its designated location. Like all structures in unrecognized villages, indications of permanence, like tiled roofs, are strictly prohibited.

#### The Land Claims Case

Nuri brought before the Beersheba District Court ownership claims over five strips of land – three in al-'Araqib (Araqib 1, 6, 60) and two (Sharia 133, 134) in Zahiliqah.<sup>57</sup> His case was heard by Justice Sarah Dovrat.

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<sup>56</sup> Nasser Rego, "Courts of Racial Rule: The Imprisonment of Human Rights Defender Nuri al-'Oqbi" *Palestine Chronicle* (January 3 2011), online: [http://palestinechronicle.com/view\\_article\\_details.php?id=16526](http://palestinechronicle.com/view_article_details.php?id=16526)

<sup>57</sup> *Suleiman Mohammad Salem al-'Oqbi v. State of Israel* [2012] DC 7161/06

In 1948, the State took possession of the lands of Zahiliqah and on it they built Moshav Talmei Bilu exclusively for the settlement of Israeli Jews. In 1956, the state expropriated the lands of al-'Araqib under the relevant legal provisions. The state operates with the conviction that, save the existence of legal title, the Naqab is essentially *mawat*, or dead land, 'terra nullius' and belonging to no one. The two requirements to classify land as *mawat* were that first, the land was so distant from any town or village that a person who used the loudest voice could not be heard there (later interpreted to mean a mile and half away), and second, that the land was barren and not held by anyone or set aside for anyone by authorities.<sup>58</sup>

However, in Nuri's case and in similar Bedouin land claims' cases, legal teams have attempted to prove that the Naqab was characterized by extensive cultivation, and therefore was not 'dead'. They attempted to show how land was bought, sold, leased, mortgaged, inherited, and how taxes were paid to the central Ottoman and British governments on both land and crops. They asserted that these undertakings on the land in the Naqab were guided by oral principles of internal regulation, laws, and customary practice.<sup>59</sup>

In the District Court case, Justice Dovrat determined that the onus was on the plaintiffs to prove that the claimed land was not *mawat*, but *miri*. *Miri* land, as determined by the Ottoman Land Code of 1858, was land that was located within the vicinity of a settlement, and it proffered possession and usage rights for the landholder though ultimate title remained with the State. Article 78 of the Ottoman Land Code provided for adverse possession rights on *miri* land, where title could be registered with the landholder if the said land was possessed and cultivated continuously for the relatively short time period of 10 years.<sup>60</sup> This is what the plaintiffs had to demonstrate to prove title over the said lands.

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<sup>58</sup> *Mawat* meaning 'dead' is one of the five categories of land under the Ottoman Land Code of 1858 which remained in effect in Israel until the late 1960s. See Abraham Granott, *The Land System in Palestine* (London: Eyre & Spottiswoode, 1952) at 91-93, Hussein Abu Hussein and Fiona McKay, *Access Denied: Palestinian Land Rights in Israel* (New York: Zed Books, 2003) at 104-137 [Abu Hussein, McKay, *Access Denied*], Ronen Shamir, "Suspended in Space: Bedouins under the Law of Israel" (1996) 30:2 *Law and Society Review* at 238-239 [Shamir, "Suspended in Space"].

<sup>59</sup> See Salman Abu Sitta, "The Denied Inheritance: Palestinian Land Ownership in Beer Sheba", Paper presented to the International Fact Finding Mission (London: Palestine Land Society, 2009), Avinoam Meir, "Contemporary State Discourse and Historical Pastoral Spatiality: Contradictions in the Land Conflict between the Israeli Bedouin and the State" (2009) 32:5 *Ethnic and Racial Studies* [Meir, "State and Pastoral Spatiality"], Noa Kram, "The Negev Bedouins: Struggles for Land Rights and Cultural Survival in Israel" (Beersheba: Robert H. Arnow Center for Bedouin Studies and Development at Ben-Gurion University, 2010).

<sup>60</sup> Alexandre (Sandy) Kedar, "The Legal Transformation Of Ethnic Geography: Israeli Law And The Palestinian Landholder 1948-1967" (2000-2001) 33 *New York University Journal of International Law and Politics* at 953, 970

However, Justice Dovrat clarified that the plaintiffs would have to prove the land as *miri* as the conditions “that prevailed in practical terms on the ground in 1858”.<sup>61</sup> Therefore, the plaintiffs had to show possession and continuous cultivation for a period of ten years from over a hundred and fifty years ago.

On 15 March 2012, Justice Dovrat issued her decision. Justice Dovrat rejected the petition to provide restitution to the al-‘Oqbi plaintiffs for the land that was expropriated in 1954. The judge’s rationale was that the al-‘Oqbi’s were not able to prove that they held title to the land. She also found that they were unable to prove title obtained through adverse possession because they were unable to show that they possessed and cultivated the claimed plots continuously for ten years beginning in 1858. Second, Justice Dovrat determined that the legal basis for the expropriation was sound. The land was expropriated pursuant to the Land Acquisition (Validation of Acts and Compensation) Law (1953). All the same, the judge acknowledged that such a law would probably not pass the constitutionality test today because it allowed for the retroactive approval of land that was seized without a statutory basis. Such retroactive validation of land expropriations would today be considered “a substantial infringement of the right of title to property”,<sup>62</sup> particularly as provided for in the Basic Law: Human Dignity and Freedom (1992).<sup>63</sup>

However, Justice Dovrat clarified that the Land Acquisition (Validation of Acts and Compensation) Law (1953) ought to be seen “in light of the needs of the period in which it was enacted”<sup>64</sup> and “the special historical circumstances of the early days of the State”.<sup>65</sup>

It is worth flagging that Justice Dovrat had strong criticism for Nuri’s legal team and the expert, Prof. Oren Yiftachel. Justice Dovrat pointed to flaws in the expert opinion for not citing authoritative

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[Kedar, “Legal Transformation of Ethnic Geography”], *The Ottoman Land Code* (trans. F. Ongley, ed. Horace E. Miller) (London: William Clowes and Sons Limited, 1892). I will discuss the doctrine of adverse possession in Israeli jurisprudence in more detail in ‘The Eviction Orders for Umm al-Hieran’ chapter.

<sup>61</sup> *Suleiman Mohammad Salem al-‘Oqbi v. State of Israel* [2012] DC 7161/06 at para. 11, citing *Bracha Diner v. State of Israel* CA 3535/04 at para. 16

<sup>62</sup> *Suleiman Mohammad Salem al-‘Oqbi v. State of Israel* [2012] DC 7161/06 at para. 11, citing *Bracha Diner v. State of Israel* CA 3535/04 at para. 6-7.

<sup>63</sup> *Basic Law: Human Dignity and Freedom* (1992), Sefer Ha-Chukkim number 1454, 90.

<sup>64</sup> *Suleiman Mohammad Salem al-‘Oqbi v. State of Israel* [2012] DC 7161/06 at para. 11

<sup>65</sup> *Supra* note 62

sources (relying on secondary rather than primary sources) and for failing to meet the standards of an expert opinion submission. Justice Dovrat also criticized the legal team's expert for conjecture, when the expert concluded, from aerial photographs taken in 1945, that there was "intensive cultivation covering most of the plots at al-'Araqib."<sup>66</sup> When an interpreter of aerial photographs', Ben Shlomo, was questioned in court it became clear to the court that "an entirely different picture emerged of very partial cultivation" in al-'Araqib.<sup>67</sup>

While both the plaintiffs and the respondents presented European travelogues from the period to support their claims regarding the presence of a 'permanent settlement' in al-'Araqib, Justice Dovrat favoured those presented by the state's expert witness, Prof. Ruth Kark. One of the key documents that Kark presented, and which Dovrat relied on in reaching her decision, was the survey of the Palestine Exploration Fund (PEF), which was carried out between 1871 and 1877, and was an "in depth and fundamental review, the results of which were published in seven volumes and 26 folios of maps",<sup>68</sup> and which "shows that for the most part the area is a Bedouin grazing area... and no permanent settlement is mentioned."<sup>69</sup> For these reasons, Justice Dovrat concluded that she "preferred the detailed and comprehensive opinion of Prof. Kark (the state's expert witness) over that of Prof. Yiftachel".<sup>70</sup>

Nuri and his fellow family plaintiffs decided to appeal to the Supreme Court. With the financial support of friends and other civil society members, enough money was raised to fund the legal appeal.<sup>71</sup> Heading Nuri's legal team in the Supreme Court appeal was the prominent human rights lawyer, Michael Sfard,<sup>72</sup> who had been assisting in Nuri's case since 2010.<sup>73</sup> I visited Sfard's Tel Aviv office in the winter of 2014, where he managed to squeeze me in for a half hour update on the case. Sfard was candid about the fact that Nuri's case threatened to undermine a very potent and pervasive Zionist narrative about the land being empty and uncultivated and that it was only revived by the new Jewish settlers in Palestine. As a result of this, it was not going to be an easy

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<sup>66</sup> *Suleiman Mohammad Salem al-'Oqbi v. State of Israel* [2012] DC 7161/06 at para. 17

<sup>67</sup> *Ibid.* at para. 19

<sup>68</sup> *Ibid.* at para. 20

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.* at para. 23

<sup>71</sup> Interview with Advocate Radwan Abu Ara'ara, Lawyer for plaintiffs in in DC 7161/06 case (January 13, 2011)

<sup>72</sup> Jodi Rudoren, "A Champion for the Displaced in Israel" *The New York Times* (July 27, 2012), online: [http://www.nytimes.com/2012/07/28/world/middleeast/in-israel-michael-sfard-fights-for-the-displaced.html?\\_r=2&pagewanted=all&](http://www.nytimes.com/2012/07/28/world/middleeast/in-israel-michael-sfard-fights-for-the-displaced.html?_r=2&pagewanted=all&)

<sup>73</sup> Interview with Advocate Michael Sfard, Lawyer for plaintiffs in in CA 4220/12 case (November 17, 2014)

decision for the judges to make. If Sfard didn't think the chances of winning were good, why take the case? I asked. "What we're trying to achieve is some sort of a crack in the sealed legal doctrine that says that Bedouin do not have any title to land in the Negev".

#### Bedouin lifeways: Alternative facts

Nuri's legal team attempted a number of arguments before the court to make that crack in how the courts understood Bedouin presence and lifeways in the Naqab. The team sought to disprove the 'Dead Negev Doctrine'<sup>74</sup> that said that land in the Naqab was essentially barren and uncultivated by Palestinians pre-1948. As no formal registrations of land existed for the majority of the Naqab Bedouin<sup>75</sup> the Israeli authorities classified those lands as vacant and barren lands that fell under the *mawat* category of the Ottoman Land Code.

However, as relayed by Western travelers such as Henry Baker Tristram in 1858 and Edward Hull in 1883 and as also demonstrated by aerial photographs from the 1940s, Palestinian Bedouin made substantial investments in agriculture on tracts of land up to two million dunams.<sup>76</sup> As mentioned earlier, the *Dafteri Mufassel* was an Ottoman tax register that showed the taxes paid by Naqab Bedouin, including the al-'Oqbi (Bani Okbeh) tribe, to the Ottoman authorities on wheat, barley and summer crops as far back as 1596.<sup>77</sup>

Justice Dovrat also relied on the Palestine Exploration Fund (PEF) survey, which indeed produced a very detailed map of the area, to reach the conclusion that there were no significant investments in agriculture nor was there a permanent settlement in the al-'Araqib area. However, as the historian, Salman Abu Sitta has pointed out with regard to the PEF survey, the survey covered only one third of the Beer Sheba district, stopping at Wadi Ghazzeah in the south. This meant that although the

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<sup>74</sup> The 'Dead Negev Doctrine' is how scholars, also active in Nuri's case, coined the phenomenon. See Oren Yiftachel, Ahmad Amara and Sandy Kedar, "Debunking the 'Dead Negev Doctrine'" *Ha'aretz* (December 31, 2013), online: <http://www.haaretz.com/opinion/.premium-1.566357>, Oren Yiftachel, Sandy Kedar, Ahmad Amara, "Challenging a Legal Doctrine: Rethinking the Dead Negev Ruling" (2012) 14:1 *Law and Government (Mishpat U-Mimshal)* 4-141 (Hebrew) [Yiftachel, Kedar, Amara, "Dead Negev Ruling"]

<sup>75</sup> Bedouin had not formally registered their lands so as to avoid paying taxes and being drafted into the army. Shamir, "Suspended in Space, *supra* note 58 at 241. Further, neither the British Mandatory authorities or the Ottomans before them surveyed the Naqab, so that there do not exist reliable records of land classification or registries of land ownership except in and around the town of Beersheba. See Ghazi Falah, "Israeli State Policy toward Bedouin Sedentarization in the Negev" (1989) 18:2 *Journal of Palestine Studies* at 75-76

<sup>76</sup> *Supra* note 74

<sup>77</sup> Salman Abu Sitta, "The Denied Inheritance: Palestinian Land Ownership in Beer Sheba", Paper presented to the International Fact Finding Mission (London: Palestine Land Society, 2009) at 5

maps mentioned the land names and the tribe names, they did not contain the same comprehensive data that the surveyed areas did.<sup>78</sup> Therefore, what Justice Dovrat concluded was proof of non-permanent settlement was in fact an area not comprehensively surveyed.

While Justice Dovrat established there was not 'extensive cultivation' in al-'Araqib, aerial photos from al-'Araqib in 1949 do show areas of cultivation, human settlement in the form of tents, a cemetery, a stone building, various water works and several smaller structures such as sheds and stables,<sup>79</sup> all of which indicate settlement and the semi-pastoral, semi-agricultural lifestyle that was common to the Naqab Bedouin lifeway.

As researchers have shown, the prior sovereigns in Palestine - the Ottomans and the British - recognized Bedouin as owning and cultivating the land.<sup>80</sup> Bedouin even sold land to the Ottomans, such as when the 'Azazma tribe sold two thousand dunams in 1900 to set up Beersheba.<sup>81</sup> Similarly, there are many Ottoman and British registry records that show Bedouin land ownership. The British also collected crop (or 'tithe') taxes,<sup>82</sup> which Nuri's family also has receipts for, for the years 1922-1946. Other document proofs that Nuri's legal team presented to the court included a lease of land agreement, a division of lands agreement and a sale agreement.<sup>83</sup>

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<sup>78</sup> Salman Abu Sitta, "The Denied Inheritance: Palestinian Land Ownership in Beer Sheba", Paper presented to the International Fact Finding Mission (London: Palestine Land Society, 2009) at 11, Palestine Exploration Fund, *The Survey of Western Palestine, 1882-1888, 10 vols. and maps* (London: PEF and The Royal Geographical Society, reprinted by Archive Editions with PEF, 1998)

<sup>79</sup> *Suleiman Mohammad Salem al-'Oqbi v. State of Israel* [2012] DC 7161/06 at para. 17

<sup>80</sup> Oren Yiftachel, Ahmad Amara and Sandy Kedar, "Debunking the 'Dead Negev Doctrine'" *Ha'aretz* (December 31, 2013), online:

<http://www.haaretz.com/opinion/premium-1.566357>, Yiftachel, Kedar, Amara, "Dead Negev Ruling", *supra* note 74

<sup>81</sup> Penny Maddrell, *The Bedouin of the Negev* (London: Minority Rights Group, 1990) at 5

<sup>82</sup> Oren Yiftachel, Ahmad Amara and Sandy Kedar, "Debunking the 'Dead Negev Doctrine'" *Ha'aretz* (December 31, 2013), online:

<http://www.haaretz.com/opinion/premium-1.566357>, Yiftachel, Kedar, Amara, "Dead Negev Ruling", *supra* note 74

<sup>83</sup> *Suleiman Mohammad Salem al-'Oqbi v. State of Israel* [2012] DC 7161/06 at para. 17. The sale agreement, referred to as 'sanad', was a written agreement that included the names of the seller and the buyer, addresses, the basis for the rights over the land (inheritance or purchase), the location and boundaries, neighboring territories, water sources, caves, cisterns or dams on the land, date, price and forms of payment, and signatures of the buyers, sellers, witnesses and the Sheikh who oversaw the transaction. Noa Kram, "The Naqab Bedouins: Legal Struggles for Land Ownership Rights in Israel" in Ahmad Amara, Ismael Abu-Saad, and Oren Yiftachel (eds.), *Indigenous (In)Justice: Human Rights Law and Bedouin Arabs in the Naqab/Negev* (Cambridge, MA: Harvard University Press, 2013) at 135, Kressel, Ben-David and Abu-Rabia, "Changes in Land Usage by the Negev Bedouin since the Mid-19<sup>th</sup> Century" (1991) 28 *Nomadic Peoples* 28-55

Finally, there was extensive purchase of land from Naqab Bedouin by Zionist organizations (such as The Jewish National Fund<sup>84</sup>) in the amount of 100,000 dunams.

In spite of the considerable evidence of Nuri's family's presence in al-'Araqib, and Bedouin presence and cultivation in the Naqab more generally, they were unable to uphold the burdens of proof placed on them by the District Court. The Supreme Court sitting as the Court of Civil Appeals found similarly and upheld the decision of the District court, with Justice Hayut of the three-judge panel writing the majority opinion.<sup>85</sup> Justice Hayut found that the Bedouin did not enjoy legal autonomy under Ottoman and British Mandatory rule in the sense that the plaintiffs claimed, meaning that the Court would need to examine British and Ottoman law to determine rights to the land, and not Bedouin tribal or customary law.<sup>86</sup>

When applying the relevant Ottoman legal provisions to determine rights to the land, Justice Hayut found that the fact that Bedouin lived in tents and lived a semi-nomadic lifestyle disqualified their form of living as being one of 'permanent settlement', which was necessary to prove certain rights to the land. So although Justice Hayut concluded that the al-'Oqbi tribe appear to have 'roamed the area'<sup>87</sup> of the claimed plots, she cited the Mandatory court judgement, *Samaonov* to buttress her conclusion that the particular way of life of Bedouin did not give rise to any prescriptive rights to the land, "I do not think that by moving tents hither and thither over a tract of land allows the tent owners to establish prescriptive title to the land".<sup>88</sup>

Second, the court imposed weighty burdens of proof to show living presence and cultivation. Justice Hayut determined that the plaintiffs would have to show proofs of ownership, possession, use or cultivation over an extended period of time and in a continuous manner between the years 1858 and 1921 to establish rights to the land.<sup>89</sup> 1921 was the year when the Mandatory government

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<sup>84</sup> The Jewish National Fund (JNF) owns roughly 12% of 'Israel Lands' ('Israel Lands' is 93% of all land in the State) in the amount of 2,542,000 dunams and is only mandated according to its bylaws to lease its land for Jewish settlement. The JNF is also the biggest owner of agricultural land in Israel. Jewish National Fund, *Memorandum of Association of Jewish National Fund, Article 3a*, Government Gazette No. 354 (June 10 1954) at 1196, Abu Hussein, McKay, *Access Denied*, *supra* note 58 at 149-153

<sup>85</sup> *Suleiman Mohammad Salem al-'Oqbi v. State of Israel* [2015] CA 4220/12

<sup>86</sup> *Ibid.* at para. 43

<sup>87</sup> *Ibid.* at para. 54-55

<sup>88</sup> *Village Settlement Committee of Arab en Nufei'at v. Samaonov*, [1941] CA 125/40, 8 P.L.R. 165, *Ibid.* at para. 50

<sup>89</sup> *Ibid.* at para. 59

passed the Mewat Land Ordinance,<sup>90</sup> repealing Article 103 of the Ottoman Land Code that allowed for the revival of 'mewat' land, so that plaintiffs could no longer acquire title to 'mewat' land by cultivating it. The weighty burdens of proof meant that the plaintiffs were unable to prove they owned the land for lack of official documents, and even if the tithe (tax) receipts on crops after 1927 and aerial photos from the 1940s showed active use and cultivation of the land, they did not count as proof because they were inadmissible, falling out of the relevant period's scope, between 1858 and 1921.

The court also dismissed all arguments based on international human rights law on indigeneity saying that such law was not applicable in this case because the Bedouin had not proved they were indigenous, local law had not codified the relevant provisions, and the norms and standards on the protection of indigenous peoples' rights and lifeways were not part of customary international law and therefore not binding on the state.<sup>91</sup>

### Discussion

*As law is able to interpret what it can follow, precedent, and what it can hear, evidence, elements of narration that are untranslatable render the entire code of which they are part lost.*<sup>92</sup>

In 'Frames of War',<sup>93</sup> Judith Butler picks up on this idea of translation when it comes to the ontology of the body. Butler sketches a genealogy for how certain bodies come to be identified with precarity, and others not, particularly in the context of war. When certain bodies are identified as 'life' then it becomes possible to see their lives as precarious and to grieve for their suffering. When certain other bodies are not identified as 'life' per se, but merely as 'living', then precarity to threats and grievability for their loss or suffering is less certain.

Butler sees recognition as beginning at the point where something is apprehended. Apprehension is the means by which one senses or perceives, but not in a way that is mapped onto a conceptual grid.<sup>94</sup> Intelligibility makes sense of the subject of apprehension, as it is the general historical

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<sup>90</sup> The Mewat Land Ordinance, 1921, 38 I.R. 5, (Mar. 1, 1921)

<sup>91</sup> *Suleiman Mohammad Salem al-'Oqbi v. State of Israel* [2015] CA 4220/12 at para. 80-81

<sup>92</sup> Gerald Torres and Kathryn Milun, 'Translating *Yonnonndio* by Precedent and Evidence: The Mashpee Indian Case', in Richard Delgado (ed.), *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 1995) at 48-49.

<sup>93</sup> Judith Butler, *Frames of War: When is Life Grievable?* (London: Verso, 2009) [Butler, *Frames of War*]

<sup>94</sup> *Ibid.* at 5

schema by which bodies that are apprehended are made to fit a frame or domain of the knowable.<sup>95</sup> The schemas of intelligibility allow for norms of recognizability to take place between two subjects.<sup>96</sup> However, when a subject falls outside the frames that constitute 'life', that subject may be seen as 'living' but not as 'life'.<sup>97</sup>

Consider the discussion and rationale for the decisions in Nuri's land claims case at both the District Court and the Supreme Court sitting as a Court of Appeals. The courts are able to identify the facts of the case and fit those facts onto a conceptual grid made up of historical schema informed by precedent – Ottoman, British and Israeli legal decisions pertaining to the Naqab Bedouin. The courts also make certain forms of evidence intelligible – the evidence of the PEF surveys, travelogues of European explorers and the testimony by the State's expert witness, Prof. Ruth Kark, because they fit the historical schema of what has come to be considered reliable enough to count as evidence. What both precedent and evidence do in this case (and in other cases pertaining to Naqab Bedouin) is that they also set the frame for how Bedouin living is understood. Both evidence and precedent do productive work in generating and sustaining the idea of Bedouin as nomadic, impermanent and agriculturally non-productive.

In doing so, evidence that is apprehended but cannot fit such a conceptual grid of Bedouin living, is dismissed. Therefore, in spite of the plethora of evidence to show Bedouin presence, cultivation and lifeways in the Naqab generally and on the said plots in al-'Araqib in particular, the evidence was not intelligible to the court in a way that would give rise to certain rights to the land.

As Bedouin forms of living fit a conceptual grid of 'nomadism',<sup>98</sup> conferring the meaning 'temporary' and 'moving', they did not count as living in a 'permanent settlement'. This precluded according them rights that arise with permanent settlement in Israeli jurisprudence, including in the courts' interpretation of Ottoman and Mandatory legislation.

Bedouin legal documents pertaining to land transactions – the 'sanad' (sale), 'rahen' (lease) and 'iratha' (inheritance) - although containing considerable information, official revenue stamps and

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<sup>95</sup> *Ibid.* at 6

<sup>96</sup> *Ibid.* at 7

<sup>97</sup> *Ibid.* at 7-8

<sup>98</sup> *Suleiman Mohammad Salem al-'Oqbi v. State of Israel* [2012] DC 7161/06 at para. 26, *Suleiman Mohammad Salem al-'Oqbi v. State of Israel* [2015] CA 4220/12 at para. 5, 61

Ottoman/Mandatory stamps, and regularly used as evidence in tribal court proceedings prior to the establishment of the Israeli state in 1948,<sup>99</sup> did not fit the conceptual grid of official, certified government documents according to Israeli standards. To the courts, the fact that the land was not registered in an official government land registry,<sup>100</sup> meant that these Bedouin legal agreements did not prove ownership, sale or otherwise regarding the status of the land.

Finally, the eleven witness testimonies at the level of the District Court, some of which were first-hand accounts of living in al-'Araqib before the foundation of the state, did not hold as much weight as the journal entries and travelogues of European explorers.<sup>101</sup>

This shows how the courts may apprehend Bedouin lifeways, but because such apprehension does not align with historical schema, it is not made intelligible in the sense that it gives rise to certain rights for the Bedouin. And it is precisely because Bedouin lifeways are apprehended but not made intelligible that Bedouin suffering is not grievable.

Consider the expulsions of the residents of al-'Araqib in 1948 and 1951 as was discussed earlier in this chapter. The fact that the harm caused to the population in forced expulsion (and subsequent land expropriation) was not duly calibrated allowed the courts to mark such actions during the Military Administration years as somehow ordinary, thereby rendering the harms caused to the local Palestinian population as something to be expected and not out of the ordinary. Indeed, this is how Justice Dovrat framed it when she said that the legal basis for the expropriation of the land would likely not pass the constitutionality test today because it retroactively legitimized illegal arbitrary expropriation,<sup>102</sup> yet that the courts had considered this question before in the *Diner* decision,<sup>103</sup> and found no reason to intervene. Justice Dovrat affirmed that the law was a *fait*

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<sup>99</sup> Kressel, Ben-David and Abu-Rabia, "Changes in Land Usage by the Negev Bedouin since the Mid-19<sup>th</sup> Century" (1991) 28 *Nomadic Peoples* 28-55 at 36

<sup>100</sup> *Suleiman Mohammad Salem al-'Oqbi v. State of Israel* [2012] DC 7161/06 at para. 10

<sup>101</sup> It is curious to note that counsel for both appellant and respondent drew upon the work of European explorers to prove their claims. In doing so, they generated a consensus over where reliable information was to be found - in the writings of European explorers more so than in the lived experiences of Naqab Bedouin themselves and the oral histories that are a tradition in the community. Meir, "State and Pastoral Spatiality", *supra* note 59 at 4-5, 13-14. For how Palmer, a 19<sup>th</sup> century British traveler, was relied on in the *al-Hawashleh* [1974] case, see Nasser Rego, *The Efficacy of the Israeli Legal System in Protecting and Fulfilling Naqab Bedouin Land Rights*, LLM Thesis (Toronto: Osgoode Hall Law School, York University, 2009) at 115-119

<sup>102</sup> *Suleiman Mohammad Salem al-'Oqbi v. State of Israel* [2012] DC 7161/06 at para. 11, citing *Bracha Diner v. State of Israel* CA 3535/04 at para. 6-7.

<sup>103</sup> *Bracha Diner v. State of Israel* CA 3535/04

*accompli*, immune from further legal challenge, ought to be seen as appropriate for the particular time period,<sup>104</sup> effectively normalizing the harms caused to those impacted by it.<sup>105</sup>

That suffering of certain populations does not elicit grief is also seen in the phenomenon of ‘structural violence’. Sociologist Carmela Murdocca explains how ‘structural violence’ is systemic violence by those that belong to a certain social order directed at persons, preventing them from achieving their potential.<sup>106</sup> The violence seems ordinary or banal where both source and subjects cannot be easily identified. In Nuri’s case – did the source of Bedouin suffering, if acknowledged, stem during the Military Administration years or were recent actions of home demolitions by the Israeli government more to blame? Who was harmed, if at all - the plaintiffs, all the al-‘Oqbi tribe, all Naqab Bedouin who were displaced in 1948? In structural violence, the difficulty in naming specific actors makes the effects appear not right, and yet nobody’s fault, while the suffering of those affected is elided.

At the chapter’s opening, I drew attention to how Bedouin lifeways, that which the Israeli court can apprehend but not make intelligible, is informed by the ‘affective’. As emotions circulate, affect does *work*; affect both makes the subject and binds subjects to one another.<sup>107</sup> When affect cannot be effectively grasped, it is inevitable that communitarian lifeways that owe their dynamism to affective investments will not be recognized.

What was striking in the court proceedings was the court’s discounting of feeling that punctuated Nuri’s testimony and that of the other witnesses. Of course, court rules of evidence often discount emotion or affective considerations as irrelevant to the facts of the case, or place those emotions in

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<sup>104</sup> *Suleiman Mohammad Salem al-‘Oqbi v. State of Israel* [2012] DC 7161/06 at para. 11

<sup>105</sup> However, the banality of state violence not only elides Bedouin suffering, it also precludes the courts from reckoning with the violence of certain laws. So, for example, the courts did not consider how owing to the Land Acquisition Law, the plaintiffs had their relationship to the claimed lands in al-‘Araqib severed. This precluded the possibility of the plaintiffs establishing rights to the land according to the reformulated adverse possession doctrine following the passing of the Law of Limitation (1958). The Law of Limitation extended the time period of the possession and cultivation requirement of *miri* land from ten years to twenty years (if in possession after 1943) in the case of unregistered land. As a result, because the plaintiffs were forcibly displaced by the military authorities in 1951 they were not able to establish a presence until 1963, mooting the possibility to claim adverse possession rights on the said lands. The banality of state violence not only elides the suffering of Bedouin but also absolves the state of its own responsibility in creating the problem being debated by the court. See Alexandre (Sandy) Kedar, “The Legal Transformation Of Ethnic Geography: Israeli Law And The Palestinian Landholder 1948-1967” (2000-2001) 33 *New York University Journal of International Law and Politics* at 971

<sup>106</sup> Carmela Murdocca, “There is Something in that Water’: Race, Nationalism and Legal Violence” (2010) 35(2) *Law and Social Inquiry* 369-402 [Murdocca, “There is Something in that Water”]

<sup>107</sup> Sara Ahmed, “Affective Economies” (2004) 22:2 *Social Text* 117-139

a hierarchy (for example, grief as acceptable but anger not), and often as a counterpoint to 'reason'.<sup>108</sup>

Consider this exchange in the District court case. Advocate Rawash, the state's counsel, queried Nuri regarding the Jewish National Fund's forestation efforts on plots Araqib 6 and 60 while judicial proceedings regarding the determination of the plots' ownership were still ongoing.<sup>109</sup>

Adv. Rawash: ...I asked if there were trees there. And do you confirm that throughout the years the plot was leased to other Bedouins?

al-'Oqbi: But is it right to do that?

Judge: We are not discussing if it is right or it is not right. Take the political issues out of this hall.

al-'Oqbi: This is not politics.

Judge: Focus on the facts, not on politics.

al-'Oqbi: It is not politics, it is my property which was robbed from me.

Judge: I heard your pain twenty times and even fifty times. Now we have to focus on the facts. We have to move forward and you should answer to the point.

When Nuri attempted to reflect to the court that he felt wronged or deceived by what was happening on his ancestral home, Justice Dovrat was swift to summarily deny him the space to do so. Of course, assuming that he was given the space to express his affective investments around the claimed land, does not necessarily imply that it would uphold the plaintiff's burden of proving land possession and use at the relevant time period.

At the same time, however, as a number of legal scholars have agreed, "emotion in concert with cognition leads to truer perception and, ultimately, to better (more accurate, more moral, more just) decisions."<sup>110</sup>

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<sup>108</sup> See for example, Susan A. Bandes (ed.) *The Passions of Law* (New York: New York University Press, 1999), Terry A. Maroney, "Law and Emotion: A Proposed Taxonomy of an Emerging Field" (2006) 30 *Law and Human Behavior* 119–142, Mary Lay Schuster and Amy Proppen, "Degrees of Emotion: Judicial Responses to Victim Impact Statements" (2010) 6:1 *Law, Culture and the Humanities*

<sup>109</sup> Protocols of Proceedings from December 7 2009, *Suleiman Mohammad Salem al-'Oqbi v. State of Israel* [2012] DC 7161/06.

<sup>110</sup> Susan A. Bandes (ed.) *The Passions of Law* (New York: New York University Press, 1999) at 7, 11

What this means is that had the court allowed for emotions to do their work, it would mean that the rich texture of Bedouin lifeways could be made palpable, and this could add to the weight of the oral testimony and other evidence presented by the Bedouin plaintiffs to show connection to the claimed lands. In this way, their unique agricultural practices of grazing and seasonal cultivation would not summarily be deemed as non-productive use of agricultural land. In a similar fashion, their tent dwellings and the wider spacing between them than is usually found in contemporary society, could be seen as a cultural preference of sustainably living off the land and their animals (tents were often made from animal skin) and them placing a high value on privacy; it would not be deemed as “hither and thither” movement of non-permanent dwellings. As for the legal arrangements around land lease and sale, were Bedouin affective investments considered, these would less likely be seen as informal, unofficial documents that fail to establish rights to the land. Rather, they would be seen as a complex, rich and deliberative negotiation of rights, obligations and duties, a legal custom very specific to this population, and ‘custom’ that generally typifies legal arrangements of indigenous peoples.

Yet, would it be fair to conclude that the discounting of affective evidence was the primary reason the court did not find in the plaintiffs’ favour? As detailed above, the rules of procedure and evidence made it very difficult for the plaintiffs to uphold the burdens of proof placed on them by the courts. What about these burdens of proof? In what particular context were they birthed and what telos do they serve?

In the next case, *Abu Mdeghem*, we will probe those aspects of procedure and evidence that make it particularly difficult for the courts to make Bedouin testimony intelligible. For this I would like to shift the focus to that moment of rupture in sovereignty around the years 1947-1949. If we consider Nuri’s case to be one of an indigenous or native sovereign effectively asserting rights, to land and lifeways, in the era of a successor sovereign, the Israeli state, then what about that particular turn of sovereignty informs the rules of evidence and procedure in the post-1948 era? For this we will move further along in space to the star of ‘structural violence’, a concept we will unpack further to look at its operation in the law through a post/colonial lens (even as 1948 was the beginning of a new settler colonial order).

## Chapter 2: A Postcolonial Reading of the *Abu Mdeghem Naqab Crop-Spraying Decision*

### Introduction

On April 14 2007, in what was characterised a 'precedent setting' ruling, the Israeli Supreme Court ruled that the aerial spraying of wheat, barley, corn and watermelon cultivated by Arab Bedouin in roughly a dozen unrecognized villages in the Naqab by or on behalf of the Israel Lands Administration (ILA) was illegal, underscoring the spraying as insensitive, disrespectful and endangering to life, health and a violation to the dignity of those affected. Subsequently, the Court held that the temporary order nisi, issued three years earlier and prohibiting the spraying of crops aerially, be made absolute, and ordered that the ILA pay legal fees and court costs to the petitioners. The ruling was considered by Bedouin advocacy groups as "important and meaningful for the Bedouins."<sup>111</sup> Israel also trumpeted the decision in international fora as evidence of the relentless efforts of the Supreme Court to enshrine human rights, as was in keeping with the state's progressive and democratic character.<sup>112</sup>

From 2002 to 2004, some thirty square kilometres of Naqab farm land was aerially sprayed with the crop-killing chemical Roundup by or under the aegis of the Israel Lands Administration, the governmental body that manages 93% of the land in Israel. The stated purpose was to stop the Bedouin from taking over state land. According to Avigdor Lieberman, then Minister of National Infrastructures and the minister responsible for the management of state lands at the time, "We must stop their illegal invasion of state land by all means possible. The Bedouins have no regard for our laws; in the process we are losing the last resources of state lands. One of my main missions is to return to the power of the Land Authority in dealing with the non-Jewish threat to our lands."<sup>113</sup>

The aim of this case study is to propose caution in the reception of a legal decision that was viewed in generally favourable terms. I want to build on the case study of Nuri al-'Oqbi, where we looked at how contours of 'human suffering' are often hidden and silenced in legal systems. The fact that such affective investments aren't allowed to be made intelligible in law stems in part from law's self-designation as objective and formal, often seen as a counterpoint to the affective. The *Abu*

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<sup>111</sup> Negev Coexistence Forum for Civil Equality (Dukium), 'Response to the Report of the State of Israel on Implementing the ICESCR' (2010) at 22

<sup>112</sup> UN CESCR (2010) Israel Third Periodic State Party Report, UN Doc. E/C.12/ISR/3 (July 12, 2010) at para. 15, 483

<sup>113</sup> Arab Association for Human Rights (HRA), *By All Means Possible* (Nazareth, Israel, 2004) at 13

*Mdeghem*<sup>114</sup> case is an apt launching point to deconstruct what appears (particularly when we choose to focus primarily on the binding declaration of the court, its decision) to be a progressive or liberal<sup>115</sup> decision by illustrating what happens the day after. What happens once the legal decision is issued and the legal processes have run their course? Will the Bedouin plaintiffs be better off when compared to where they were before they sought, and received, remedy from the courts?<sup>116</sup> And what about 'the law in these parts',<sup>117</sup> Israeli law as applied in the Naqab Bedouin context, informs what happens after a progressive decision?

It is with similar caution that others have received the *Qa'adan* decision, where in 2000 the Supreme Court ruled that the State has an obligation not to discriminate in the allocation of land between Arab and Jew.<sup>118</sup> *Qa'adan* was a decision celebrated in many quarters.<sup>119</sup> In *Qa'adan*, the Court did not, however, set precedent with a formal ruling but instructed the authorities to reconsider the admission of an Arab couple into the Jewish community of Katsir. Further, it stated specifically that the decision was 'forward-looking' and would not serve to re-evaluate past land allocations that may have been discriminatory. This was of little comfort to Palestinian Arab citizens, for whom land expropriations took place during the early years of the state.<sup>120</sup> Only in December 2010 did the Qa'adans move into their home in Katsir.<sup>121</sup> In March 2011, the Knesset

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<sup>114</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62.

<sup>115</sup> For a detailed analysis of Israeli law and liberalism, see the Wine Path Plan chapter.

<sup>116</sup> The motivation for this chapter stems in part from Palestinian scholar Nimer Sultany's own burrowing in what were hailed 'landmark decisions'. As Sultany shows how such decisions legitimate hierarchies, he also calls for a disenchantment with the law in how it is applied in Israel/Palestine. See Nimer Sultany "Roundtable on Occupation Law: Part of the Conflict or the Solution? Part V", *Jadaliyya*, (September 22, 2011), online: <http://www.jadaliyya.com/Details/24424/Roundtable-on-Occupation-Law-Part-of-the-Conflict-or-the-Solution-Part-V-Nimer-Sultany>. Of course, legal realists have shown, since the 1980s, the persistent gap between law on the books and the law in practice. See Austin Sarat, "Legal effectiveness and social studies of law" (1985) 9 *Legal Studies Forum* 23-32. Such an appreciation is the starting point of socio-legal studies, see for example, Dragan Milovanovic, *A Primer in the Sociology of Law* (2d) (New York: Harrow and Heston, 1994).

<sup>117</sup> Taken from the title of an award-winning Israeli documentary that asks, "Can justice truly be served in the occupied territories given the current system of law administered by Israel for Palestinians?" From Internet Movie Database (IMDB), "The Law in These Parts" (2011), online: <http://www.imdb.com/title/tt2069916/>

<sup>118</sup> *Qa'adan v. Israel Lands Administration*, HC 6698/95, P.D. 54 (1).

<sup>119</sup> See, for example, the following commentary that interpreted Qa'adan as possibly signaling an end to the persistent discrimination faced by Arabs in public resource allocation. Alexandre (Sandy) Kedar, "A First Step in a Difficult and Sensitive Road: Preliminary Observations on *Qaadan v. Katzir*" (2000) 16 *Israel Studies Bulletin* 3, Ilan Saban, "Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel" (2004) 36 *New York University Journal of International Law and Politics* at 964.

<sup>120</sup> Ronen Shamir, "Legal Activism in a Bi-National Society: Israeli Palestinians and Jews at a Crossroad" (2000) *Adalah Newsletter*

<sup>121</sup> Jonathan Cook, "Arab family's home win blow to Israeli 'Jews only' policy", *The National* (December 15, 2010), online: <http://www.thenational.ac/news/worldwide/middle-east/arab-familys-home-win-blow-to-israeli-jews-only-policy>

passed an 'Admissions Committee Law' that gave 695 communities the legal basis to reject applicants if they found them to be 'socially unsuitable'<sup>122</sup> to live in that particular community.<sup>123</sup>

The *Abu Mdeghem* case is of significance because of the groundswell of legal measures initiated by the government to tackle 'the invasion' and resolve the decades long land conflict between the Naqab Bedouin, indigenous to the region<sup>124</sup> and the Israeli government that refers to them as interlopers. The Praver Plan is the government's latest proposal and it threatens to expropriate hundreds of thousands of dunams of ancestral Bedouin lands and forcibly evict 40,000 Bedouin into government planned development towns against their will. Although the Praver Plan was shelved in 2013, in no small part due to the work of civil society organizations and activists,<sup>125</sup> three years later it was revived again.<sup>126</sup> Among the villages to be demolished are those whose crops were destroyed in the *Abu Mdeghem* case, namely the villages of al-'Araqib, 'Atir and Umm al-Hieran.<sup>127</sup>

The chapter recommends that decisions that are considered landmark, such as *Qa'adan*, or meaningful, as *Abu Mdeghem* was received, only be accorded these attributes with time having substantiated the accolades. A progressive decision is one whose effects trickle down to the affected parties and bring about a substantial, marked improvement in the situation for which they had sought legal remedy. In order to achieve this, law cannot offer patchwork solutions and cannot

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<sup>122</sup> Adalah, "New Discriminatory Laws and Bills in Israel", 83 *Adalah Newsletter* (June 2011), online: [http://www.adalah.org/upfiles/2011/New\\_Discriminatory\\_Laws.pdf](http://www.adalah.org/upfiles/2011/New_Discriminatory_Laws.pdf)

<sup>123</sup> Law to Amend the Cooperative Societies Ordinance (No. 8), 5771-2011

<sup>124</sup> UN HRC, Report by the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, UN Doc. A/HRC/18/35/Add.1 (August 22, 2011) at Annex VI, para. 1-28, online: [http://www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35-Add-1\\_en.pdf](http://www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35-Add-1_en.pdf)

<sup>125</sup> Maureen Clare Murphy, "Withdrawal of Praver Plan bill "major achievement" for Palestinians in Israel" *Electronic Intifada* (December 13, 2013), online: <https://electronicintifada.net/blogs/maureen-clare-murphy/withdrawal-praver-plan-bill-major-achievement-palestinians-israel>, Mansour Nasasra, "Bedouin tribes in the Middle East and the Naqab: changing dynamics and the new state" in Mansour Nasasra, Sophie Richter-Devroe, Sarab Abu-Rabia-Queder and Richard Ratcliffe (eds.), *The Naqab Bedouin and Colonialism: New perspectives* (London and New York: Routledge, 2015) at 50-51

<sup>126</sup> Adalah: The Legal Center for Arab Minority Rights in Israel, "Adalah's Position Paper on "Praver II": The Israeli Government's New Plan to Forcibly Displace and Dispossess Palestinian Bedouin Citizens of Israel from their Land in the Naqab (Negev)" (February 23 2017), online: <https://www.adalah.org/en/content/view/9049>

<sup>127</sup> ACRI, Bimkom and The Regional Council for the Unrecognized Villages (RCUV), "Principles for Arranging Bedouin Villages in the Negev: Position Paper" (May 2011), online: <https://www.acri.org.il/en/wp-content/uploads/2011/09/Praver-Policy-Paper-May2011.pdf>, Adalah, *Nomads Against Their Will: The attempted expulsion of the Arab Bedouin in the Naqab - The example of Atir-Umm al-Hieran* (2011), online: <https://www.adalah.org/uploads/oldfiles/eng/publications/Nomads%20Against%20their%20Will%20English%20pdf%20final.pdf> [Adalah, *Nomads Against Their Will*] For a detailed discussion on Atir and Umm al-Hiran, see the following chapter dedicated to the story of this sister village duo.

restrain itself to only 'looking forward', as in *Qa'adan*, but would need to be adequately retrospective to a past that motivates such wrongs in the present.

To achieve its aim, the chapter attempts a number of tasks. First, it will perform a postcolonial reading of the legal decision, while also attempting to identify how a judicial postcolonial sensitivity might have read the case differently. It will also venture to locate traces of the 'native informant,'<sup>128</sup> the non-elite or subordinated group in Israeli society – the Naqab Bedouin, in the legal decision, which although discontinuous and interrupted, in a postcolonial, deconstructivist reading, make appearance. Yet in being a postcolonial critique, this chapter stresses that the very naming of the native informant, or subaltern, and with that the other as lord, or colonizing class, risks a generalization that assumes endorsement of non-acknowledgement for the silences and disruptions in all text.<sup>129</sup> The chapter will isolate the genealogical fragment that is a postcolonial reading of the *Abu Mdeghem* case to enable an empirical methodology that challenges the dominant historical and legal narratives of the case. This genealogical fragment is the alternative knowledge, the native informant's testimony juxtaposed against the official script and it provides the opportunity to critically read a particular empirical event that was interpreted in the mainstream as positive, praiseworthy, and general proof of the court as a site where justice is dispensed.<sup>130</sup>

### The Facts of the Case and the Rationales for the Decision

The facts of the case as established by the Court are that Negev Bedouin nomads, citizens of the State, had undertaken large scale, illegal incursions onto state land in al-'Araqib, Wadi al-Baqqar and other areas, and had planted agricultural crops there. The respondents decided to destroy the crops by aerielly spraying herbicide, Monsanto's Roundup, from 2002 to 2004.<sup>131</sup> The Bedouin petitioners challenged this policy on the grounds that the spraying of herbicide was done *ultra vires* of the Plant Protection Law,<sup>132</sup> which authorizes the Minister of Agriculture to carry out pest control activities for a single purpose only, which is the protection of plants and the environment. However, the spraying was performed without warning, and it endangered the health and dignity of Bedouins

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<sup>128</sup> Gayatri Chakravorty Spivak, "Introduction" in *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, Massachusetts and London: Harvard University Press, 1999).

<sup>129</sup> Gayatri Chakravorty Spivak, *The Spivak Reader: Selected Works of Gayatri Chakravorty Spivak*, Donna Landry and Gerald Maclean (eds.) (New York, London: Routledge, 1996) at 33

<sup>130</sup> Michel Foucault, *Society Must be Defended: Lectures at the Collège de France 1975-1976* (New York: Picador, 2003) at 8-12, cited in Yehouda Shenhav, *The Arab Jews: A Postcolonial Reading of Nationalism, Religion, and Ethnicity* (Stanford, California: Stanford University Press, 2006) at 188 [Shenhav, *Arab Jews*]

<sup>131</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] H CJ 2887/04, IsrLR 62, Justice Arbel opinion at para. 1

<sup>132</sup> *Plant Protection Law, 1956*

in the vicinity of the spraying. It was also harmful to animals and the land.<sup>133</sup> The petitioners refuted that the land was state land and countered that the settlement proceedings to determine the land's owners were still ongoing.<sup>134</sup> The respondents denied that the herbicide Roundup presented any risks to health. They emphasised that according to legal provisions they had a duty to protect the state's ownership and possession of its land for the benefit of the public. According to the respondents, Bedouin incursions onto state land did not concern only the affected areas as raised in the petition but was a pervasive phenomenon of repeated illegal incursions onto extensive tracts of land in the Negev owned by the State. The respondents insisted that the herbicide Roundup was safe and remained one of the most commonly used herbicides in Israel and the world.<sup>135</sup>

During legal proceedings, in 2005, the court issued an *order nisi* barring the practice of aerial spraying until the petition had been decided on.

In 2007, the court delivered its decision. The court found the ILA's actions of the aerial spraying of Roundup a violation of the constitutional rights to dignity and to life and a violation of the fundamental right to health, as encoded in Israeli law, and also drew on various international legal provisions to support their decision. In deciding in favour of the petitioners, Justice Joubran, who wrote the majority opinion, ruled that the act was performed *ultra vires* of the Plant Protection Law,<sup>136</sup> and the executive branch of government had no authority in the law to conduct the spraying. Justices Arbel and Naor ruled on a different rationale. Justice Arbel found that the act had a legal basis, particularly in the Public Land (Eviction of Squatters) Law whose provisions granted the authority the right to evict 'squatters' and to destroy or uproot or undertake any other act to return the land to its original state.<sup>137</sup> However, the spraying operation failed the proportionality test, as the harms caused to the right to life, the right to dignity and the right to health of those affected superseded the benefit accruing to the public in the state enforcing its right to property and its right to evict squatters. The right to evict squatters stemmed from the duty of the state, as Arbel elaborated, to prevent incursions and illegal planting on state land to ensure public benefit of that land, and also to relay to the public and 'lawbreakers' that the rule of law cannot be treated

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<sup>133</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 4

<sup>134</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62, Justice Arbel opinion at para. 5

<sup>135</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 5

<sup>136</sup> *Plant Protection Law, 1956*

<sup>137</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 17-20

lightly.<sup>138</sup> In applying the three-pronged proportionality test, Justice Arbel quotes then Supreme Court President Aharon Barak to explain why the third subtest, where measure is made of whether the benefit stemming from the act supersedes the harm, is a cornerstone of Israeli democracy: “It is an expression of the concept that there is an ethical barrier that democracy cannot pass, even if the purpose that is being sought is a proper one”.<sup>139</sup>

However, what are we to make of the particular narratives and statements of fact as recorded in the legal decision where the chief assumptions of the state surrounding the case – of ‘the Bedouin’ as ‘nomads’, squatters and lawbreakers that threaten the development of the land in keeping with Zionist prerogatives (which necessarily exclude the Bedouin as ‘non-Jews’) – are then reconstituted, packaged and deployed as facts by the court? This more circumspect critique of the *Abu Mdeghem* case, informed by postcolonial theory and deconstruction, is reason why caution rather than celebration is how the legal decision should be received, while also signalling how legal decisions by the Israeli Supreme Court vis-à-vis Palestinians might be better understood.

#### A Discussion around Postcolonial Theory

Colonialism is both the exercise of power and control over a native population via racial rationalities,<sup>140</sup> and their exclusion, dispossession, and displacement by the colonizing class.<sup>141</sup> As Goldberg<sup>142</sup> describes, drawing from Foucault,<sup>143</sup> the construction and deployment of racial rationalities is termed ‘racialization’. Racialization creates a hypothetical hierarchy of beings, creates physical/mental distinctions between them, enabling a legitimate and ethical subjugation and different levels of entitlement and restriction.<sup>144</sup>

Fanon poetically depicts in his exploration of the French colonization of Algeria in *The Wretched of the Earth*,<sup>145</sup> how the dehumanization and exclusion of the colonised Algerians circumvented

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<sup>138</sup> *Ibid.* at para. 2

<sup>139</sup> *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Defence*, [2006] HCJ 8276/05 (2) IsrLR 352 at p. 3689, *Ibid.* at para. 43

<sup>140</sup> Edward Sa’id, “Zionism from the Standpoint of its Victims” (1979) *Social Text* 1 at 7.

<sup>141</sup> Nasser Rego, *The Efficacy of the Israeli Legal System in Protecting and Fulfilling Naqab Bedouin Land Rights*, LLM Thesis (Toronto: Osgoode Hall Law School, York University, 2009) at 67.

<sup>142</sup> David Theo Goldberg, ‘The Social Formation of Racist Discourse’, in *Anatomy of Racism* (Minneapolis and London: University of Minnesota Press, 1990).

<sup>143</sup> Michel Foucault, *The Archaeology of Knowledge* (trans. A. Sheridan-Smith) (London: Tavistock, 1972).

<sup>144</sup> David Theo Goldberg, ‘The Social Formation of Racist Discourse’, in *Anatomy of Racism* (Minneapolis and London: University of Minnesota Press, 1990) at 298-300.

<sup>145</sup> Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1963).

burdensome moral queries about racialized colonial spaces on account of the French. Therefore, as differential exclusion enabled the creation and persistence of racialized spaces<sup>146</sup>, places marked by their housing of particular racial groupings, the inegalitarian distribution of resources, services and security *between* those racialized spaces posed no hard, moral questions for the colonizing class. Rao and Pierce<sup>147</sup> write that colonial governmentality created minute distinctions of race and status that were encoded into forms of rule that encompassed extreme bodily violence and the more benign 'rule of law'. Where violence on racialized, colonised bodies seemed necessary but also antithetical to civilized governance, it required a more moderate, less obviously tortuous, form of discipline, which found possibilities of realization in 'the rule of law'.

Scholars like Kimmerling,<sup>148</sup> Shafir<sup>149</sup> and Shamir<sup>150</sup> have demonstrated how Zionism was in essence a colonial movement, and others like Zureik<sup>151</sup> and Yiftachel<sup>152</sup> have shown how Israel operates as a colonial settler state. More recent work looks at how settler colonialism operates in the Naqab.<sup>153</sup>

Yiftachel points out that in the case of the Naqab Palestinians, the twin goals of securing land and a Jewish demographic majority defined the Israeli policy towards this community.<sup>154</sup> The Zionist settler policy of settling and Judaizing the land was threatened by the fact that the Palestinian

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<sup>146</sup> For a fuller treatment of the racialization of space, see Sherene Razack (ed.), *Race, Space and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) [Razack, *Race, Space and the Law*]

<sup>147</sup> Anupama Rao and Steven Pierce, "Discipline and the Other Body: Humanitarianism, Violence, and the Colonial Exception", in Anupama Rao and Steven Pierce (eds.), *Discipline and the Other Body: Correction, Corporeality, Colonialism* (Durham and London: Duke University Press, 2006) at 4.

<sup>148</sup> Baruch Kimmerling, *Zionism and Territory: The Socioterritorial Dimension of Zionist Politics* (Berkeley: Institute of International Studies, University of California, 1983) [Kimmerling, *Zionism and Territory*]

<sup>149</sup> Gershon Shafir, *Land, Labour and the Origins of the Israeli-Palestinian Conflict, 1882-1914* (Cambridge, England: Cambridge University Press, 1989).

<sup>150</sup> Ronen Shamir, *The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine* (Cambridge University Press, 2000)

<sup>151</sup> Elia T. Zureik, *The Palestinians in Israel: A study in internal colonialism* (London: Routledge & Kegan Paul, 1979).

<sup>152</sup> Oren Yiftachel, "Bedouin Arabs and the Israeli Settler State: Land Policies and Indigenous Resistance", in D. Champagne and I. Abu-Saad (eds.), *The Future of Indigenous Peoples: Strategies for Survival and Development* (Los Angeles: American Indian Studies Center, UCLA, 2003).

<sup>153</sup> Mansour Nasasra, Sophie Richter-Devroe, Sarab Abu-Rabia-Queder and Richard Ratcliffe (eds.), *The Naqab Bedouin and Colonialism: New perspectives* (London and New York: Routledge, 2015). See also the entire journal volume of *Settler Colonial Studies* that explores how settler colonialism operates in Palestine, "Past is Present: Settler Colonialism in Palestine" (2012) 2:1 *Settler Colonial Studies*

<sup>154</sup> Oren Yiftachel, "Epilogue: Studying Naqab/Negev Bedouins—Toward a colonial paradigm?" (2008) 8:2 HAGAR Studies in Culture, Polity and Identities 83-108

community in the Naqab exerted possession in various forms over 3-5 million dunams of land.<sup>155</sup> Further, the community were sizeable in number and enjoyed high fertility rates.

What postcolonial theory attempts to treat are the contestations, forms of agency, counter-currents and complexities in colonial encounters that tend to be ignored if adopting a Fanonian Manichean dichotomy between the colonizer and the colonized.

Stoler and Cooper assert that colonial regimes were neither monolithic nor omnipotent.<sup>156</sup> Therefore, there were competing strategies for maintaining control, doubts about legitimacy of the endeavour, questions about how much 'civilizing' of the natives should occur, and competing conceptions on the extent of power being diffused through capillary<sup>157</sup> and arterial forms.<sup>158</sup> Further, a postcolonial approach would not discount the role of native leaders and elites in assisting the colonial project, the reconstitutions of identity among the colonizing class, the negotiations between capitalist and imperialist interests that were not necessarily always aligned, as well as the multiplicity of actors, power struggles and contradictions in colonial contexts.<sup>159</sup>

The postcolonial current of this case study has taken its form inspired by three texts. The first, Yehouda Shenhav's postcolonial study on the subject of 'Arab Jews'.<sup>160</sup> *Arab Jews* explores, in the context of Zionism, how colonised, racialized identities of Jews from Arab/Muslim lands are constructed, but purified, patched together and unraveled, by emissaries whose own identities were fluid and changing, as a means of encouraging the immigration of 'Arab Jews' and enabling their absorption into the Israeli settler state. Shenhav illustrates how the Zionist subject is manufactured around three intertwined, heterogeneous and necessary categories that are the ideological structure of Zionism, namely nationalism, ethnicity and religion. However, the

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<sup>155</sup> Alexandre (Sandy) Kedar, "Land Settlement in the Negev in International Perspective", 8 *Adalah Newsletter* (September 2004).

<sup>156</sup> Ann Laura Stoler and Frederick Cooper (eds.), "Between Metropole and Colony: Rethinking a Research Agenda", in *Tensions of Empire: Colonial Cultures in a Bourgeois World* (Berkeley: University of California Press, 1997) 1-56.

<sup>157</sup> Capillary form of power meant systematic monitoring, teaching desired behaviour and rewarding 'correct' behaviour.

<sup>158</sup> Arterial power, a precursor to understanding the operation of power in a capillary-like modality, meant that power followed well defined pathways from governments to chieftains to subjects.

<sup>159</sup> Ann Laura Stoler and Frederick Cooper (eds.), "Between Metropole and Colony: Rethinking a Research Agenda", in *Tensions of Empire: Colonial Cultures in a Bourgeois World* (Berkeley: University of California Press, 1997) 1-56.

<sup>160</sup> Shenhav, *Arab Jews*, *supra* note 130

heterogeneity of the 'Arab Jews' category is unacknowledged by state institutions, but is packaged as homogenous and uniform. Shenhav accepts the hegemonic definition and counterposes a critical opposition to it; doing what he feels Spivak would refer to as 'strategic essentialism'.<sup>161</sup> Shenhav's work underscores how identity is constructed, how it is constituted of non-essentialist underpinnings, while it acknowledges the 'rhizome-like' character of 'nation' and 'history', which is not composed by 'the single story'<sup>162</sup> but is constituted of numerous contradictions and breaks. Shenhav's work is of particular import for this case study because it allows for a circumspect take on identifiers such as 'Negev Bedouin', probing the silences in such an identity construction and the power-effects behind its use. The construction of the Zionist subject in *Arab Jews* as a means to facilitate their immigration to that same place where *similar homogenous constructions* of Negev Bedouin are deployed, as a means to have the former take the place of the latter, speaks specifically to the power-effects behind homogenous identity constructions.

I then draw from the deconstructivist work of Spivak,<sup>163</sup> whose postcolonial reading challenges the linear progression of history and elite historiographies and emphasizes the heterogeneous strands and indeterminates in politics, ideology, economics, sexuality and history that constitute the subject. Specifically, it is Spivak's tracking of the work of the Subaltern Studies group<sup>164</sup> and their efforts to bring hegemonic historiography into a crisis that I have taken as the second textual cue in shaping this analysis.

Spivak cites Ranajit Guha who writes that although the prose of the colonial class in archives takes shape based on the will of colonial administrators, it is itself based on the will of the insurgent.<sup>165</sup> As Guha notes, despatches, minutes, and reports of counterinsurgent archives are informed not on the will of the counterinsurgents themselves, because the will of the counterinsurgents is predicated on the will of another – that is the insurgent. Colonial administrators act in response to acts by the

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<sup>161</sup> *Ibid.* at 15

<sup>162</sup> Chimamanda Ngozi Adichie, "The danger of a single story", *TED Talk* (October 2009), online:

[https://www.ted.com/talks/chimamanda\\_adichie\\_the\\_danger\\_of\\_a\\_single\\_story/transcript?language=en](https://www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story/transcript?language=en)

<sup>163</sup> Gayatri Chakravorty Spivak, *The Post-Colonial Critic: Interviews, Strategies, Dialogues*, Sarah Harasym (ed.) (New York and London: Routledge, 1990) [Spivak, *The Post-Colonial Critic*], *The Spivak Reader: Selected Works of Gayatri Chakravorty Spivak*, Donna Landry and Gerald Maclean (eds.) (New York, London: Routledge, 1996) [Spivak, *The Spivak Reader*], *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, Massachusetts and London: Harvard University Press, 1999) [Spivak, *A Critique of Postcolonial Reason*].

<sup>164</sup> Gayatri Chakravorty Spivak, *The Spivak Reader: Selected Works of Gayatri Chakravorty Spivak*, Donna Landry and Gerald Maclean (eds.) (New York, London: Routledge, 1996) at 203-236

<sup>165</sup> *Ibid.* at 203.

colonised. Therefore, we can read a rebel consciousness in bodies of official evidence.<sup>166</sup> Spivak similarly engages with the work of subaltern studies scholar Dipesh Chakrabarty who attempts to account for the gaps in the historical record, arguing that they are as representative of working class conditions as any direct description of them.<sup>167</sup>

While Shenhav's work allows us to scrutinise the construction of 'Naqab Bedouin' identity, Spivak's writings tell us where to direct that scrutiny. Spivak's tracking of the work of the subaltern studies group is a cue to look for traces of the native informant not in a native informant composed text, but in the text of official historiography, in the text of a legal decision, which I've chosen as the subject of analysis. According to Spivak, only the texts of counterinsurgency, that is of the colonial administrators, give us some idea of consciousness of the insurgent/the subaltern,<sup>168</sup> as being subaltern is *about being excluded* from official historiography.<sup>169</sup> As soon as a subaltern speaks, to Spivak it is as if that person ceases to be subaltern.<sup>170</sup> Why this line of thinking is influential is that it enables us to track the native informant/subaltern both in the text and in the gaps of the *Abu Mdeghem* legal decision. Granted Spivak's strict definition of 'subaltern', those Naqab Palestinian citizens who have managed to speak on their own account and for their community before international fora, Israeli officials and in the media, could be said to have ceased being 'subaltern' in that their effort at representation was able to catch official lines.<sup>171</sup>

Finally, the theme of violence is recurrent in the legal decision. However, there are certain forms of violence that are underscored while other forms are undisclosed; certain actors and victims identified, while others brushed over. The third cue that this chapter draws on allows for a postcolonial take on the phenomenon of violence in a situation of ongoing colonialism. This builds on the form of violence that we touched upon in the previous chapter, that is, law's foundational violence during the founding of a new sovereignty. Carmela Murdocca explores how for indigenous people in Kashechewan, Canada, a site of water contamination for many years, ongoing colonialism

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<sup>166</sup> Ranajit Guha, *Elementary Aspects of Peasant Insurgency in Colonial India* (New Delhi: Oxford University Press, 1983) at 15, *Ibid.* at 213-214

<sup>167</sup> Dipesh Chakrabarty, "Conditions for Knowledge of Working-Class Conditions: Employers, Government and the Jute Workers of Calcutta, 1890-1940", in Ranajit Guha and Gayatri Spivak (eds.), *Selected Subaltern Studies* (New York: Oxford, 1987) 179-230

<sup>168</sup> Gayatri Chakravorty Spivak, *The Spivak Reader: Selected Works of Gayatri Chakravorty Spivak*, Donna Landry and Gerald Maclean (eds.) (New York, London: Routledge, 1996) at 203

<sup>169</sup> *Ibid.* at 289-291

<sup>170</sup> *Ibid.* at 5-6

<sup>171</sup> *Ibid.* at 306

is effected via forms of legal and structural violence.<sup>172</sup> The phenomenon of structural violence applied to this study allows for a more rigorous critique of the conceptions and representations of violence raised by the court.

### Structural Violence and Historical Amnesia

Juxtaposed to the facts of the case and the rationales for the legal decision are the stories of alterity/otherness that are deliberately elided as a necessary feature of structural violence in a colonial setting. Drawing from Galtung<sup>173</sup> and Farmer,<sup>174</sup> Murdocca explains how 'structural violence' is systemic violence by those that belong to a certain social order directed at others where the effects seem 'wrong' and yet nobody's fault and the suffering of those affected is obscured. The difficulty in naming structural violence is an historical amnesia that prevents current acts of structural violence to be associated with, or to be seen as an effect of, a specific perpetrator or historical referent.

Applying this phenomenon of 'structural violence' to the particular colonised place of the Naqab allows us an opportunity to provide an alternative reading to the spraying of agricultural crops than that stated as its official purpose. According to both the State as respondent and the court, the spraying was a means to stem incursions on State land and to ensure the possibilities of public benefit to those lands. However, reading the performance of spraying as 'violence' and opening up the possibility of considering it violence that is structured, historical, ongoing as is characteristic of 'structural violence' as a form of ongoing colonialism allows us to reach conclusions that are markedly different from those reached by the court.

The crop spraying constituted a number of violent acts. It caused the destruction of thirty square kilometres of agricultural land where wheat, barley, corn and watermelon were being grown and were feeding a politically and economically marginalised community. Often times the spraying took place without warning.<sup>175</sup>

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<sup>172</sup> Murdocca, "There is Something in that Water", *supra* note 106

<sup>173</sup> Johan Galtung, "Violence, Peace, Peace Research" (1969) *Journal of Peace Research* 6(3): 167–91.

<sup>174</sup> Paul Farmer, "An Anthropology of Structural Violence", Sidney W. Mintz Lecture 2001, (2004) *Current Anthropology* 45(3): 305–25.

<sup>175</sup> Arab Association for Human Rights (HRA), *By All Means Possible* (Nazareth, Israel, 2004) at 22-23, *Abu Mdeghem v. Israel Lands Administration*, [2007] H CJ 2887/04, IsrLR 62 at para. 28.

It was accompanied by the police, border guards and inspectors from the Green Patrol,<sup>176</sup> the latter a governmental body that is noted for violently handling residents of the Naqab as a means to effect state control of land.<sup>177</sup> The spraying occurred over residential areas as well<sup>178</sup> and as a result many of the residents had to be hospitalized, among them children.<sup>179</sup> The act killed; it was both violent in debilitating the inherent fertility of the land and was responsible for the death of livestock and the spontaneous abortion of goat fetuses.<sup>180</sup> According to the expert opinion of Dr Eliahu Richter, submitted by the petitioners, the spray substance, Monsanto's Roundup, presented risks to fertility, caused congenital defects and may have been carcinogenic. In the expert opinion of Dr Ahmad Yazbak the dangers of Roundup included eye and skin irritations, and prompted frequent abortions, nausea and breathing difficulties.<sup>181</sup> As would be in keeping with the phenomenon of structural violence, the suffering and the gravity of violent destruction is for the most part anesthetized. The court deliberates and decides with a concurrent historical amnesia. Therefore, at the heart of the legal decision was a remedy to the arbitrary and illegal administrative act of the destruction of crops planted by citizens. However, by eliding a retrospective turn, the court's decision was intended to treat one spoke in the historic wheel of structural violence experienced by Palestinians from the Naqab. And therein lay its ineffectiveness. Immediately following the temporary injunction to ban the aerial spraying of crops, the State resumed its destruction by plowing the land with tractors,<sup>182</sup> a method of crop destruction that continues today.<sup>183</sup>

The Court's lack of engagement around the contested legal status of Naqab land was also very problematic. As touched upon in Nuri's land claims case, effectively all the land in the Naqab is considered by the state as being *mawat* (dead land that has been uninhabited and uncultivated for an extended period of time) based on the Ottoman Land Code of 1858, thereby according ownership of the land to the state. The Israeli-legislated Land Rights Settlement Ordinance

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<sup>176</sup> Arab Association for Human Rights (HRA), *By All Means Possible* (Nazareth, Israel, 2004) at 22, Aliza Arbeli, "ILA razes 'illegally-planted' Bedouin crops in the Negev", *Ha'aretz* (February 15, 2002), online: <http://www.haaretz.com/print-edition/news/ila-razes-illegally-planted-bedouin-crops-in-the-negev-1.52784>

<sup>177</sup> Abu Hussein, McKay, *Access Denied*, *supra* note 58 at 272

<sup>178</sup> Arab Association for Human Rights (HRA), *By All Means Possible* (Nazareth, Israel, 2004) at 24

<sup>179</sup> *Ibid.* at 23-24

<sup>180</sup> *Ibid.* at 25

<sup>181</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 8

<sup>182</sup> Yuval Yoaz, "Senior ILA official admits using non-approved chemicals to spray Bedouin crops", *Ha'aretz*, (February 16, 2005), online: <http://www.haaretz.com/print-edition/news/senior-ila-official-admits-using-non-approved-chemicals-to-spray-bedouin-crops-1.150409>

<sup>183</sup> Interview with Advocate Salem Abu Mdeghem, April 20 2011, Bir Saba'. Interview on file with author.

(1969)<sup>184</sup> took precedence over the Ottoman legislation and provided for land to be registered in the state's name unless legal title said otherwise. In 1921, under the British Mandate, authorities passed The Mawat Land Ordinance,<sup>185</sup> which the Israeli state considered the last opportunity to gain legal title for *mawat* land. As the vast majority of Bedouin had not formally registered their lands and so could not prove title, the only option left to claimants was to prove that said lands were not of the *mawat* category so as to invalidate registration of the land as State-owned.

However, it has been near impossible for Naqab Bedouin to prove that the land they claim possession, ownership or use of was not *mawat* in the middle of the 19th century. Orientalist rationales of Bedouin encampments not counting as settlements and of pastoralism as non-productive use of land have been standard court findings to deny recognition of Bedouin claim to Naqab land, since the 1974 *al-Hawashelah*<sup>186</sup> case until the recent Supreme Court decision in Nuri's case. Of nearly 200 land rights cases that Naqab Bedouin have brought before the courts, all have been decided in the state's favour.<sup>187</sup> The state began a land settlement process in the 1970s, whereby Naqab Bedouin who had claims to land were invited to appear before the Land Settlement authority to put forward his/her claim. As a result, 776,856 dunams were claimed.<sup>188</sup> However, the State made no genuine attempt to resolve the claims since they began the land settlement process in the 1970s, except to file counter-claim suits.

From interviews I conducted with persons with outstanding claims, like Nuri, I was made to understand that it was as if the State was waiting for the claimants to die so that their claims would expire with them. Although the land settlement process is still ongoing, meaning that the authorities have officially registered the fact that there are contested claims on land ownership, the courts continue to refer to the Negev Bedouin collectively as 'the dispersion'. An engagement with the above facts would have precluded the court's use of labels conferring illegality, such as 'the dispersion', 'squatters' or 'interlopers' when referring to the affected communities. As a result of the lack of adequate engagement with these issues, the court effected a deliberate historical

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<sup>184</sup> *The Land Rights Settlement Ordinance, 1969*, 23 L.S.I. 283.

<sup>185</sup> *The Mawat Land Ordinance, 1921*, 38 Official Gazette 5 (March 1 1921).

<sup>186</sup> *El-Hawashelah v. State of Israel*, [1974] CA 218/74, P.D. 38(3) 141.

<sup>187</sup> SBS Dateline, "Israel's Mabo?", Video (March 27, 2011), online:

<http://www.sbs.com.au/dateline/story/watch/id/601031/n/Israel-s-Mabo>

<sup>188</sup> Abu Hussein, McKay, *Access Denied*, *supra* note 58 at 260, footnote 15

amnesia which furthered the structural violence, which has come to be a recurrent experience of the Naqab Bedouin before the authorities.<sup>189</sup>

As the ruling was reached on the basis of the injuries caused specifically using the chemical Roundup, the history of structural violence experienced by the Naqab Bedouin did not actively influence the decision. Therefore, the remedy provided meant that a particular performance of structural violence, the aerial spraying of the chemical substance Roundup, could no longer occur. However, the destruction of crops and the eviction of Naqab Bedouin from lands they occupy and to which they lay ownership claim, in plowing of the lands, an “agrotechnological” instance of structural violence, were allowed to continue. In fact, this form was sanctioned by the court, which stressed the duty of the state to protect the land from illegal encroachment, owing to its status as an “unparalleled vital resource” and “national asset”.<sup>190</sup>

Structural violence, resting as it does on being without historical referent, was reduced to only a vague mention by Arbel. At the tail end of her decision, she references some of the historical context provided by the petitioners in their petition of the community’s poverty, unemployment, inadequate housing and their substandard health, educational and welfare facilities. The land’s contested legal status and the histories of violence, however, are not mentioned. Further, Arbel supplants this vague historical context with “distress does not justify committing illegal acts”.<sup>191</sup>

#### What a Postcolonial Reading Enables: Locating Foreclosure, Racialization and Humanitarianism, and the Trace of the Native Informant

In *A Critique of Postcolonial Reason*, Spivak demonstrates how the Lacanian concept of foreclosure is effected on the native informant, or the subaltern, in the great texts of Marx, Hegel and Kant.<sup>192</sup> Foreclosure is the sense of a specific defence mechanism in which “the ego rejects the incompatible

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<sup>189</sup> See Kedar, “Legal Transformation of Ethnic Geography”, *supra* note 60 for a comprehensive treatment of *mawat* jurisprudence and the legal maneuvers that facilitated the transfer of Palestinian held land to Israeli ownership.

<sup>190</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 33

<sup>191</sup> *Ibid.* at para. 49

<sup>192</sup> Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, Massachusetts and London: Harvard University Press, 1999) 1-111.

idea together with its affect and behaves as if the idea had never occurred to the ego at all,"<sup>193</sup> so that an element is rejected outside the symbolic order as if non-existent.<sup>194</sup>

The legal decision, in being composed by Israeli Supreme Court judges, is an example of counterinsurgent text. Although references are made to subaltern Bedouin, their voice is rendered stemming from a homogenous mass, the specificities of their very human suffering unheard, while only the legally 'relevant' facts of the case are mentioned and debated.

In the reading of the legal decision, we see how certain elements are foreclosed – namely, law's violence and the violent events of 1948 that speak to the content and nature of rights to the land in the present. This case study will focus on the foreclosure not of the native informant (as in Spivak), since in many ways he/she is specifically referenced (even if much is missing in such reference) but on those elements that are crucial to the rationales behind the decision, but nevertheless are completely unaccounted for. These elements are so far outside the symbolic order that they are rejected completely, and remain unaddressed by even the petitioners.

The reading of the legal text provides us with two other manifestations – one, the explicit narrative of the courts that mark a 'worlding' of what the Court assumes is as an uninscribed world.<sup>195</sup> Here the legal text ignores, by deliberate non-inscription, the lived histories of the Naqab Bedouin population, and itself creates and defines a world that the Naqab Bedouin are said to inhabit. As a result, narratives of fact (read 'truth') are constructed, reformulated and deployed by the court of Bedouin racialization. In concert with the narratives of the court's 'humanitarianism', which is another explicit element of the decision, credence is given to the right of colonial rule.

Second, there are implicit elements that are not completely foreclosed nor explicitly stated, but through the careful deconstructivist technique of 'tracing', the native informant makes a subliminal and discontinuous appearance. Tracing is the technique whereby subaltern agency can be evinced in the gaps and remnants of the text, with an understanding that from text we can also gauge that which has been silenced, elided but nevertheless subsists. Tracing the native informant in the

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<sup>193</sup> Jean Laplanche and J.-B. Pontalis, *The Language of Psycho-Analysis*, (trans. Donald Nicholson-Smith) (New York: Norton, 1974) at 166-169

<sup>194</sup> *Supra* note 192 at 4

<sup>195</sup> Gayatri Chakravorty Spivak, *The Post-Colonial Critic: Interviews, Strategies, Dialogues*, Sarah Harasym (ed.) (New York and London: Routledge, 1990) at 1-2, *Ibid.* at 2, 114

decision hints at the agency of the subaltern in asserting her/his claim to land that is at the same time claimed, and violently contested, by another. Performing the trace to expose native informant agency, we also come to appreciate how the court's racialized representation of the native informant is a necessary device to speak of the centrality of land in the Israeli national imagination.

### Foreclosure in the *Abu Mdeghem* Case

The expulsion from the unconscious in Lacanian psychoanalysis as a self defence mechanism is what Spivak evidences in the foreclosure of the native informant in Kant's third critique, *The Critique of Judgement* and in Hegel's reading of the Hindu scripture Gita.<sup>196</sup> The *Abu Mdeghem* decision also forecloses elements that are so incongruent with the particular worlding of the world undertaken by the judges and the legal system, that they are treated as non-existent. The petitioners do not broach the foreclosed subjects of law's violence and the violence of 1948 because they know that such subjects would be deemed irrelevant to the case; the rules of legal process preclude any possibility of these issues from being received, let alone discussed. As law is able to interpret what it can follow, precedent, and what it can hear, evidence, elements of narration that are untranslatable render the entire code of which they are part lost.<sup>197</sup> Yet, these are the very elements that speak to the heart of the issue, how law is being used by the executive to displace and dispossess and how the legal system is unable to effectively remedy these administrative wrongs. The events of 1948 mark the originary violence that birthed the conflict over *whose* land and *what* rights therein. Acknowledging these elements would help identify the act not as 'excessive' by the executive, but as a spoke in the wheel of structural violence, debated in a forum, the court, that is unable to acknowledge its own violence, and thereby the historical and current impediment it poses to providing an adequate and just remedy.

In 'Force of Law', where Derrida engages with Walter Benjamin's 'Critique of Violence', the theme of originary violence of the law is discussed.<sup>198</sup> As Benjamin describes, every act of the legal system conserves the originary violence on which it was founded. The foundational moment was when a

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<sup>196</sup> Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, Massachusetts and London: Harvard University Press, 1999)

<sup>197</sup> Gerald Torres and Kathryn Milun, "Translating *Yonnonديو* by Precedent and Evidence: The Mashpee Indian Case", in Richard Delgado (ed.), *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 1995) at 48-49.

<sup>198</sup> Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'", in Drucilla Cornell and Michael Rosenfeld (eds.), *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) 3-67, Walter Benjamin, 'Critique of Violence', in Peter Demetz (ed.), *Reflections: Essays, Aphorisms, Autobiographical Writings* (Edmund Jephcott, trans.) (New York: Schocken, 1986).

previous (out)law was violently undone and a new law violently enforced. Zizek<sup>199</sup> holds that to foreclose its originary violence, as Israeli law does, is the necessary condition by which law sustains itself, by hiding this foundational violence in which it was birthed. To acknowledge that foundational violence, which is hidden but conserved in every legal act subsequently, is to undo law's authority and eternal character and law's subject's fetishism for and allegiance to it.

The violent events of 1948 are similarly foreclosed. Therefore, the judges make no reference to the fact that roughly 90% of Palestinian Bedouin from the Naqab were expelled or forced to flee, while those remaining were forcibly concentrated in a closed reservation under Military Administration rule with basic civil liberties of freedom of movement, freedom of association and the right to property denied.<sup>200</sup> In fact, concentration in the reservation enabled that land in use, possession or ownership of the Naqab Bedouin be expropriated and transferred to state ownership without due process. This is precisely what happened in Nuri al-'Oqbi's case during his family's expulsions from their lands in al-'Araqib. And this is the cornerstone of the land conflict between the Naqab Bedouin and the state today.

It was brought to the attention of the Court how the family of petitioner Salman Abu Jilaydan, from the Wadi al-Baqqar area that was sprayed in March 2003, was present on the sprayed lands before the Israeli state was founded in 1948. At the very least, such a fact ought to render the term 'squatter' inappropriate to describe his family's legal status. Abu Jilaydan's family was forced to move out of their lands in Wadi al-Baqqar during the war in 1948 but returned in 1952 and continued with the planting of wheat and barley and raising sheep.<sup>201</sup> However, had the court deemed 'squatters' inappropriate to describe the Abu Jilaydan family, the legal backing to use 'reasonable force'<sup>202</sup> of eviction provided by the Public Land (Eviction of Squatters) Law would not apply, making administrative action *ultra vires*, and precluding the judge from recommending that the state enforce its duty to protect state land via evictions, at least as regards the Abu Jilaydan family.

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<sup>199</sup> Slavoj Zizek, *For They Know Not What They Do: Enjoyment as a Political Factor* (London, New York: Verso, 2008) at 203-204

<sup>200</sup> Salman Abu Sitta, "The Denied Inheritance: Palestinian Land Ownership in Beer Sheba", Paper presented to the International Fact Finding Mission (London: Palestine Land Society, 2009) at 23, 'Aref Abu-Rabi'a, *A Bedouin Century: education and development among the Negev tribes in the 20th century* (New York: Berghahn Books, 2001) at 93, Sabri Jiryis, *The Arabs in Israel* (Beirut: The Institute for Palestine Studies, 1968).

<sup>201</sup> Petition in *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 16.

<sup>202</sup> Section 18b of The Land Law, cited by Justice Arbel in the decision at para. 13, p. 83.

There was also no reference made by the court to documentary evidence that indicated how the state discussed in 1951-52 how the Bedouin were expelled/fled the land and how the State intended to concentrate the remaining in a closed reservation in order to free up western Naqab land, considered 'rich', for Jewish settlement.<sup>203</sup>

The necessary foreclosure of both the law's violence and the violent events of 1948 enable the spectacle of the law to function as intended and for the status quo over the land conflict to be maintained. To address the issues would force the court to cease using a term like 'squatting' to describe Naqab Bedouin settlement and would radically alter the facts of the case and the framework the court applies in adjudication.

By foreclosing these subjects, the court effectively ignores over six decades of human suffering, pain, of the lived experiences of military administration coercion, of community disintegration, impoverishment, forced relocations and physical violence. The court as an ideological actor, an actuality whose contents we will flesh out in more detail over the course of the case study, thereby prevents any link from being drawn between administrative wrongs committed today from those that were committed in 1948 and precludes possibilities of the State assuming historical responsibility.

This is, therefore, also how we come to understand the enabling of law's violence conserving its originary violence – that which was able to strip privilege from the land's original inhabitants and accord it to the incoming, preferred ethnicity. The purging of historical violence is also generative. By de-linking between wrongs today from those of 1948, and by abdicating historical responsibility, colonial governmentality enables similar privilege-granting and privilege-taking rituals to be reproduced (maintaining their originary production), deployed and consequently, amplified.

#### Explicit Elements of the Decision: Racialization and Law's Humanitarianism

From the particular locus of Abadan, on the Iranian side of the Shatt al-Arab waterway, Shenhav explores how the Arab Jewish subject is constructed by Zionist emissaries working for Solel Boneh

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<sup>203</sup> Petition in *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 34, citing Joseph Ben-David, *A Feud in the Negev: Bedouins, Jews, and the land dispute* (Ra'anana, Israel: Center for Studying the Arab Society in Israel, 1996) (Hebrew) at 48-50.

in the 1940s, a construction company that built and maintained oil-refining facilities under the aegis of the Anglo-Iranian Oil Company. The Solel Boneh company provided cover for the emissaries' illegal entry into Iran and Iraq to recruit Jewish communities into the Zionist project of settling in Palestine.<sup>204</sup>

Shenhav notes how the Zionist emissaries saw Arab Jews as “difference”, as ‘others’ in a colonial reality where they were Orientals vis-à-vis Europe, and as Jews in their (Arab/Muslim) national paradigm.<sup>205</sup> Drawing on Latour,<sup>206</sup> Shenhav argues that Zionism adopts the simultaneous processes of hybridization (hybridizing secular with religious) and purification (treating nationalism and religion as two separate spheres, obscuring the hybridization) to create modern Jewish nationalism. Religion is equated with the premodern which represents Arab Jews. Conversely, secular stands in for the modern and this represents European Jews.<sup>207</sup> However, for Arab Jews to be absorbed, even if partially, into the Israeli national imagination, they are propelled towards assuming a national and religious identity but pressured towards relinquishing their Arab identity.<sup>208</sup> In this way, Arab Jews were constructed in the service of a particular colonial project of encouraging settlement.

Yet, as in many colonial projects, in addition to the settlement of the colonizing class, there needs to be a concomitant displacement, exclusion and dispossession of the natives. How do Israeli legal narratives construct Bedouin subjects to facilitate this colonial project? In the decision's summary, the Bedouin are referred to as interlopers under ‘facts of the case’,<sup>209</sup> as lawbreakers<sup>210</sup> and as nomads,<sup>211</sup> the latter even though the community was fully sedentarized by the early 1970s and underwent processes of sedentarization as far back as the mid-nineteenth century.<sup>212</sup> Further, the rationality and legal dexterity that mark Justice Arbel's thirty-nine page decision strengthen the legitimacy of the particular worlding that it performs. Therefore, we are told to see the Bedouin as undertaking incursions onto a very precious, national resource, thereby restricting the ability of the

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<sup>204</sup> Shenhav, *Arab Jews*, *supra* note 130 at 19-20

<sup>205</sup> *Ibid.* at 25

<sup>206</sup> Bruno Latour, *We have Never Been Modern* (Cambridge, Massachusetts: Harvard University Press, 1993).

<sup>207</sup> Shenhav, *Arab Jews*, *supra* note 130 at 80

<sup>208</sup> *Ibid.* at 13, footnote 8

<sup>209</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62

<sup>210</sup> *Ibid.* at para. 2

<sup>211</sup> *Ibid.* at para. 6

<sup>212</sup> Ghazi Falah, “Israeli State Policy toward Bedouin Sedentarization in the Negev” (1989) 18(2) *Journal of Palestine Studies* 71 at 72

public, which we can infer does not include non-Jews, to enjoying the land. The Bedouin are therefore framed as outsiders to the national consensus and threatening to it.<sup>213</sup> The violence that state representatives mete out on the Bedouin is equated to that directed by the Bedouin towards the state,<sup>214</sup> and in fact the judge reprimands the Bedouin for their ‘reckless’ behaviour in *endangering themselves*.<sup>215</sup> State violence manifests in the spraying of a toxic substance that threatened the health and forced the hospitalization of the affected, among them children, and killed livestock and crop. All the while individual violent reactions from the Bedouin were contained with the threatening presence of police and the Green Patrol.<sup>216</sup> Therefore, similar to how Arab Jews were racialized by Zionist emissaries and later state institutions, the legal decision demonstrates the racialization of Naqab Bedouin towards the facilitation of a particular colonial national objective.

Justice Arbel’s obiter dictum on ‘the Bedouin society in the State of Israel’<sup>217</sup> clues us into how the court envisions Bedouin be absorbed, inadvertently with unease and in a process never fully achieved,<sup>218</sup> into the national Israeli paradigm. Referring to the Bedouin as “an integral part of Israeli society”, she cites the petitioners’ arguments, which themselves are supported by a 2000 State Commission of Inquiry, to make note of how economic, housing and health disparities result in part for the Bedouin’s lawbreaking activity of squatting. However, Arbel is quick to backtrack on this truncated historical context, reminding all participants of the legal spectacle that violence against the sovereign is never acceptable, “Distress, *no matter how great it is*, cannot justify breaking the law” [italics added]. The parting message of the decision is that law is without origin, is supreme and is what makes “a civilized country”; under no circumstance can breaking it be tolerated.

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<sup>213</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 33

<sup>214</sup> *Ibid.* at paras. 2, 7

<sup>215</sup> *Ibid.* at para. 41

<sup>216</sup> Arab Association for Human Rights (HRA), *By All Means Possible* (Nazareth, Israel, 2004) at 22

<sup>217</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 49

<sup>218</sup> Shenhav (2006: 13, footnote 8) draws from the Althusserian concept of ‘interpellation’, whereby the recruitment of individuals into subjects is an incomplete project. As Arab Jews’ identity is influenced by various ideological forces in society and assumes a national, religious identity, it is unable to fully relinquish the Arab component of identity. Their recruitment as subjects is therefore never fully achieved, generating crisis and antagonism. See Louis Althusser, “Ideology and Ideological State Apparatuses”, in *Lenin and Philosophy and Other Essays* (New York: Monthly Review Press, (1971)) 162-83 at 174.

Justice Arbel closes with her vision of how the Bedouin ought to be recognized. This form of recognition, which is at the same time *the Bedouins' need to be absorbed* into Israeli society, recommends,

“a complete and comprehensive systemic solution, and the sooner the better... will be capable of allowing the integration of the Bedouins once and for all in Israeli society as citizens of equal status, who have equal rights and equal obligations. It should be emphasized that this call is not directed solely at the state authorities. It is also directed at the Bedouin population itself, which as I have said is also responsible for the position in which it finds itself, as well as for the nature of its relationship with the authorities. *The two sides are jointly responsible* for the situation which I call upon them to change, even if in greater or lesser degrees and in different ways. Only by means of *communication, collaboration, tolerance*, a recognition of joint interests and a willingness to make *compromises* — on both sides — will it be possible to succeed in changing the situation” [italics added]<sup>219</sup>

It is hard to grasp how the recommendation by Justice Arbel that the State “take determined and uncompromising action”<sup>220</sup> to evict Bedouin squatters aligns with her recommendation that communication and collaboration be the markers of future relations between the State and the Bedouin. Uncompromising action seems to preclude the possibilities for genuine communication and collaboration between the state and the Bedouin.

For communication, there needs to be a transaction between speaker and listener. Subalternity is the condition whereby there is no listener in the transaction of ‘speech’,<sup>221</sup> meaning there is no communication, but rather a ‘talking at’. Not being able to make speech acts is the consequence of not being able to be heard. Naqab Bedouin’s lived experience of structural violence and the contested legal status of the land are both unheard - by the state and most significantly by the court, that which is prescribing ‘communication’. In their failing to make speech acts catch official ears, the Naqab Bedouin condition is expressive, at least on the issues of structural violence and the contested legal status of the land, of their subalternity. The court’s refusal to hear jars with their

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<sup>219</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] H CJ 2887/04, IsrLR 62 at para. 49

<sup>220</sup> *Ibid.*

<sup>221</sup> Spivak, *The Spivak Reader* at 289-291

recommendation that 'communication' inform official relations with the Naqab Bedouin. The court, which is meant to keep executive action in line with democratic principles according to administrative law, is prescribing that which itself is unable to perform.

Arbel's endorsement of compromise fails a number of the prerequisites to ethical and moral bargaining between contending groups in the jurisprudence on compromise and in the ethics of exchange. Compromise between contending groups forces each to ask what are one's own priorities/interests that they can trade for other goods that they would prefer.<sup>222</sup> For the bargaining to be honest and fair, deception, manipulation, evasion and exploitation are necessarily precluded.<sup>223</sup> The party proposing, and possibly mediating, compromise and negotiation should be a relatively neutral party for the negotiation to be honest and fair. Yet, the court can hardly be said to be that neutral party given its uncritical adoption of the state's position on the 'nomadic' and 'illegal' nature of Naqab Bedouin settlement. The occlusion of historical referents to the case also render the court's mediation as problematic.<sup>224</sup>

Further, the proposal to compromise seems, at best, imperceptive. Negotiation between conflicting parties in the form of alternative dispute resolution does have its benefits. Arbel's proposed negotiation could save the burdens of traditional litigation, such as the expenses accrued by both parties, the burden on public resources, and the formality that accompanies the legal process.<sup>225</sup> Arbel proposes a collaborative strategy in the negotiation between the two parties, as opposed to a competitive one. Therefore, value-embedded trades are envisioned to satisfy both parties' interests. There is a particular long-term objective implicit in the negotiation, that is preserving the relationship and integrating Bedouin 'once and for all' into Israeli society. On the other hand, the competitive strategy in negotiation is sensing the possibilities to exploit the other party on their account of being legally inept or overly trusting. If one side is resolved to a collaborative strategy, the resolution to adopt a competitive strategy by the other side would mean walking away with a bigger slice of the pie. Following that line of thinking, we could assume that the strategy chosen by a party in this instance would be influenced significantly by what one believes one has to lose in the exchange. Naqab Bedouin do not possess the same resources to legal astuteness as is available to

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<sup>222</sup> Sanford Levinson, "Compromise and Constitutionalism" (2010-2011) 38 *Pepperdine Law Review* 821

<sup>223</sup> Scott R. Peppet, "ADR Ethics" (2004) 54 *Journal of Legal Education* 72-78 at 72.

<sup>224</sup> *Ibid.* at 77

<sup>225</sup> Sylvia Shaz Shweder, "Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements" (2007) 20 *Georgetown Journal of Legal Ethics* 51-71 at 53-54

the state, and the law of trespass has always already implicated them as wrongdoers. They are the trusting party, in that they agreed to initiate a legal process that they deemed impartial enough to hear their petition. Yet, the negotiation process in contractualism can also be defined by the social, economic and racial components that define the parties, whereby the party that perceives itself socially, economically or racially superior, in our case the state, will choose a competitive strategy to maintain its advantage or elite status.<sup>226</sup>

Arbel's recommendation of compromise comes after she recognizes that the 'two sides' are equally responsible for the current conflict. Therefore, alongside with equating the extent of violence performed by both sides, there is the implicit assumption that the conflict between the State and the Bedouin is one of balance, hence the need for communication and compromise. Yet the histories of structural violence and the vanishing present moments of it do not accord with the relationship's characterization as one of balance. A common criticism of alternative dispute resolution is how power disparity plays to the advantage of the more powerful.<sup>227</sup>

These considerations in mind, the court's endorsement of collaboration and negotiation between the state and the Naqab Bedouin is not what it seems. In the mind of the court, Naqab Bedouin do not hold the land, so they are not being forced to compromise such a right to the land. What Bedouin are being forced to compromise is planting and living on land that is not theirs. But not being theirs, to compromise it should be easy. Implicitly the court seems to be saying that Bedouin stubbornness in living on and off land that is not theirs, what are Bedouin priorities/interests in this situation, should be compromised in exchange for the goods that are the development townships the state has constructed for them. The court has made it clear that on the other hand the state holds the land. The state is not asked to compromise their interest in the land, because they own it, whereas the Bedouin do not. Rather, what the state is being asked to compromise appears to be the enormous power at its disposal to enforce their ownership to the land.

The recommendation to compromise is not so as to reach a solution whereby the genuine concerns of both parties are addressed. Rather, it is done so that the state does not overstep the law and

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<sup>226</sup> Scott R. Peppet, "ADR Ethics" (2004) 54 *Journal of Legal Education* 72-78 at 73-74; see also Charles W. Mills, *The Racial Contract* (Ithaca, NY : Cornell University Press, 1997), Carole Pateman and Charles Wade Mills *Contract and Domination* (Cambridge: Polity, 2007)

<sup>227</sup> Sylvia Shaz Shweder, "Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements" (2007) 20 *Georgetown Journal of Legal Ethics* 51-71 at 55-56

threaten the democratic image that justifies the right to colonial rule. This idea seems to accord with what was considered the 'paradox of colonial discipline'. The paradox is that violence on colonised natives seemed necessary but also antithetical to civilized governance. In order to discipline but at the same time maintain the representation of being a civilized country, as the court characterizes the state,<sup>228</sup> requires a more moderate, less obviously tortuous, form of discipline. This form of discipline was realized in 'the rule of law'.<sup>229</sup> The court is not calling for the state to halt its use of violence to enforce its right to the land. On the contrary, "the state is required to act forcefully, through its various executive organs".<sup>230</sup> What the court is calling for is the state's *measured* use of violence. In what could be akin to a teacher's slap on the wrist of a student that should have known better, the court appears to be asking, 'Does the state not realize that law's sanction and its threat of violence, together with your own executive efforts, are sufficient enough to adequately discipline, punish and deter Naqab Bedouin from squatting, thereby preserving your important, central and constitutional right to the land'? The court is endorsing a violence that is *measured*, meaning that the violence not be excessive and second, that it is measured in the sense that it is also precise, to reflect the formalism of the law (which ultimately determines executive action and the rights and responsibilities of citizens). The court, as in Nuri's case, once more performs the law as objective and formal.

If Arbel's proposal to negotiate is located on ethically shaky ground, how can we understand its purpose vis-à-vis the context of Bedouin being integrated as citizens of equal status in Israeli society? If we follow Himani Bannerji's critique<sup>231</sup> of Charles Taylor's politics of recognition,<sup>232</sup> or Elizabeth Povinelli's thesis in *The Cunning of Recognition*,<sup>233</sup> we come to appreciate how recognition in colonial contexts creates an aura of accommodation and toleration that masks the imperial histories and colonial violence that then tend to be hidden indefinitely.<sup>234</sup> By encouraging negotiation and compromise, and eliding the structural violence of ongoing colonialism, it seems that the court is advocating that the status quo continue, that Naqab Bedouin remain a counterpoint

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<sup>228</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 49

<sup>229</sup> Anupama Rao and Steven Pierce, "Discipline and the Other Body: Humanitarianism, Violence, and the Colonial Exception", in Anupama Rao and Steven Pierce (eds.), *Discipline and the Other Body: Correction, Corporeality, Colonialism* (Durham and London: Duke University Press, 2006) at 4.

<sup>230</sup> *Supra* note 228 at para. 33

<sup>231</sup> Himani Bannerji, "Charles Taylor's Politics of Recognition: A Critique", *The Dark Side of the Nation: Essays on Multiculturalism, Nationalism and Gender* (Toronto: Canadian Scholars Press, 2000)

<sup>232</sup> Charles Taylor, "The Politics of Recognition" in Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (New Jersey: Princeton University Press, 1994)

<sup>233</sup> Povinelli, *Cunning of Recognition*, *supra* note 14

<sup>234</sup> I will explore the concept of recognition in greater detail in the final chapter of this dissertation

to the preferred Jewish ethnicity. In this way, the Bedouin are resolved to being authentically Bedouin, 'recognized', yet as per the status quo, differentially excluded.

The Justice's references to those affected by the crop spraying in her obiter dictum and even when talking about the harm caused<sup>235</sup> are to 'Bedouin', as opposed to naming the particular persons harmed and the specificities of that harm. Yet, the spraying took place in around fourteen different localities in the Naqab, on seven different occasions over the span of three years, and in circumstances that were specific to every spraying act. Therefore, the acts against individual Bedouin varied in terms of the extent to which they were affected, the number and extent to which their animals were hurt, and the consequence to the health of the land. There were those who were hospitalized and those who were not, spraying occurred mostly without warning except on a few occasions, and the physical violence at the hands of the state and the threatening presence of police and other security forces was experienced differently by each member of the community. What, then, explains the judge's use of such generalization? Homogenization, Goldberg writes, is the hallmark of a population's racialization. They are constructed as a homogenized mass that then facilitates the creation of hypothetical hierarchies between them and the referent, preferred ethnicity, enabling a legitimate and ethical subjugation and different levels of entitlement and restriction.<sup>236</sup> When a 'Bedouin' identity is constructed, its meaning embedded with the aforementioned qualifiers or historical schema of reckless lawbreakers, squatters, nomads, then the deployment of these understandings are greatly facilitated with simply the use of the term 'Bedouin'. This also saves the risk of sounding racist and illiberal in repeatedly specifying varied ugly character traits; it becomes enough to say 'Bedouin'.

Law's humanitarianism is explicitly stated in the legal decision. Drawing on Kelm,<sup>237</sup> Murdocca shows how the nation responds to the Kashechewan water crisis and contamination with an act of national goodwill, by saving and compensating the affected indigenous community.<sup>238</sup> In a similar vein, the legal decision was shown to be a humanitarian ruling, one that kept governmental excess in check, and looked out for the health and dignity of the affected Naqab Bedouin community.

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<sup>235</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 40-41

<sup>236</sup> David Theo Goldberg, 'The Social Formation of Racist Discourse', in *Anatomy of Racism* (Minneapolis and London: University of Minnesota Press, 1990) at 298-300

<sup>237</sup> Kelm, Mary-Ellen, *Colonizing Bodies: Aboriginal Health and Healing in British Columbia 1900-50* (Vancouver: UBC Press, 1998) at 101

<sup>238</sup> Murdocca, "There is Something in that Water", *supra* note 106 at 388

This positive 'humanitarian' ruling can be seen as a cornerstone of colonial/racial rule, the message being that we are humanitarian and so have a right to rule over you.<sup>239</sup> Justice Arbel underscores the state's responsibility to protect citizens from indirect or direct results of state actions. She concludes that the State is obligated by a (humanitarian) law to protect the Bedouin from themselves, who she says we can expect to ignore the issuance of warnings.<sup>240</sup> The construction of a humanitarian court is seen when Justice Arbel cites a previous case overseen by former Supreme Court President Barak, affirming that the present ruling is in line with the "constitutional democracy" that Israel is. A judicious approach to the proportionality test helps the Court "maintain a system of human rights", guided by "ethical barrier(s)" that minimize harm even if an action is undertaken for a proper purpose.<sup>241</sup>

Further, Justice Arbel underscores the possibility of unintentionality in the state being insensitive or disrespectful to Bedouin.<sup>242</sup> This despite the testimony of Saleem Abu Mdeghem that his wife was sprayed while tending the field, that the Green Patrol had prevented him from reaching his wife to assist her, and requests to police to call an ambulance were denied.<sup>243</sup> Sayyah Abu Mdeghem also gave testimony that the aerial spraying took place on his land in al-'Araqib without prior, adequate warning to residents as required by law<sup>244</sup> and the lack of warning is supported by others similarly affected.<sup>245</sup> However, Justice Arbel concludes that "the premise in our case is that the state is acting legitimately... and certainly it seeks to prevent any harm to the Bedouin citizens".<sup>246</sup>

### A Postcolonial Sensitivity to Power Relations and Judicial Reasoning

Yet, are we slipping into the hold of Manichaeism whereby a colonial situation is characterized by an all powerful colonizer oppressing a forsaken and feeble colonised class? Postcolonial theory reminds us that identities are fluid, changing, negotiated, contested, and rewritten, that the

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<sup>239</sup> *Supra* note 237

<sup>240</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 41

<sup>241</sup> *Ibid.* at para. 43

<sup>242</sup> *Ibid.* at para. 45

<sup>243</sup> Petition in *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para.10

<sup>244</sup> *Ibid.* at 11

<sup>245</sup> See Arab Association for Human Rights (HRA), *By All Means Possible* (Nazareth, Israel, 2004), Aliza Arbeli, "ILA razes 'illegally-planted' Bedouin crops in the Negev", *Ha'aretz* (February 15, 2002), online:

<http://www.haaretz.com/print-edition/news/ila-razes-illegally-planted-bedouin-crops-in-the-negev-1.52784>

<sup>246</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 44

colonised also exhibit agency, even if with ‘selective sovereignty’, meaning that subjects of power are active agents yet not completely self-sovereign in the construction of their conscious will.<sup>247</sup>

Foucault reminds us that power is neither an institution nor a structure, “it is the name that one lends to a complex strategical situation in a particular society”.<sup>248</sup> Power’s operation is intelligible as a moving base of force relations that by their inequality induces states of power, with ‘moving base’ implying that the power base is taken away from the character of intentionality.<sup>249</sup> As Deleuze instructs us, although power may be the result of a moving base of force relations, it is nevertheless a fairly stable system, one that we can *represent* as ‘power’. Its state of equilibrium is maintained by ‘attractors’ or equilibrium points, though it is nevertheless open-ended and subject to fracture owing to the potentiality of the virtual and the virtual structure’s processes of individuation.<sup>250</sup> Spivak notes that the act of naming it power is the closest one can get to it. This sort of naming can be called catachrestic, the misapplication of a word to overcome poverty of expression.<sup>251</sup> Similarly, the complexities of power relations in this particular court spectacle, encompassed in the written and unwritten in the legal decision and in the historical materialism, and our own historical sense, that informs it, tells us this story is not one of powerful oppressing the powerless. I will return to this point when performing the native informant trace in the legal decision. First, however, it is worth looking at how a postcolonial sensitivity may have informed a different decision.

For one, the accounting of ‘Bedouin identity’ as monolithic, homogenous, nomadic and with all the racialized inscriptions of criminality would not stand up to a postcolonial critique. The individual subject is a plethora of inscriptions as much as she/he inscribes politics, sexuality, history and ideology. As Spivak elaborates, the ‘subject-effect’ of the subaltern as subaltern consciousness doesn’t account for heterogeneous strands and indeterminates that constitute subaltern consciousness. Therefore, that which is the subject is actually an amalgam of an immense discontinuous network (‘text’ as she uses it in other places; assemblage if we use Deleuze’s term) of strands that are politics, ideology, economics, sexuality, history. Therefore, the subject is actually an effect of an effect. The subject-effect of the subaltern, that is subaltern consciousness, thereby

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<sup>247</sup> Donald S. Moore, *Suffering for Territory: Race, Place and Power in Zimbabwe* (London and Durham: Duke University Press, 2005) at 1-32

<sup>248</sup> Spivak, *The Spivak Reader* at 143, footnote 7, citing Michel Foucault, *The History of Sexuality, Vol. I: An Introduction*, (trans. Robert Hurley) (New York: Vintage, 1980) at 93

<sup>249</sup> Spivak, *The Spivak Reader* at 147

<sup>250</sup> Srnicek, *Assemblage Theory*, *supra* note 20 at 38-9.

<sup>251</sup> Spivak, *The Spivak Reader* at 143

substitutes an 'effect' (of many heterogenous factors) for a 'cause' ('this subject' causes subaltern consciousness).<sup>252</sup> The judicial rationale is far less generous, positing that the subaltern consciousness in this case, generalized to envelop all Naqab Bedouin society in Israel, is sovereign in its exercise, and therefore fully responsible for squatting, violently reacting to police and therefore of breaking the law. Even if we can assume that the 'distress' this community faces, the effects of poverty, housing inadequacies and poor health and welfare services, constitute in part the Bedouin subject, we are told that the Bedouin bear responsibility, because their consciousness is essentially sovereign in its exercise.

Similarly, a postcolonial sensitivity would invite historical referents to inform the ratio. It would consider the histories of forced expulsion, military administration, home demolitions, administrative violence, planning discrimination and governmental plans at concentration and freeing up the land for the settlement of Jewish immigrants. It would also appreciate the incongruence of such practices with basic anti-discrimination provisions in Israeli law, and would not ignore the contours of human suffering that circulate in these encounters. The suffering of the subaltern would then be better grasped, as would the realization that the violations to the fundamental right to dignity and to the basic rights to health and to property are not to be consigned to the particular instance of being sprayed with Monsanto's Roundup between 2002-2004. Rather, the violations would be seen as symptomatic of structural violence before the authorities ever since Palestinian Bedouin were constituted as being outside the Israeli Jewish constituency. Further, the role of the legislative and the judiciary in this structural violence is clearly indicative of their lack of postcolonial sensitivity. As a result, the violence of that which they make and adjudicate, law, is far easier foreclosed than it is queried.

#### Tracing the Native Informant in the Decision

Performing the native informant trace in the legal decision is an attempt to read a text of counterinsurgency for evidence of subaltern agency. The discontinuous appearance of the subaltern is in the gaps of the text and in the will of the judges who inscribe the text, the judge's will in part predicated on the will of the subaltern. If we follow Derrida, as the judges attempt to undertake an 'explanation', as is done in every textual production, what we can trace "is the itinerary of the constantly thwarted desire to make the text explain".<sup>253</sup> Applying this understanding to our reading

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<sup>252</sup> *Ibid.* at 213-214

<sup>253</sup> *Ibid.* at 33

of the legal decision helps us to appreciate that when the judges compose a text, they are also telling us something that is not part of their textual composition. Also, when judges compose, we should understand their rationale and motivation as not a product of sovereign agency, but rather motivated in part by the effect of Naqab Bedouin agency (the unspoken and unwritten), which itself is a product of other effects. Drawing from this, Spivak contends that explanation, in this case a requisite of legal authority, is the desire to have self and world. The “possibility of explanation carries the presupposition of an explainable (if not fully) universe and an explaining (even if imperfect) subject... [By explaining] we exclude the possibility of the radically heterogenous”.<sup>254</sup> These exclusions via explanation were explored above, showing how law's violence and the violence of 1948 were foreclosed, how structural violence is excluded from explanation, how constructions of Bedouin identity and law's humanitarianism in judicial explanation shuts out the lived experiences and affective investments of the subjects - of that identity and of that law - as they do not accord with official explanation.

Nevertheless, by tracing the native informant we do not restrict ourselves to revealing that which has been hidden nor do we confine ourselves to exposing distortions. Rather, by tracing the native informant we are able to understand the shifting, contentious, contradictory forces at play in power relations between the Israeli state and the Naqab Bedouin. The aim of the native informant trace is to go beyond cautioning of the law and prescribing disenchantment.<sup>255</sup> As a result of our effort we are able to locate agency in the subaltern and defeat the Manichaeism of which postcolonial theory warns.

Before applying the proportionality test, Justice Arbel applies the limitations clause test, which aims to answer if the violation of human rights is nevertheless constitutional and lawful.<sup>256</sup> For a violation of human rights to be lawful, the limitation clause of Section 8 of the Basic Law: Human Dignity and Liberty sets out four conditions that need to be satisfied: that there is authority in statute for the violation, that the violation befits the values of the state; that the violating norm has a proper purpose; and that the violation is not excessive (the fourth condition being the proportionality test).

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<sup>254</sup> *Ibid.*

<sup>255</sup> As Nimer Sultany does in his article reviewing Israeli ‘landmark’ decisions, “Roundtable on Occupation Law: Part of the Conflict or the Solution? Part V” (2011) *Jadaliyya*, (September 22, 2011), online:

<http://www.jadaliyya.com/pages/index/2699/roundtable-on-occupation-law-part-of-the-conflict->

<sup>256</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] H CJ 2887/04, IsrLR 62 at para. 30

Finding the first two conditions satisfied, Justice Arbel turns to the third condition of the limitations clause test. Tackling the third condition of ‘proper purpose’, she explains the meaning of the term as “the purpose of a statute will be deemed proper if it serves a public purpose whose realization may justify a violation of human rights”.<sup>257</sup> She finds that the purpose “is a very proper one” given the centrality of land to the Israeli national project.<sup>258</sup>

Justice Arbel then borrows in part from Justice Or in the *Sedei Nahum Kibbutz* case to explain why Israeli land is so important to the national project:

“The State of Israel is a small country. Its territory is limited, and its land is a very valuable resource. Public land, in particular, constitutes an important national asset, since it is an essential basis for future development of the state and society... The first respondent, which is responsible under the law for retaining possession of state land and managing it, has the duty to protect it so that it can be used to further various national and other goals...”<sup>259</sup>

“Land is a unique asset among state assets. It is hard to exaggerate its importance to society and the state. If the nation and its cultural enterprise are the “soul” of the people, then its land is its “body.” On the basis of land the individual and society conduct their whole lives...

“Land is an unparalleled vital resource and it has great value. It is of especially great importance in a country like Israel, where the territory is small, the population density is high and there is a policy of absorbing immigration. It is impossible to create land...

“... [those entrusted with public land should] ensure that it has sufficient land reserves for the various needs in the future, whether for building, agriculture, industry and other gainful occupations...Awareness of the need to spread the population is also required”.<sup>260</sup>

It is because land is vital, a national asset and necessary for immigration absorption to answer “the need to spread the population” that makes the following a governmental duty:

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<sup>257</sup> *Ibid.* at 32

<sup>258</sup> *Ibid.*

<sup>259</sup> *Ibid.* at 33

<sup>260</sup> *Ibid.*, citing Justice Or in *Sedei Nahum Kibbutz v. Israel Land Administration*, HCJ 3939/99 [16], p. 62-63

“The widespread phenomenon of incursions onto state land in the Negev in particular requires the state to take effective measures to remove the squatters and the incursions [sic]”.<sup>261</sup>

What we can trace here is the itinerary of Palestinian Naqab Bedouin effecting agency that is threatening to the state ethos that envisions the unison of the land (body) and the Jewish people (soul). It therefore requires the state to take forceful, effective measures to enable their eviction from the land and to foreclose the possibilities of hearing the native informant speak.

The community’s particular “politics of contention” to expand common understandings of citizenship, and framed increasingly in terms of indigeneity,<sup>262</sup> is exercised beyond the utilization of political arenas like the courts, the Knesset and civil society organizations. Naqab Palestinians are exerting a presence on historical lands in spite of the cycles of structural violence they face as a consequence. In the eyes of the State and the courts, ‘the Bedouin’ are not only lawbreakers, but undermine the cornerstone of Zionism, that rightly exercised enables consummation of the people (*adam*) and the fertile land (*adama*) towards the realization of God’s righteous city, their living union incomparable to other nations in the world.<sup>263</sup> A pioneer of modern Zionist thought, Moses Hess, speaking of the faithful Jews, wrote they need a land of their own, “a common native soil”, the earth “to realize the historical ideal of our people, an ideal that is none other than the reign of God on earth”.<sup>264</sup> As Justice Arbel emphasises, land is a requisite to satisfying both the social and spiritual imperatives of the state. It is ‘an unparalleled vital resource’ that enables the social goal of ‘the future development of state and society’. By being the ‘body’ (*adama*), land communes with the Jewish nation, the ‘soul’ (*adam*) thereby enabling the spiritual, historical ideal of Zionism.

According to Shenhav, Zionism emerged from a theological context and ostensibly passed it by transforming religion into modern nationalism. Yet, Zionist nationalism, operating as it does via simultaneous processes of hybridization and purification, remained theological, so that conceptions

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<sup>261</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 33

<sup>262</sup> Amal Jamal, “Strategies of Minority Struggle for Equality in Ethnic States: Arab Politics in Israel” (2007) 11(3) *Citizenship Studies* 263

<sup>263</sup> Martin Buber, *On Zion: The History of an Idea* (trans. Stanley Godman) (London: Horovitz Publishing, 1973) at xix-xx, 10-11.

<sup>264</sup> *Ibid.* at 177

of the nation revolve in part around the theological myths of 'redemption of the land' and a 'return to Zion'.<sup>265,266</sup>

Although Arbel professes that Bedouin have formal democratic representation in being equal citizens,<sup>267</sup> and that her ruling is in line with the constitutional democracy that Israel represents<sup>268</sup> (she finds in favour of the petitioners<sup>269</sup> based on the democratic value of human dignity and the right to life), this postcolonial reading of the decision indicates otherwise. The judges employed a deliberate historical amnesia towards the structural violence that the community has faced for decades. Also, they framed the community in absolute, homogenizing and racialized terms of criminality. Therefore, being 'a fact of the case' we are told to see the defendants for their lawbreaking activities and for the violence *they* exert on the authorities who attempt to evict them. We are told to see the defendants *not* for their humanity, but within the strictures of criminality. The absence of due attention paid to the varied forms of violence exerted on Bedouin bodies and the loss of animal life as a result of the spraying fails the test of adjudicating based on the democratic value of the sanctity of life. One would also be very hard-pressed to consider the court's call to compromise and negotiate and the simultaneous endorsement that the state forcefully evict illegal Bedouin as adjudication inspired by 'social justice', however hard that term may be to define.<sup>270</sup>

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<sup>265</sup> Shenhav, *Arab Jews*, *supra* note 130 at 89-90. For more on the Israeli construction of history based on the connection to land, see Kimmerling, *Zionism and Territory*, *supra* note 148, Shmuel Almog, "On Land and People in Jewish Modern Nationalism" (1984) *Yahadut Zmanenu* 53-67 (Hebrew), cited in Shenhav, *The Arab Jews* at 139.

<sup>266</sup> Arbel's rationale, inspired by Zionist nationalism, is an illustration of how adjudication does particular ideological work. Duncan Kennedy, *A Critique of Adjudication: fin de siècle* (Cambridge, Massachusetts; London, England: Harvard University Press, 1997). Particular to Israel, that ideological work is inspired by two poles, which in uneasy arrangement guide judicial interpretation of Israeli law, liberalism and Judaism, according to Israeli legal scholar, Menachem Mautner in *Law and the Culture of Israel* (Oxford: Oxford University Press, 2011) at 44-53. The point to be made, though, is that both liberalism and Judaism, in that particular mix that is Israeli statute and adjudication do not necessarily coalesce to bring about democratic results. Former Supreme Court Justice Barak (1992) argued (though later retracted in favour of greater emphasis on Jewish values) that in negotiating the Jewish and democratic characters of the state in adjudication that the Jewish state concept be taken to 'a high level of abstraction' to the point that it overlaps with universal values of democratic society. These values include 'love of humanity, the sanctity of life, social justice, doing what is good and right, respecting human dignity, the rule of law'. See Aharon Barak, "The Constitutional Revolution: Protected Human Rights" (1992) 1 *Mishpat Umimshal* 9 (Hebrew) at 30, cited in Mautner, *Law and the Culture of Israel* at 51. I will take up the issue of liberalism in Israeli law in detail in the chapter on the 'Wine Path Plan'.

<sup>267</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] H CJ 2887/04, IsrLR 62 at para. 49

<sup>268</sup> *Ibid.* at para. 43

<sup>269</sup> *Ibid.* at para. 47-48

<sup>270</sup> For critical explorations of the manifestations/not of justice in law see Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Oxford: Hart Publishing, 2005). For justice as that

As an ideological actor committed to the social and spiritual projects of Zionist nationalism, the court *needs* to first, perform a foreclosure of law's violence and the events of 1948 and then to secondarily, racialize Bedouin and present that which it adjudicates and makes, law, as humanitarian. To allow the space for foreclosed subjects would threaten to unravel the very project to which it has stated its commitment and for whose longevity it adjudicates in the manner it does.

Coming back to the native informant trace, in its performance we are able to identify how the steadfastness, *sumoud*,<sup>271</sup> of Naqab Palestinians in holding on and exerting their rights to historical lands is an act of considerable accountable reason (Spivak's characterization of 'agency') that falls significantly out of line with the national Israeli script. It therefore elicits the court to call for a prompt, comprehensive solution and Bedouin's integration into Israeli society. Integration should be read as neutralizing their agency and the bestowing of recognition so that Naqab Palestinians can be enveloped into the fold of liberal (tempered by ethnocratic prerogatives) citizenship in a Jewish state. The national script is the securing of land for the spread of the Jewish population and for the absorption of Jewish immigrants, mandated in part by the theological underpinnings of modern Israeli nationalism. Therefore, the trace enables us to understand precisely why the legal judgement is not progressive, and should be treated with caution over celebration, because the ruling affirms the centrality of land to the Israeli national project, and the necessity of Naqab Palestinians' exclusion from it.

In an interview with Salem Abu Mdeghem,<sup>272</sup> somebody Spivak would be hesitant to call a 'native informant' or 'subaltern' given his professional position as lawyer and well-known community activist that is able to be heard by official ears,<sup>273</sup> we discussed the case, where his own family had been affected by the spraying in al-'Araqib. Considering the ruling ineffective, he drew my attention to what he considered to be at the heart of the matter. According to Salem, the law is built on a Zionist ideology that directs land be taken over by the State so that it can be *made* 'Hebraic'. A

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which flows from experience with oppression, see Mari J. Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1992) 14 *Women's Rights Law Reporter* 297-300.

<sup>271</sup> For how 'sumoud', steadfastness, is a spiritual/mental state of resilience and hope against all odds, see the following collection of stories and journal entries of life in the West Bank under Israeli occupation in Raja Shehadeh, *The Third Way: A Journal of Life in the West Bank* (London: Quartet Books, 1982).

<sup>272</sup> Interview of Salem Abu Mdeghem, April 20 2011, Bir Saba'. Interview on file with author.

<sup>273</sup> Spivak, *The Spivak Reader* at 287-308

precursor to such making is that the land needs to be expropriated from Naqab Palestinians that lay claim to it.

### Conclusion

The court's conceptualization of time and space stems from the official historical narrative of Judaism, itself hybridized and purified by modern Israeli nationalism. As Shenhav points out, modern Israeli nationalism, taking from the Zionist movement, divides the past into two periods: the ancient past when Jews were in the land of Israel before the destruction of the temple and the past in exile, following the temple's destruction. However, in constituting the exile as metacategory, the Zionist movement succeeded in obliterating Jewish histories in other kingdoms, the heterogeneity of Jewish communities' experiences, while sovereignty was seen in the kingdoms of David and Solomon as a positive time, a time to which to return. The void between exile and the return and foundation of modern Israel was bridged in the constitution of a single historiographic narrative line linking the ancient past to the present.<sup>274</sup>

This linear progression of history between the Kingdoms of Solomon and David and Israel's foundation in its 1948 independence is an elitist historiography that ignores the other histories, both of Arab Jews and Palestinians at large, that don't fit into this sequential timing. Their lived experiences and memories are either expropriated and recast as national memory,<sup>275</sup> as in the case of Arab Jews, or for the most part erased, as we see in the court's accounting of Naqab Palestinian history.

As Spivak alerts, time and the process of timing as a sequential event prevents us from reading life. Freud suggested that 'real lived time' is produced by the machinery of the mental theatre. Therefore, we grasp life and 'ground-level' history as 'events' by fleshing out 'time' as a sequential process. This Spivak calls 'timing' – therefore, this feeling for 'time' prevents us from feeling for life or history.<sup>276</sup>

Yet it is precisely by fleshing out events that contribute to the national narrative that other alternative events are kept at bay. This is a very important element of the judgement, where just as

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<sup>274</sup> Shenhav, *Arab Jews*, *supra* note 130 at 139

<sup>275</sup> *Ibid.*

<sup>276</sup> Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, Massachusetts and London: Harvard University Press, 1999) at 37-38

time is isolated to certain fragments that support 'the single story', the dirt, the alternative histories, are kept at bay. The alternative history of Palestinian presence, ownership, land, law, memory, suffering, economy, affect, agency and loss on the land, the same land that is to be 'native soil' on which to realize the dream of Zion, is like 'dirt', matter out of place, that needs to be kept separate from the sacred<sup>277</sup> for fear of contamination of the other.<sup>278</sup>

Yet Buber's endorsement of the realization of God's righteous city through the unison of land and the people, we could say, exhibited postcolonial sensitivity. Buber recognized Palestinian presence on the land and called for sharing the land with Arabs, because Jews know of rejection.<sup>279</sup> In words not characteristic of the Israeli court's 'precedent-setting' ruling, Buber underscored how, reading from Leviticus, the land does not belong to a specific people but to all, because it is not of the people, but of God.<sup>280</sup> The court's conception of right and responsibility to the other is much less informed by philosopher and Talmudic scholar, Levinas. On the infinite right, what he refers to as 'Jewish humanism', Levinas contends its basis is not the concept of man but 'of the other', the extent of the right of the other is that of a practically infinite right.<sup>281</sup> And this also marks the break (within which deconstruction exercises itself) between *droit*/right/law and justice, where law is the calculable, the founded, the enforced, it encapsulates the performance of the Israeli court. What the Israeli court makes *no attempt at* is the ethical turn to the other, justice, as infinite, incalculable, heterogeneous, ethical alterity.<sup>282</sup> I will turn to Levinas, and specifically Judith Butler's endorsement of his ideas on the Jewish conception of ethical responsibility, when discussing recognition in the final chapter.

The ethical turn to the other is enabled in part by an unlearning. The unlearning would mean seeing one's privilege as one's loss<sup>283</sup> and exercising a critique of what one cannot not want.<sup>284</sup> This

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<sup>277</sup> Shenhav, *Arab Jews*, *supra* note 130 at 87

<sup>278</sup> Murdocca, "There is Something in that Water", *supra* note 106 at 390, citing Sandar Gilman, *Disease and Representation: Images of Illness from Madness to AIDS* (Ithaca, NY: Cornell University Press, 1988)

<sup>279</sup> Martin Buber, "Foreword" in *On Zion: The History of an Idea*, trans. Stanley Godman (London: Horovitz Publishing, 1973)

<sup>280</sup> *Ibid.* at 15-16

<sup>281</sup> Emmanuel Levinas, "Un droit infini" in *Du Sacré au Saint – Cinq Nouvelles Lectures Talmudiques* (Paris: Editions de Minuit, 1977) 17-18, cited in Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'", in Drucilla Cornell and Michael Rosenfeld (eds.), *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) 3-67 at 22

<sup>282</sup> Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'", in Drucilla Cornell and Michael Rosenfeld (eds.), *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) 3-67 at 14-29

<sup>283</sup> Spivak, *The Spivak Reader* at 4-5

<sup>284</sup> *Ibid.* at 161-162

deconstructivist reading of the space between law and justice would mean that the court would work critically back through its particular history and prejudices modelled as they are on mainstream Israeli nationalism and elite historiography and their learned and instinctual responses that entrench this privilege. As Spivak stresses, our learnings about race and nation are a closing down of creative possibilities of other knowledge, which is knowledge we are not equipped to understand because of our social position. Unlearning means to gain knowledge of Naqab Palestinians who occupy spaces most closed to our privileged view. This then could perhaps make possible for the court to speak to them (and not just 'at them Bedouin') so they may "take us seriously" and "be able to answer back".<sup>285</sup> The court's imaginings around land as a vital, national public asset crucial to the realization of God's promise to the Jewish people is something the court cannot not want, that is, it is the basis for the ruling that functions to protect the land in effecting the unison of *adam* and *adama*. Yet, it is precisely this imagining, of what the court cannot not want, that a deconstructivist reading would critique, asking what about this want betrays an ethical turn to the other, what about this want makes it difficult to sit oneself ethically, what about this want does not accord with the possibility of justice? Only by probing and working against the grain can the court unseat itself as a means to ethically reseat itself.

In tracing the native informant in the Abu Mdeghem legal decision, we were able to locate how *sumoud* was a marker of the tremendous power effected by Naqab Palestinians, challenging the national ethos of land acquisition to enable the spread of the Jewish population on it. Therefore, we were able to grasp how power is not necessarily found in an institution or structure, like the Israeli court, but in Foucauldian terms is a moving base of force relations, whether enacted by 'states', historical currents, effects of ideology or hegemony emanating from and inscribed by multiple sources, or the selective sovereignty with which subalterns like Naqab Bedouin exact agency. It is the inequality of these force relations that produces 'power', painting a picture far more complicated than one of colonizer exerting power over colonised.

All the same, it would be myopic to conclude for the sake of constituting the argument as displaying 'postcolonial sensitivity', and with that requiring some measure of indeterminacy, that we cannot identify the scope and tilt of 'inequality' when talking about force relations. Although Justice Arbel places equitable onus on the two sides in solving problems in her obiter dictum, performing what may seem a recognition of agency on both sides and defeating the State-Bedouin/oppressor-

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<sup>285</sup> *Ibid.* at 4-5

oppressed dichotomous divide, what is actually being performed is a myopia of not seeing the forest from the trees. Seeing the bigger picture means weaving together the different threads of experience that tell of how power, ideology, hegemony and agency are performed.<sup>286</sup> Arbel's excessive focus on the empirical 'facts' of the case, of striking a balance between the two sides, prevents her from recognizing the historical materialism and historical referents of structural violence that inform it. As this chapter isolates a genealogical fragment in reading with postcolonial sensitivity the *Abu Mdeghem* legal decision, although it is able to show the effecting of tremendous agency on the part of Naqab Palestinians, it remains cognizant of the scope and tilt of 'inequality' in force relations. Accordingly, it appreciates how the interweaving of structural violence, racialization, and the foreclosed subjects of the violence of law and the events of 1948 constitute Israeli legal hegemony, law's power and its necessary inability to hear the subaltern Naqab Bedouin speak.

This case study calls for a deliberate disenchantment with the law. I applied various postcolonial techniques to illustrate why. We also looked at the paradigm of 'structural violence' to a situation of ongoing colonialism to provoke the silences in official descriptions of violence. The case study drew on the work around the heterogeneity of identity and history. It showed how what was considered progressive and important was a decision that failed its own democratic tests of adjudication. Finally, I attempted to apply deconstructive techniques to perform a native informant trace by reading an official text in the legal decision.

In the following chapter, I will read the legal case of the sister-village duo of Atir and Umm al-Hiran which are threatened with demolition and eviction of all Bedouin residents to make room for the Jewish village of Hiran. As both Nuri's case and the *Abu Mdeghem* case centre on land, the next chapter that also centres on land is a ripe opening to explore a new constellation, 'spatial theory', in this study. I will build on the identification of silences of human suffering (Nuri's case) and structural violence (*Abu Mdeghem*) in Israeli adjudication to explore how several other elements of 'space' – particularly the 'social' and lived aspects of it - are also silenced and the implications of such silencing for Naqab Bedouins' interactions with it.

### The Postscript

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<sup>286</sup> Susan S. Silbey, "After Legal Consciousness" (2005) 1 *Annual Review of Law and Social Science* 323-368 at 357

The Solel Boneh company that was active in recruiting Jews from the Arab and Muslim world to settle in Palestine was also responsible, in the mid to late 1940s, for setting up Jewish settlements in the Negev, some in the place of existent Palestinian villages. In 1949, Solel Boneh demolished homes of Bedouin from Atir and Umm al-Hieran, the sister villages later sprayed in 2002<sup>287</sup> and are today threatened with complete destruction. This cyclical profit-driven, capitalist performance of a construction company that engineered both colonial settlement and native displacement bears peculiar resemblance to the agricultural company that is the subject of the case, Monsanto. Monsanto, whose efforts coalesce with those of Solel Boneh in the Naqab region, also carries the mark of a capitalist venture, with a cyclical story angle, that is unwilling to reveal the negative effects that follow from its purportedly worthy and respectable mandate.<sup>288</sup> While the defendants boasted that Monsanto's Roundup was one of the most commonly used insecticides in Israel and the world, what was conveniently absent was how Monsanto, owing to its aggressive and underhand marketing strategy, was also one of the most hated agricultural biotechnology corporations to those it professed to serve, farmers (Robin 2010).<sup>289</sup>

In 2010, a study was performed on Genetically Modified Roundup-Ready (GM RR) soy.<sup>290</sup> GM RR soy is soy genetically modified to be resistant to Monsanto's herbicide Roundup, which when sprayed kills all plant life except the GM RR soy. The researchers found that Monsanto's claim that GM RR soy produced better yields, was economically and mechanically efficient in allowing for no-till farming and used less toxic weed control were either short-term or illusory claims. Further, the harmful impacts of its use were not publicized by Monsanto.

As was revealed through court proceedings in *Abu Mdeghem*, glyphosate, the essential element in Roundup has serious health and environmental impacts. The 2010 study showed that the use of Roundup, contrary to Monsanto's claims, produced low yields of the GM RR soy crop, interfered with nutrient uptake and increased pests and diseases. However, the most problematic impact was the phenomenon of glyphosate-resistant weeds, known as 'superweeds'. In order to kill these

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<sup>287</sup> Adalah, *Nomads Against Their Will*, *supra* note 127 at 10-11

<sup>288</sup> See Solel Boneh's vision at <http://en.shikunbinui.co.il/category/vision> and Monsanto's 'pledge' at <http://www.monsanto.com/whoweare/Pages/monsanto-pledge.aspx>

<sup>289</sup> Marie-Monique Robin, *The World According to Monsanto: Pollution, Corruption, and the Control of the World's Food Supply* (The New Press, 2010)

<sup>290</sup> M. Antoniou, Brack, P., Carrasco, A., Fagan, J., Habib, M., Kageyama, P., Leifert, C., Nodari, R., Pengue, W. *GM Soy: Sustainable? Responsible?* (GLS Gemeinschaftsbank and ARGE Gentechnik-frei, 2010)

superweeds, farmers were forced to use herbicides in greater quantity and potency. In some cases, the added herbicides failed and farmers were forced to abandon their land.

It is the strange phenomenon of Roundup-resistant superweeds that prompts one to draw parallels between toying with nature and toying with humans embedded in nature. It is hard to miss the irony of how the state's oppressive policy in the Naqab mirrors Monsanto's oppressive policy of spraying Roundup. This policy effects Bedouin agency in *sumood*, as it does the phenomenon of superweeds. The state's policy of attempting to replace the Naqab Bedouin by settling Jews in their place, as GM RR soy takes the place of the natural features of the land, does not serve the stated purposes of sustainability and efficiency.

Rather, and with disparaging associations aside, superweeds (Bedouin) spring up in the vicinity of the GM RR crop and prompt an elevation of herbicides (oppressive, violent, legal measures) to kill the superweed (Bedouin) presence. However, unpredicted by scientific formula, superweed *sumood* persists. The metaphor should clue in authorities to how, potentially, an upsurge in violent measures to eradicate Bedouin incursions and squatting will only lead to an increase in Bedouin *sumood*, much like the positive feedback cycles inherent in certain systems of nature. However, what loses in the process is soil fertility, energy, environment, animal life and the quality of human life. If farmers in Georgia were forced to abandon tens of thousands of dunams of farmland after losing out to superweeds,<sup>291</sup> how will oppressive state policy render Naqab land? Will large tracts of Naqab land, whose settlement was once envisioned by Ben-Gurion as one of the most central and urgent duties of Zionist policy as a whole,<sup>292</sup> be finally rendered unliveable? If unliveable, then will it, in irony, but finally in truth, acquire the label of *mawat* land?

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<sup>291</sup> *Ibid.* at 15

<sup>292</sup> Eric Engel Tuten, *Between Capital and Land: The Jewish National Fund's Finances and Zionist National Land Purchase Priorities in Mandatory Palestine*, PhD Dissertation (Utah: Department of History: The University of Utah, 2000) at 208

### Chapter 3: The Eviction Orders for Umm al-Hieran

"I'm not against being cited. Cite me. I'm not breaking the law. *The state* is breaking the law". The interview with 'Atwa Abu al-Qi'an, native of Umm al-Hieran, an unrecognized village of five hundred in the Naqab had begun. We buried our heads in an indiscriminate, poorly lit corner at coffee-chain Aroma's Hebrew University branch, each sipping faintly bitter *hafukh*<sup>293</sup>. Seated at this Mount Scopus branch, which had about it an unsettling hue of exaggerated bloody red, we were not unaware of the university's dubious honour of contravening international law. Some four decades earlier, it was implicated in the expropriation of private Palestinian land, and the subsequent eviction of Palestinian residents, in order to expand its campus premises.<sup>294</sup>

Yet 'Atwa and I were meeting to discuss a more recent attempt at eviction. We were meeting to discuss the civil appeal to court-issued eviction orders for the village of Umm al-Hieran. These orders, together with various other home demolition and eviction orders, threaten to forcibly expel one thousand Palestinian residents, comprising 150 families, from the sister-village duo of Atir and Umm al-Hieran. It struck me as curious how the court rationalized the forced eviction of these residents, particularly with the knowledge that an Israeli Jewish town was to be built in its place. Indeed, an expulsion of this magnitude was a step up from the routine home demolitions, police harassment and non-provision of basic amenities that is the experience of residents from the unrecognized villages.

I asked 'Atwa if he had hope in the appeal, if he saw promise in the legal process to realize the rights of his community. He was unambiguous about the possibilities. "There is no court of justice in Israel... it's a lie, maybe when talking about [appealing] a traffic violation fine, but on the issue of land, there is no justice". I asked if he was referring to the land on which Naqab Palestinians were living. Equally unambiguous, he replied, "In all Palestine". He then proceeded to map out the history of his community for me.

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<sup>293</sup> Hebrew for cappuccino

<sup>294</sup> PACBI, "Palestinian Appeal to Legal Scholars: Boycott INjustice Conference at Hebrew University!" (April 2, 2012), online: <http://www.pacbi.org/etemplate.php?id=1852>

### Native Testimony: His-Story<sup>295</sup>

As it happens, 'Atwa's family is not unfamiliar with eviction, as they had been forced to move on a number of occasions in the past. After the 1948 war, under the imperatives of Israeli military government, the Abu al-Qi'an family were first expelled to Laqiya from their historical lands in Khirbet Zubaleh, presently within the jurisdiction of Kibbutz Shoal. They were subsequently moved to Khirbet al-Huzayyel, where fellow al-Huzayyel tribe members under Sheikh al-Huzayyel resided, to the area of Jighili (today Kibbutz Lahav), Kohleh and Abu Kaff.<sup>296</sup> In 1956, about two-thirds of the original tribe, around two hundred persons, conceded to the order to move to Wadi Atir, their present location, and the locus of this case study.

Throughout the period, requests to return to their historical lands in Khirbet Zubaleh were turned down by the military authorities. The military authorities leased the family seven thousand dunams of land for residence, agriculture and grazing after the family completed the procedural steps of the Ministry of Agriculture. All the same, the residents were dismayed by the land's poor quality, compared to that which they held in Khirbet Zubaleh. In 1963, the government transferred part of the family's farmed land to the Jewish National Fund. Around the time of the 1967 War, 'Atwa recalls "being caught in the cross-fire", as Jordanian forces used to shoot into Israel,<sup>297</sup> though the tribe received no protection from the state. As the years progressed, the majority of the family's farmed land was turned into a forest. In the early 1980s the lease of land they were issued upon agreeing to move in 1956 was cancelled by the Israel Lands Administration.

In 1969, under the Land Rights Settlement Ordinance [New Version], the government initiated the land-title settlement process, inviting Naqab Palestinians to register land ownership claims with the Land Settlement Officer at the Ministry of Justice.<sup>298</sup> Thereafter, in 1973, the family registered

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<sup>295</sup> This historical and contemporary account has been chiefly composed from Adalah, *Nomads Against Their Will*, *supra* note 127 and from the interviews with 'Atwa Abu al-Qi'an, December 7 2011 (Jerusalem) and March 23 2012 (including with his mother and son) (Umm al-Hieran).

<sup>296</sup> Adalah, "Adalah and Bimkom Demand Recognition and a Master Plan for the Unrecognized Village of Atir-Umm al-Hieran in the Naqab", *Adalah Press Release* (November 26 2007), online: [http://www.adalah.org/eng/pressreleases/pr.php?file=07\\_11\\_26](http://www.adalah.org/eng/pressreleases/pr.php?file=07_11_26)

<sup>297</sup> JTA, "Terrorists Invade Israel's Negev; Some Arabs Protest Actions of PLO", *Jewish Telegraphic Agency* (Jan 4, 1968), online: <http://archive.jta.org/article/1968/01/04/2944607/terrorists-invade-israels-negev-some-arabs-protest-actions-of-plo>

<sup>298</sup> State Comptroller, "Annual Report 2001", *Report No 52*, (April 29 2002), online:

<http://www.mevaker.gov.il/serve/contentTree.asp?bookid=235&id=57&contentid=&parentid=undefined&sw=1366&hw=698> at 115, HRW - Human Rights Watch, *Off the Map: Land and Housing Rights Violations in Israel's Unrecognized Bedouin Villages* (2008), online: <https://www.hrw.org/reports/2008/iopt0308/iopt0308webwcover.pdf> at 18-20

their claims to lands in Khirbet Zubaleh. Their claim is pending, as are the majority of similar land-title settlement claims by Naqab Palestinians.<sup>299</sup>

In 2002, the planning authorities undertook an amendment to the Master Plan for the Southern District<sup>300</sup> to construct the Jewish settlement of Hiran in the vicinity of these villages; this was approved by the hierarchically senior National Council for Planning and Building (NCPB) and subsequently by the government. In July 2002, the government issued a decision<sup>301</sup> for the establishment of 14 new Jewish settlements in the Naqab and Galilee, including Hiran. It was described by then Prime Minister Ariel Sharon as a "national necessity".<sup>302</sup>

As the planning process progressed, the 2007 Partial District Master Plan for Metropolitan Beer Sheva was submitted and it too accounted for the Jewish settlement of Hiran.<sup>303</sup> Yet, conspicuously absent in the plan's explanatory notes and maps, as well as in that of previous plans, was any mention of the villages of 'Atir and Umm al-Hieran.<sup>304</sup> Rather, these official documents had disappeared them, representing the space as empty. It is this particular conceptualization of space, of the land as empty, awaiting Jewish settlers, that informed some of the germinal ideas in Zionist thought and was a rallying call for settlement in the new yishuv period (pre-1948) and founding years of the state.<sup>305</sup> And yet today it seems incredible that one would fail to grasp the diversity of

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<sup>299</sup> By 1979, the cut off date for registration of land claims, a million and a half dunams were claimed by the Naqab Palestinian community, but six hundred thousand were refused recognition because these were mountainous and used for pasture. The refusal stemmed from the fact that these claims pertained to land held in common, whereas only private property claims were considered eligible under the process. Therefore, 3,220 claims of 991,000 dunams were registered. Following a 2003 government decision (Government Decision no. 216 (Arab 1) "A plan for the Bedouin sector in the Negev", April 14 2003, Dukium - Negev Coexistence Forum for Civil Equality, "Alternative Report to CERD" (2012) at 9), the state began a process of counter-claims via the courts, winning all decided cases, leaving only between 550,000 - 600,000 dunams still awaiting settlement (HIC-HLRN - Habitat International Coalition: Housing and Land Rights Network, *The Goldberg Opportunity: A Chance for Human Rights-based Statecraft in Israel* (2010) at 16, Goldberg - Government Committee for Policy Development for Arrangement of Settlement in the Negev (2008) 'Goldberg Commission Report', (Jerusalem: December 2008) (Arabic) at 11, Shlomo Swirski, Shlomo and Yael Hasson, *Invisible Citizens: Israel Government Policy Toward the Negev Bedouin* (Beer Sheva, Israel: HaMachpil Ltd, 2006) at 19, Neve Gordon, "Uprooting 30,000 Bedouin in Israel", *Al-Jazeera* (April 3, 2012), online: <http://www.aljazeera.com/indepth/opinion/2012/04/2012421020291808.html>

<sup>300</sup> District Master Plan – Southern District No. 14/4 (Amendment No. 27) – Suburban town of Hiran.

<sup>301</sup> Cabinet Decision No. 2265 of 21 July 2001, "Building new settlements and recognizing existing ones".

<sup>302</sup> Hana Hamdan, "Individual Settlement in the Naqab: The Exclusion of the Arab Minority", *10 Adalah's Newsletter* (February 2005) at 2 [Hamdan, "Individual Settlement"]

<sup>303</sup> District Master Plan No. 14/4 (Amendment No. 23) – Partial District Master Plan for Beer Sheva (Beer Sheva Metropolitan Area).

<sup>304</sup> Hamdan, "Individual Settlement", *supra* note 302 at 4

<sup>305</sup> It is worth flagging that there were streams, though in the minority, that did not subscribe to a reductionist vision of Palestine's demographic makeup. For example, Eastern European Jewish essayist, Ahad Ha'am, wrote in 1891 after a visit to Palestine that contrary to the Zionist belief that Eretz Yisrael is almost totally desolate, in truth it was

this space and the rival claims that render it bitterly contested. Do the courts conjure this space as essentially contested and not *terra nullius*? Or does the court's conceptualization of space mirror that of the new yishuv's in the early 20<sup>th</sup> century? I will take up this query later in my analysis.

Having been rendered invisible by the authorities, the community nevertheless appealed to them for recognition. The community felt that gaining visibility would put a halt to plans to displace them and would also mean receiving essential services, such as being connected to the national water and electricity grids, which they were currently denied. Drawing on the support of human rights NGOs Adalah and Bimkom, they filed an objection to the National Council for Planning and Building (NCPB) against the plan.<sup>306</sup> The response of the Southern District Planning and Building Committee was that the residents should move to the development town of Hura. The NCPB solicited the services of Advocate Talma Duchan<sup>307</sup> to provide recommendations to the objections filed. In her report, Duchan called for the partial recognition of the sister village duo, effectively granting recognition for a rural settlement within the boundaries of Atir,<sup>308</sup> which was met with the NCPB's approval. However, the Prime Minister's office intervened<sup>309</sup>, ostensibly on account of security considerations, and in November 2010 the NCPB withdrew their approval.<sup>310</sup>

In 2003, a year after the planning authorities earmarked Hiran for settlement, they began legal efforts to demolish homes and evict residents from Atir-Umm al-Hieran. Among these legal undertakings is the motion to the Beersheba Magistrate's Court for demolition orders against all

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difficult to find fields that are not sowed. He derided Zionist use of such a *terra nullius* characterization of the land. Bat Ye'or, *The Dhimmi, Jews and Christians under Islam* (Fairleigh Dickinson University Press/Associated University Presses, 1985) at 105, cited in Benny Morris, *Righteous Victims: A History of the Zionist-Arab Conflict, 1881-1999* (New York: Knopf, 1999) at 42.

<sup>306</sup> Adalah, "Adalah and Bimkom Demand Recognition and a Master Plan for the Unrecognized Village of Atir-Umm al-Hieran in the Naqab" (November 26 2007), online:

[http://www.adalah.org/eng/pressreleases/pr.php?file=07\\_11\\_26](http://www.adalah.org/eng/pressreleases/pr.php?file=07_11_26)

<sup>307</sup> Duchan formerly served as chief of the Jewish Agency's (JA) planning team for the Galilee (Zuckoff 1987). The JA, where Duchan was formerly a high-level employee, is responsible for immigrant absorption and rural settlement with a policy, like that of the Jewish National Fund (JNF), of serving Jewish interests to the exclusion of Palestinians (Abu Hussein, McKay, *Access Denied*, *supra* note 58 at 154).

<sup>308</sup> Talma Duchan, "Recommendations of the Researcher to the Objections to TM"M 23/14/4 –The Partial District Master Plan for Metropolitan Beer Sheva", Investigatory report to the TM"M 23/14/4 – Partial District Master Plan for Metropolitan Beer Sheva (June 21, 2010) (Hebrew)

<sup>309</sup> Gabi Golan, Advisor to the Prime Minister for Planning and Development in the PMO, sent a letter on November 15 2010 to the NCPB urging the reconsideration of their decision to grant the villages recognition, citing, among other factors, existing living options in Hura. The NCPB scheduled a meeting the following day at which they rescinded their approval. See Khoury 2010.

<sup>310</sup> Lia Tarachansky, "Israel's New West Bank", *The Real News Network*, (February 28, 2012), online: [http://therealnews.com/t2/index.php?option=com\\_content&task=view&id=31&Itemid=74&jumival=8002](http://therealnews.com/t2/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=8002)

homes in Umm al-Hieran, *ex parte*, without informing, and in the absence of, homeowners.<sup>311</sup> A few months after the motion was filed, the Magistrate Court issued the demolition orders without hearing the homeowners, who only discovered their homes were to be demolished when police were deployed to execute the demolition in 2007. Adalah filed a series of court requests to the Kiryat Gat Magistrate's Court<sup>312</sup> to cancel the 33 home demolitions but the court rejected the motion, and instead suspended the application of the decision by a year to give the residents and the authorities time to negotiate alternative housing solutions. According to Adalah's Attorney Suhad Bishara, "The judge ignored the history of the people of Umm el-Hieran who were uprooted from their ancestral lands and displaced to the land of Umm el-Hieran by military order in 1956" and completely supported the government's intention to clear the area for the settlement of Jewish citizens in their place.<sup>313</sup> Adalah filed an appeal to the Beersheba District Court,<sup>314</sup> but this was rejected on March 19 2014.<sup>315</sup>

In April 2004, the authorities filed eviction lawsuits against all the residents of Umm al-Hieran, with the Magistrate Court ruling in their favour<sup>316</sup> and the District Court upholding the decision.<sup>317</sup> A motion for appeal to the Supreme Court was subsequently filed<sup>318</sup> but this was rejected on 5 May 2015 in a 2-1 decision. This case of eviction orders against Umm al-Hieran, and in particular the Magistrate and District court decisions, is the focus of this chapter.

In late 2010 I drove down to Haifa to meet with the chief attorney working on the eviction case. I was flitting through white paper photocopies in the sitting room when a senior staff member approached. We exchanged pleasantries. Sipping from her generously sized coffee mug, she asked what case I would be inquiring into that day. "Atir-Umm al-Hieran". She chuckled, "Which Atir-Umm al-Hieran case? We have half a dozen different Atir-Umm al-Hieran cases!" Indeed, among the other legal submissions submitted by Adalah, besides the planning objections and legal petitions

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<sup>311</sup>*The State of Israel v. Anonymous*, Different Motions (DM) 6615/03, Beer Sheva Magistrates' Court.

<sup>312</sup>*Sabri Abu al-Qi'an v. The State of Israel*, DM 2136/09, Kiryat Gat Magistrates' Court.

<sup>313</sup> Adalah, "Court Rejects Motion to Cancel Home Demolition Orders in Unrecognized Arab Bedouin Village of Umm al-Hieran in the Naqab; Adalah to Appeal" (December 12, 2011), online: [http://www.adalah.org/eng/pressreleases/12\\_12\\_11.html](http://www.adalah.org/eng/pressreleases/12_12_11.html)

<sup>314</sup>*Abu Al-Qian v. State of Israel*, Criminal Appeal 50761-01-12,

<sup>315</sup> Adalah, "District Court Rejects Appeal against 33 Home Demolition Orders in Arab Bedouin Village of Umm el-Hieran in the Naqab" (2014), online: <https://www.adalah.org/en/content/view/8258>

<sup>316</sup>*The State of Israel v. Ibrahim Farhoud Abu al-Qi'an*, [2009] CC 3326/04

<sup>317</sup>*Ibrahim Farhoud Abu al-Qi'an v. The State of Israel*, [2011] Civil Appeal (CA) 1165/09

<sup>318</sup>*Ibrahim Farhoud Abu al-Qi'an. v. The State of Israel*, Motion for Permission to Appeal 3094/11

already mentioned, include a water petition<sup>319</sup> and an objection filed with the Southern District Committee for Planning and Building to cancel the 'Yatir Forest Plan'.<sup>320</sup> This latter plan, spearheaded by the Jewish National Fund, seeks to evict and demolish the homes of the five hundred Palestinian residents of 'Atir. The plan is then to plant trees in their place.<sup>321</sup>

### The Abu al-Qi'an Case

#### *Procedural History and the Magistrate Court Decision*

In 2004, the state filed lawsuits with the Beer Sheva Magistrates' Court to evict residents of Umm el-Hieran.<sup>322</sup> These eviction lawsuits, together with previously filed eviction lawsuits, aimed to evict all one thousand residents of Atir-Umm al-Hieran. The state claimed that the Bedouin residents were trespassers on state land and had not received permission from the state to settle there. Accordingly, the state was seeking their eviction.

In the eviction lawsuits, the state argued that Bedouin who had lost past eviction cases had subsequently moved to the recognized development town of Hura, where there remains availability of homes. According to the state, the purpose behind the respondents wishing to stay was to acquire higher compensation as many homes now fell within the boundaries of the Jewish settlement of Hiran.<sup>323</sup>

According to the residents, respondents in the case, they had been moved to the Wadi Atir area in 1956 under military order, where they remained with the consent of the authorities, and so claimed they were not 'trespassers'. In their view, the eviction lawsuits were injurious to their constitutional rights to equality, property and human dignity, and were inconsistent with the limitations clause test for actions infringing on human rights. Accordingly, they called for the court

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<sup>319</sup> *Salib Abu al-Qi'an vs. The Government Authority for Water and Sewage*, CA 2541/12

<sup>320</sup> Objection to the "Yatir Forest" Plan No. 264/03/11

<sup>321</sup> For more on the dubious aspects of official green-friendly environmentalism in the Naqab, see Al-Beit - Association for the Defence of Human Rights in Israel, *JNF eBook Volume 3 - Ongoing Ethnic Cleansing: Judaizing the Naqab* (January 2011), online: <http://jnfebook.net/JNFeBookVol3.pdf>, Irus Braverman, *Planted Flags: Trees, Land and Law in Israel/Palestine* (New York: Cambridge University Press, 2009) [Braverman, *Planted Flags*], Zafir Rinat, "JNF using trees to thwart Bedouin growth in Negev", *Ha'aretz* (December 8, 2008), online: <http://www.haaretz.com/print-edition/news/jnf-using-trees-to-thwart-bedouin-growth-in-negev-1.259038>

<sup>322</sup> *The State of Israel v. Ibrahim Farhoud Abu al-Qi'an*, [2009] CC 3326/04. The statutory basis for the eviction lawsuits is found under the laws for the protection of ownership and possession, specifically Article 17 of the Land Law 5729-1969.

<sup>323</sup> Protocol of *The State of Israel v. Ibrahim Farhoud Abu al-Qi'an*, CC 3326/04 (June 4 2009), Nasser Rego, *The Efficacy of the Israeli Legal System in Protecting and Fulfilling Naqab Bedouin Land Rights*, LLM Thesis (Toronto: Osgoode Hall Law School, York University, 2009) at 138-139.

to dismiss the lawsuits. Adalah's motivation for taking on the case was the discrimination that underpinned the eviction orders. They saw both the action and its effects as discriminatory, and in their reading of the case, there was also government intent to discriminate.

The court identified that at issue was determining whether the residents had certain prescriptive rights to the land that should prevent their eviction. The court placed the burden of proof on the residents as the state was owner of the land.

The Magistrate Court determined a number of 'facts'. It found that the community's living quarters - illegally constructed tin, mud and cement shacks - did not count as investment in property and so the respondents did not have a right to demand compensation for their eviction. No statute of limitations applied against eviction since prior to the lawsuits being filed, the state did not revoke permission for the residents' stay there. As the court clarified in its decision, only at the point where the state revokes permission does the period of the statute of limitations begin.<sup>324</sup>

The court determined that the respondent's claim of discrimination, whereby their eviction was set to make room for the Jewish town of Hiran, was beyond the court's judicial authority to determine, while also irrelevant to answering the central issue at hand, which was if the residents had certain prescriptive rights to the land that should preclude eviction. The court stated, "maybe the respondents will find a remedy in the sphere of constitutional and administrative law before the appropriate court, however, in the current constitutional legal setting, these claims do not form a basis for their claim to a right to the land, or a defence from prosecution by the appellant, by force of its ownership of the land" (para. 13).<sup>325</sup>

#### *Rationale and Decision of the Magistrate Court*

The court established that the standing of the respondents was that of having authorised entitlement to the land, as their settlement was undertaken with the knowledge and consent of the state. Aside from authorised entitlement, the court determined that the residents had no other prescriptive rights to the land. Owing to the fact that the state gave permission to the community to reside on the land free of charge, the court found that the state could revoke its permission "at any

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<sup>324</sup> *The State of Israel v. Ibrahim Farhoud Abu al-Qi'an*, [2009] CC 3326/04 at para. 11.

<sup>325</sup> *Ibid.* at para. 13

time".<sup>326</sup> Rights stemming from adverse possession<sup>327</sup> did not apply since permission to settle was granted, thereby the 'hostile' condition for adverse possession was not satisfied. The court found that the payments made by the respondents to the state for the agricultural use of the land did not give rise to any prescriptive or ownership rights to the land. The courts found that the respondents did not prove that the authorities promised them certain rights to the land upon their consent to move from their original village of Khirbet Zubaleh.<sup>328</sup>

On the basis of the respondents not picking up the burden of proof that they had rights to the land that should prevent their eviction, the court ruled in favour of the state and issued the eviction orders.

#### *The District Court Decision*

In fairly short deliberations, the District Court confirmed the findings of the lower court. Among these, it found that as the state gave permission to the community to reside on the land free of charge, in the absence of evidence such as a lease agreement, the state could revoke its permission at any time. It affirmed that it too was not an appropriate forum to deliberate the constitutional issues raised, directing the appellants to raise planning objections with the relevant tribunal, presumably the Supreme Court or the planning authorities.

#### *Motion for Permission to Appeal to the Supreme Court*

Following the District Court decision, the residents filed a motion for permission to appeal to the Supreme Court.<sup>329</sup> However, the Supreme Court denied the motion and upheld the decision of the lower courts in a 2-1 decision. In her dissenting opinion, Justice Daphne Barak-Erez found that once it was determined by the lower court that the residents were not illegal trespassers (as the respondents had claimed) but permitted residents, the authorities ought to have *reconsidered* the format of the eviction and the compensation that would be granted to the residents in the event of eviction. However, the authorities did not. As the original eviction demand by the authorities was based on the claim of illegal trespassing, the fact that the authorities did not change the format of

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<sup>326</sup> *Ibid.* at para. 11

<sup>327</sup> The doctrine of adverse possession transfers title to a non-owner of land upon the satisfaction of basic conditions such as her continual, exclusive occupation for a sufficiently long period of time. In addition, the occupation should be hostile to the interests of the true owner and without the owner's consent, as well as 'open', meaning that the owner is aware of the occupation. See the elaboration on the doctrine of adverse possession below.

<sup>328</sup> *The State of Israel v. Ibrahim Farhoud Abu al-Qi'an*, [2009] CC 3326/04 at para. 11.

<sup>329</sup> *Ibrahim Farhoud Abu al-Qi'an. v. The State of Israel*, Motion for Permission to Appeal 3094/11

the eviction procedure meant that there were flaws in the authorities' conduct, both in terms of legal procedure and public law.<sup>330</sup> For the majority, Justice Elyakim Rubenstein found as the lower courts had, that the residents did not acquire a right to the land but resided on it as permitted residents, free of charge. Therefore, the authorities' revocation of that permission was lawful and there was no need to intervene in the decisions of the lower courts.<sup>331</sup>

Before interpreting the magistrate and district court decisions, I'd like to outline the relevant legal doctrines that apply.

### The Legal Issues: Adverse Possession and Prescriptive Easement, Equality and Non-Discrimination

#### **Adverse Possession and Prescriptive Easement**

The doctrine of adverse possession assigns title to a non-owner who exerts physical possession over land and makes use of the property via certain stipulations, such as cultivation, for a sufficiently long duration of time. The possession is also determined to be actual, exclusive, continual, open and hostile.<sup>332</sup> Accordingly, the original owner of the property loses title, which is transferred to the adverse possessor. Prescriptive easement, on the other hand, arises by the satisfaction of some, but not all, of the conditions for adverse possession such as open, hostile and continuous use of property over a designated period of time, and gives a non-owner the right to use part of the property for a particular purpose. In prescriptive easement, unlike in adverse

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<sup>330</sup>*Ibrahim Farhoud Abu al-Qi'an. v. The State of Israel*, Motion for Permission to Appeal 3094/11, Barak-Erez opinion (dissenting) at para. 15.

<sup>331</sup>*Ibrahim Farhoud Abu al-Qi'an. v. The State of Israel*, Motion for Permission to Appeal 3094/11 at para. 20

<sup>332</sup> In the spirit of the post-colonial sensitivity that informs this study, it is worth noting the 'adverse', or unfavourable, aspects of adverse possession doctrine, or of possession more generally, as raised by property law scholars. Although these aspects do not bear on our study, given that in our case the issue is of natives asserting rights to property by adverse possession, and not of a colonial power doing the same, it underscores how certain legal doctrines can be called upon in the interests of conflicting parties, whether natives or the colonial power. Stolzenberg (2009: 119) asserts that the basic logic of possession in property law shows overlap with the imperial European doctrines such as the 'right of discovery' and the 'right to conquest', and that such rights enabled the colonization and expropriation of native lands by imperial powers. Nomi Maya Stolzenberg, "Facts on the Ground" in Gregory S. Alexander and Eduardo M. Peñalver (eds.) *Property and Community* (Oxford: Oxford University Press, 2009) at 119. In the same vein, see Rose's exploration of possession as the cornerstone of property law, conclude that it is "doubtful whether the claims of any nomadic population could ever meet the common law requirements for establishing property in land", given that the law's presumed audience is that of an agrarian/commercial society and not a communal one. Carol M. Rose, "Possession as the Origin of Property" (1985) 52 *The University of Chicago Law Review* 73 at 87 [Rose, "Possession as Origin of Property"]. In the Israeli case where Palestinians were attempting to exert rights of adverse possession, Kedar demonstrates how the Supreme Court (SC) ruled in line with the more stringent conditions to satisfy adverse possession rights. The SC also overwhelmingly ruled in favour of the state on appeal in adverse possession cases. The reason for this, Kedar proffers, is that the Supreme Court functioned in an ideological context where 'redemption of land' was central, as it would probably be expected to be in a colonial/settler-society context. Kedar, "Legal Transformation of Ethnic Geography", *supra* note 60 at 973, 985-988.

possession, title remains with the original owner. There are various justifications for the law of adverse possession,<sup>333</sup> yet principal theories that underlie this legal doctrine are utilitarianism, Lockean labour theory and Hegelian personality theory.

Utilitarian theory would be willing to abandon property rules upon applying a cost-benefit analysis, where the benefits accrued to the larger public outweigh the costs involved. It would therefore be willing to allow forced exchanges such as that under adverse possession, where the adverse possessor is making productive use of land and increasing the land's marketability, while the original owner is not. High transaction costs such as title search costs also factor into the cost-benefit equation favouring the adverse possessor.<sup>334</sup> As time erodes memory, adverse possession under utilitarianism favours the certainty in establishing an owner, and accordingly imposes a statute of limitations on claims against an adverse possessor.<sup>335</sup>

Lockean labour theory holds that when an individual exerts labour on a thing, that thing intermingles with the person, making it part of the person, and thereby giving the person ownership of the thing.<sup>336</sup>

Hegelian personality theory, or personhood theory, emphasises the emotional bond that develops between the adverse possessor and the property over time, wherein the property becomes part of her person. Conversely, the lack of possession by the original owner signifies a weakening of this bond, and a wading of interest in the property.<sup>337</sup>

The Ottoman Land Code (OLC) of 1858 was one of the chief statutes governing land law in Palestine, and was operational in Israel until the passing of the Israeli Land Law of 1969. Under

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<sup>333</sup> See, for example, Jeffrey Evans Stake, "The Uneasy Case for Adverse Possession" (2001) 89 *The Georgetown Law Journal* 2419-2474 at 2434-2455

<sup>334</sup> Robert C. Ellickson, "Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights" (1986) 64 *Washington University Law Quarterly* 723 at 724-725, Richard Epstein, "Past and Future: The Temporal Dimension in the Law of Property" (1986) 64 *Washington University Law Quarterly* 667 at 679-680 [Epstein, "Past and Future"]

<sup>335</sup> Epstein, "Past and Future", *ibid.* at 675

<sup>336</sup> Rose, "Possession as Origin of Property", *supra* note 331 at 73, John Locke, *Second Treatise of Government*, C.B. McPherson (ed.) (Indianapolis and Cambridge: Hackett Publishing Company, 1980 [1690]) at Section 27

<sup>337</sup> Margaret Jane Radin, "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 723 at 741.

Article 78 of the OLC, adverse possession rights could be acquired on state land, classified as miri<sup>338</sup> land, by satisfying the condition of continuous possession over ten years and cultivation of the land.

The possibility that Arab landholders could establish land rights via adverse possession alarmed ILA officials back in the 1950s. The fact that it was not particularly hard to satisfy the conditions of Article 78 aroused in the authorities "concern that this land would be removed from ILA possession and transferred to the ownership of trespassers".<sup>339</sup> Accordingly, the authorities sped up settlement of title operations<sup>340</sup> in the Galilee in the 1950s and 1960s, while at the same time modifying the law of adverse possession.<sup>341</sup>

The reformulated doctrine of adverse possession meant the passing of the Law of Limitation (1958). This law extended the time period of the possession requirement, from ten years to fifteen (if land was in possession before 1943) or twenty years (if in possession after 1943) in the case of unregistered land, and twenty-five years in the case of registered land.<sup>342</sup> Second, the possibility to use land possession as evidence of ownership declined, with the courts establishing that cultivation had to be of 50% of the tract of land, irrespective of the land's agricultural suitability. In addition, rules of evidence and procedure made it increasingly difficult for occupants to prove that they had cultivated the land for the time required.<sup>343</sup> Among these rules was the court's regular use of British Mandatory aerial photos of 1945 to show evidence of cultivation. These photos were taken as part of a project mapping all of Palestine. If the state was able to show that in 1945 less than 50% of a tract of land was cultivated or that there was non-agricultural use of land, such as the presence of a structure such as a house, they were able to disprove the adverse possessor's claim and to acquire

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<sup>338</sup> According to Ottoman land law, 'Miri' referred to agricultural land in the vicinity of villages, that was in the ultimate ownership of the state, but to which a landholder had various prescriptive rights.

<sup>339</sup> ILA Report for the Years 1964 - 1965 (Jerusalem 1965) at 66, cited in Kedar, "Legal Transformation of Ethnic Geography", *supra* note 60 at 970.

<sup>340</sup> Settlement of title meant that land rights are recorded in official registers according to blocs and parcels based on mapping. See Kedar, "Legal Transformation of Ethnic Geography", *supra* note 60 at 938. Once land had completed this registration procedure, it came to be known as 'settled' land. Following surveying and registration efforts of the British Mandatory authorities, 'settled land' accounted for only 5 million of the 20.4 million dunams that would be incorporated into the state of Israel (see Haim Zandberg, *Land Title Settlement in Eretz-Israel and in the State of Israel*, Ph.D. dissertation (unpublished) (Hebrew University of Jerusalem, 1999) (Hebrew) at 287, cited in Kedar, "Legal Transformation of Ethnic Geography", *supra* note 60 at 938-9). Therefore, land expropriations, transfers and settlement of title operations were instituted to rectify those lands awaiting settlement. Today, ownership of effectively all lands have been 'settled', with 93% of all land classified as state land and the remainder under private ownership, leaving no land 'unsettled'.

<sup>341</sup> Kedar, "Legal Transformation of Ethnic Geography", *supra* note 60 at 970

<sup>342</sup> See Articles 5b, 22 of the Law of Limitation (1958).

<sup>343</sup> Kedar, "Legal Transformation of Ethnic Geography", *supra* note 60 at 970-988

the land.<sup>344</sup> Also, tax records as evidence of possession no longer qualified under Israeli jurisprudence, whereas these could be used as evidence of possession of land in the Mandate period.<sup>345</sup>

Therefore, adverse possession of state land could be possible under Article 78 of the OLC, despite the aforementioned difficulties. In addition, the statutory basis for establishing an easement, either adverse possession or prescriptive easement, can be found in the Land Law 1969, though neither apply to public land.<sup>346</sup> However, following the 1992 *Shibli* decision of the Supreme Court,<sup>347</sup> the possibility of acquiring title by long term possessors and cultivators of state land under Article 78 of the OLC was effectively extinguished.

*Shibli* concerned the land of Bedouin living in the Lower Galilee near the Mount Tabor area in the village of Shibli. In 1943 their land was registered in the name of the High Commissioner, as trustee of the British Mandate. Upon Israel's establishment in 1948, as with other Mandatory assets, the land was transferred to the state.

The residents petitioned the District Court in 1986 to recognize their ownership of the land. The District Court found in favour of the Bedouin petitioners, on account of Article 78 of the OLC, as amended by the Law of Limitation 1958. As the petitioners were able to establish they had been in

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<sup>344</sup> *Ibid.* at 981-982

<sup>345</sup> *Ibid.* at 982-984

<sup>346</sup> Article 162(2) of the Land Law 1969 allows for the applicability of a plea of limitation (and thereby a claim for adverse possession) under Article 78 of the OLC for 'unsettled land', meaning land not registered under the Land (Settlement of Title) Ordinance (New Version) 1969. Under Article 159(b) of the Land Law 1969, limitation no longer applied to 'settled land' because its registration was seen as accurate and having been thoroughly examined (Weisman 1970: 449). However, a plea of limitation continued to be applicable was a person entitled to raise one prior to the coming into force of the Land Law, on January 1 1970 (Article 159(b)). Article 23 of the Land Law provides for the right of a non-owner to register land in his name. Among the conditions are that the non-owner invested in the land by building or planting on it whilst believing in good faith the land to be under his ownership. In essence, this provision compels the original owner to 'force sell' the land to the non-owner at a price equal to the value of the land prior to the non-owner's investment in it. This provision is grounded in the doctrine of adverse possession. Yet, the terms of adverse possession under common law, such as 'open' and 'hostile' mentioned earlier are not found in this provision. This provision, by virtue of Article 112, does not apply to public land, which is land held by the State, the Development Authority, the JNF, by corporate bodies established by statute and local authorities. Article 94 of the Land Law provides for prescriptive easement rights to both 'settled' and 'unsettled' land if a limitation period of thirty years has elapsed. The provision does not apply to public land by virtue of Article 113c. Unrelated, but worth noting, is that one principal motivation of the Land Law was to extinguish equitable rights (see Article 161), which are those remedies found outside statute and case law, that allow a judge to deliver a 'just' result.

<sup>347</sup> *State of Israel v Abdullah Asad Shibli*, [1992] CA 520/89. See also Abu Hussein, McKay, *Access Denied*, *supra* note 58 at 120-121.

possession and farmed the land for a period exceeding twenty-five years (counted backwards from January 1 1970 when the Land Law 1969 came into effect), they were able to prove their claim.

In the appeal, the Supreme Court sought to determine the relationship between Article 78 of the OLC and Basic Law: Israel Lands (1960). The Court found that Article 1 of the Basic Law that "The ownership of Israel lands, being the lands in Israel of the State, the Development Authority or the Jewish National Fund, shall not be transferred either by sale or in any other manner" showed intent of the legislator to prevent land in state ownership being transferred to private hands. The Court referred to Article 78 of the OLC as an archaic provision and unsuitable for the times. It determined that where there was a conflict of adverse possession provisions of the OLC and the inalienability of state lands in the Basic Law, the latter would prevail. It overturned the ruling of the District Court and ruled in favour of the state. The decision ensured that once land was registered in the name of the state, even if the prescription period of twenty-five years had been satisfied by an adverse possessor (and counted backwards from 1970 when the Land Law came into force), the state would not lose title to the land.

#### Equality<sup>348</sup>

Although not codified in statute, the right to equality has been established in Israeli case law. It has been determined to have constitutional quality.<sup>349</sup> With regard to the principle of non-discrimination in Israel, public law dictates that public bodies have a duty not to discriminate on the grounds of race, sex, religion or national origin. As established in case law,<sup>350</sup> the executive as a public body is obligated to act non-discriminatorily, in particular in dealing with the Arab minority.

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<sup>348</sup> A more circumspect treatment of the principle of equality as it applies in Israeli jurisprudence, its normative content and in particular how Palestinians have been/are accommodated into the stated government objective of ensuring equality between Jews and non-Jews, will follow in the subsequent chapter on the Wine Path Plan decision. The Wine Path Plan case deals with differentiated land allocation and access between Palestinians and Israeli Jews in the Naqab, where the latter are allotted individual single-family settlements stretching tens of thousands of dunams, while tens of thousands of Palestinians from the Naqab are denied basic amenities. As in this case, the Court refused to consider that the principle of equality had been offended. The JNF has justified the Wine Path Plan initiative saying it brings "blue and green to a brown land" (See Lauder (undated). This is Lauder's (then JNF's president) description of the Wine Path Plan initiative. Today Lauder is Chairman of the JNF Board). At this point, however, it is worth touching on the status of the right to equality in Israeli law, that it has constitutional quality as established by case law, to appreciate the oddity in both Magistrate and District courts' resolve not to address the residents' claim that their right to equality was violated by the executive in expelling entire Bedouin villages to make place for new Jewish settlements.

<sup>349</sup> See Aharon Barak, *The Judge in a Democracy* (Princeton, Oxford: Princeton University Press, 2006) at 86, 88 [Barak, *Judge in a Democracy*], Aeyal M. Gross, "The Politics of Rights in Israeli Constitutional Law" (1998) 3 *Israel Studies* 80

<sup>350</sup> See *Follow-Up Committee for Arab Affairs v. Prime Minister of Israel*, [2006] H CJ 11163/03 at para. 14; *Adalah v. Minister of Religious Affairs*, H CJ 1113/99, PD 54(2) 164 [2000]. Also, the Or Commission, a government panel

Nevertheless, encoding the principle of equality has been fraught with difficulties and has been the cause of deep divisions and disagreements, so that there has not been a broad enough consensus in favour of bills entrenching this right. Some of the sources of disagreement have been the implications of entrenching the right on the status of non-Jews vis-à-vis Jews and women vis-à-vis men in religious law.<sup>351</sup> Accordingly, equality is not incorporated in the Basic Law: Human Dignity and Freedom (1992), which is a constitutional document that is foundational in establishing civil rights in Israel. Israeli law professor, Aeyal Gross has written that the principle of equality has only been recognized by the courts in cases involving discrimination on grounds of gender or sexual orientation. In equality petitions brought by the Palestinian minority the court has regularly rejected claims, resorting to a formal and narrow interpretation of the principle.<sup>352</sup>

#### Proving Discrimination – Israeli and US Jurisprudence

In discrimination cases, Israeli jurisprudence does not adopt the doctrinal standard of strict scrutiny analysis, as is applied in US jurisprudence. Strict scrutiny analysis is applied when the courts are dealing with a governmental or legislative classification that disadvantages a minority. Accordingly, the burden is placed on the state to demonstrate that the classification has been narrowly tailored to achieve a compelling government interest, and no other less drastic means could have been employed.<sup>353</sup> Further, strict scrutiny is also applied when dealing with a 'suspect class'. Suspect class refers to a group that has been historically subject to discrimination, for example particular racial(ized) groups, such as African Americans.

Although the above jurisprudential standards for establishing discrimination exist in the US where they do not in Israel, nevertheless, establishing discrimination in US courts has been a challenge.

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of inquiry instituted after the killing of twelve Palestinian citizens of Israel by Israeli police, recommended in its final report that the state allocate land to Arabs according to the principle of equality and distributive justice. See Or Commission Report – Official Commission of Inquiry into the October 2000 Events, ch. 6, para. 13.

<sup>351</sup> Judith Karp, “The Basic Law: Human Dignity and Freedom, History and Power Game - A Biography of Power Struggles” (1993) 1 *Mishpat Umimshal* 323-84 at 333-338 (Hebrew), Suzie Navot, *The Constitutional Law of Israel* (Netherlands: Kluwer Law International, 2007) at para. 589 [Navot, *Constitutional Law*]

<sup>352</sup> Aeyal M. Gross, “The Politics of Rights in Israeli Constitutional Law” (1998) 3 *Israel Studies* 80 at 101

<sup>353</sup> Benvenisti and Shaham argue that the Israeli Supreme Court adopts a 'colour-blind' approach to discrimination suits concerning resource allocation, as opposed to an approach with sensitivity to ethnicity. Accordingly, minority interests are insufficiently protected against facially neutral discrimination and the possibilities for affirmative action for marginalized minorities are also precluded. Eyal Benvenisti and Dahlia Shaham, “Facially Neutral Discrimination and the Israeli Supreme Court” (2003-4) 36 *NYU Journal of International Law and Politics* 677-716 at 700

Discriminatory purpose doctrine dictates that in order to prove discrimination under the equal protection clause of the US Constitution, it would have to be established that either the government act/policy is worded in racial terms or that a discriminatory purpose underlies it. In both cases, the *intent* to discriminate would have to be demonstrated to prove a constitutional violation.

The historical development of the discriminatory purpose doctrine can be seen in the judicial decisions of *Swann*<sup>354</sup> and *Keyes*<sup>355</sup>. These were two cases that upheld *Brown's*<sup>356</sup> ruling that segregation was unequal and therefore unconstitutional. However, the two cases also made the distinction between *de facto* and *de jure* discrimination, with only the latter establishing discriminatory intent. This eventually translated to only *de jure* discrimination being a violation of the Fourteenth Amendment's Equal Protection Clause, which could be proven by demonstrating that it was brought about by *intentional* official action. However, given that only exceptional short-sightedness could give rise to an official body admitting intention to discriminate, intent has been a very hard condition to prove to establish official discrimination under discriminatory purpose doctrine.<sup>357</sup>

Establishing discrimination in Israel in discrimination cases concerning Palestinian citizens has been even more of a challenge than the US case. *Nazareth Lands*<sup>358</sup> concerned the 1954 government confiscation of Arab land, on which government offices were to be constructed. The Arab petitioners claimed that the confiscation order was discriminatory as they were targeted because they were Arab. The Court found that unless the petitioners could prove discriminatory intent they would not be able prove their claim. Accordingly, the petitioners would have to prove that the expropriation took place *because* they were Arab, with the court clarifying that it was insufficient

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<sup>354</sup> In *Swann* the Court found that District courts had judicial authority to rectify an intentionally segregated public school system via remedies such as bussing students. It also found that racial segregation that resulted from facially neutral language in the desegregation plans of the Charlotte-Mecklenburg school system was *de facto* segregation. This distinction of 'de facto segregation' was one that future courts would find did not offend the equal protection clause. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 [1971].

<sup>355</sup> *Keyes* concerned segregation in schools in the US North. The court found that intentional state actions that contributed to segregation, even though not expressed as such in statute, amounted to *de jure* segregation. *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 [1973].

<sup>356</sup> In *Brown* the Court declared that school segregation was unconstitutional because it was inherently unequal. The ruling spurred civil rights legislation in education, housing and employment. *Brown v. Board of Education*, 347 U.S. 483 [1954].

<sup>357</sup> Yousef Taiseer Jabareen, *Constitutional Protection of Minorities in Comparative Perspective: Palestinians in Israel and African-Americans in the United States*, PhD Dissertation (Georgetown University Law Center, 2003) at 66-67

<sup>358</sup> *Nazareth Lands Defence Committee v. Ministry of Defence*, 9 P.D. III 1261 (1955).

for the petitioners to demonstrate that alternative land could have been used for the construction of the government offices. The Court applied low-level scrutiny, or 'rational basis' review in this case, with the test being that the governmental action be rationally related to a legitimate government interest, which it found it was. Although Arabs were living under Military Administration at the time and were being denied fundamental rights such as freedom of movement and freedom of association and widespread expropriations of Arab lands were taking place, the Court did not see the need to apply a higher level of scrutiny of government action. The Court subsequently found in the government's favour.

In *Bourkan*,<sup>359</sup> the Court upheld a government policy of permitting only Jewish Israelis to purchase apartments in the Jewish Quarter of Jerusalem's Old City in a petition brought by a Palestinian who had formerly lived there and was forced to move out of his residence in 1967. In this case, officials admitted to intentionally discriminating in allowing only Jewish Israelis to purchase apartments. Nevertheless, contrary to the US doctrinal standards of discriminatory purpose, the Court applied low level scrutiny in the face of discriminatory intent. The Court determined that the issue was not one of equal right of residence, though this was what the petition sought remedy for. Rather, the Court determined that the issue was whether public bodies, in the aim of "restoration of a national and historical site, in name as well as substance, in character and identity"<sup>360</sup> were justified in discriminating against individuals. The Court found that they were.

However, a break from the above trend was to be found in the *Higher Follow-up Committee*<sup>361</sup> decision of 2006. In this case, the Court sought to determine if the 1998 government decision to establish 'national priority areas' was discriminatory. These 'national priority areas' were granted a variety of benefits, including in education, on account of their being peripheral communities. Yet, they excluded Arab towns. The Court found that the decision was both without authority and discriminatory. The Court found that the government decision was *ultra vires*, since the executive had no authority to undertake what they determined was a 'primary arrangement', which is an arrangement that requires legislative backing from the Knesset because of its country-wide implications. Further, Justice Barak affirmed that discrimination can be established by only showing discriminatory effects, that is by establishing that the institution of 'national priority areas' resulted

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<sup>359</sup> *Bourkan v. Minister of Finance*, [1978] HCJ 114/78, 32 P.D. II 800

<sup>360</sup> *Ibid.* at 807-8.

<sup>361</sup> *Higher Follow-up Committee for Arab Affairs in Israel v. Prime Minister of Israel*, [2006] HCJ 11163/03

in discriminatory allocation between Arab and Jewish areas, without the need to prove intent to discriminate.<sup>362</sup>

Over the years, judicial standards for proving discrimination have tended to apply low level scrutiny even when discriminatory effects and intent were shown.<sup>363</sup> Yet, the 2006 Court decision regarding 'National Priority Areas' (NPAs) seems to signal a break from this trend,<sup>364</sup> as the Court

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<sup>362</sup> *Higher Follow-up Committee for Arab Affairs in Israel v. Prime Minister of Israel*, [2006] HCJ 11163/03, Barak Opinion, para. 18. It is worth noting that by March 2011, the decision of the Court to void the government decision was not implemented by the executive and Arab towns in the north were not designated 'national priority areas' (NPAs). See Letter from Advocate Yehudit Karp to Attorney General Yehuda Weinstein, "Re: Failure to comply with interim decisions of the courts and with commitments and undertakings made by the state concerning court rulings" (March 2011), online: [http://www.adalah.org/upfiles/2011/Yehudit\\_Karp\\_English.pdf](http://www.adalah.org/upfiles/2011/Yehudit_Karp_English.pdf), Akiva Eldar, "Former official bemoans government's disregard of Supreme Court", *Ha'aretz* (April 1 2011), online: <http://www.haaretz.com/print-edition/news/former-official-bemoans-government-s-disregard-of-supreme-court-1.353406>. Since then, the government announced it was no longer using the prohibited decision, yet it continues to possess wide discretion in the assignment of NPAs under criteria that remains obscure. See Adalah, "New Discriminatory Laws and Bills in Israel", Updated October 2012 at 5, online: [http://adalah.org/Public/files/English/Legal\\_Advocacy/Discriminatory\\_Laws/Discriminatory-Laws-in-Israel-October-2012-Update.pdf](http://adalah.org/Public/files/English/Legal_Advocacy/Discriminatory_Laws/Discriminatory-Laws-in-Israel-October-2012-Update.pdf). For more critique on the arbitrariness in the assignment of NPAs and non-compliance with the court decision, see Adalah, "On the Israeli Government's New Decision Classifying Communities as National Priority Areas" (2010), online: <http://adalah.org/newsletter/eng/feb10/docs/english%20layout.pdf>. On August 4 2013, the Israeli cabinet approved 20 new communities, all Jewish and nine of them settlements in the OPT, to the list of 'National Priority Areas'. See Adalah, "Israeli Government Adds 20 Jewish Towns to 'National Priority Area' List, 9 are Settlements in the Occupied West Bank; Arab Towns in Israel Excluded" (2013), online: <http://adalah.org/eng/Articles/2197/Israeli-Government-Adds-20-Jewish-Towns-to-Area>, Barak Ravid, "Mapping national priorities - Cabinet approves new development plan to benefit more Israeli settlements" *Ha'aretz* (August 4 2013), online: <http://www.haaretz.com/news/diplomacy-defense/premium-1.539667>.

<sup>363</sup> For example, see *Wattad v. Minister of Finance*, HCJ 200/83, 38 P.D. III 113 (concerning discriminatory allocation of child benefits), *Agbaria v. The Minister of Education*, HCJ 3491/90, 45(1) P.D. 221-4 (concerning special educational programs implemented in 'development areas', which included only Jewish localities at the time), *Al-Sane' v. Attorney General*, HCJ 2678/91, P.D. 46(3) 709 (regarding home demolition provisions in the Planning and Building Law (1965) that petitioners claimed was used in a discriminatory manner against Naqab Bedouin), *Adalah v. The Minister of Religious Affairs*, HCJ 240/98 52 P.D. V 167 (regarding discriminatory budget allocation for religious affairs of community); *Alumni Association of the Arab Orthodox School in Haifa v. Minister of Finance*, HCJ 3429/11 (regarding the penalization of public bodies such as schools and universities for holding events commemorating the Nakba).

<sup>364</sup> Other examples where the Court found in favour of Palestinian petitioners claiming discrimination was the 2000 decision in *Qa'adan v. Israel Lands Administration*, HCJ 6698/95, P.D. 54 (1) 258, finding that the principle of equality had been offended by the ILA in allocating State land that was only accessible to Jews. In 2011, however, the legislature sidestepped fairer access to land that was intended by the *Qa'adan* decision. On March 22 2011, the 'Admission Committees Law' (The Law to Amend the Cooperative Societies Ordinance (no. 8) (2011)) was passed, whereby 'admission committees', such as that in Katzir that denied the Qa'adan family the right to buy a plot of land on 'suitability grounds', were legalised to operate in roughly 475 small community towns (up to 400 family units) built on state land in the Naqab and Galilee. Two other cases where the principle of equality for Palestinians was upheld were in *The Follow-Up Committee for Arab Education v. The Ministry of Education*, HCJ 2814/97, 54 P.D. III 233, where the Court accepted the government offer, which was proposed after the petition was filed, that academic enrichment programs to the Palestinian Arab sector should be allocated at 20% of the Ministry's budget. Similarly, in *The National Committee of Arab Mayors v. The Ministry of Housing*, HCJ 727/00, the Court ruled that the 'Urban Renewal Program' designed to reduce social inequalities in Israel, and whose social-educational component consisting of enrichment programs, scholarships and extra-curricular activities, should be provided to

affirmed that as long as the act or policy adversely impacted a particular group, or was discriminatory in its effects, there was no need to show that there was discriminatory purpose behind it in order to establish discrimination. Would this 2006 ruling be that liminal possibility for the residents of Umm al-Hiran to arrive at justice through the law? What would the courts need to apprehend – human suffering, affective investment, structural violence, something else - in order for such disruptive potentials located within the law to manifest not just as a ‘possibility’ but as ‘an actual state’<sup>365</sup>?

### International human rights law (IHRL)

International human rights law on forced evictions and equality and non-discrimination tell of the duties binding on Israel, via ratification of the relevant treaties and as a matter of customary international law, vis-à-vis Naqab Palestinians and are a benchmark against which the state’s actions should be judged.

### **IHRL on Forced Evictions**

In IHRL, the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 4 on ‘Adequate Housing’ has written that forced evictions can only be justified in the most exceptional circumstances.<sup>366</sup> In General Comment No. 7 on forced evictions,<sup>367</sup> the Committee emphasizes the state’s obligation that no discrimination is involved when evictions take place,<sup>368</sup> and when they do take place, that feasible alternatives are provided, in particular to large groups, in genuine consultation with them. It also calls for legal remedies to be provided to those affected, and that affected persons have a right to adequate compensation for affected property.<sup>369</sup> Further, the law provides that adequate notice of the eviction and information on the land’s alternative use be provided to those affected.

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Arab localities at at least 20% of the relevant budget. However, Jabareen interprets these rulings as formal remedies that failed to answer to the substantive demands of the community. Yousef Taiseer Jabareen, *Constitutional Protection of Minorities in Comparative Perspective: Palestinians in Israel and African-Americans in the United States*, PhD Dissertation (Georgetown University Law Center, 2003) at 246-248

<sup>365</sup> For more on liminality, actual states and assemblage see the extended discussion on Deleuze’s assemblage theory in the fifth chapter on vaccination allowances.

<sup>366</sup> UN Committee on Economic, Social and Cultural Rights, “The right to adequate housing,” General Comment No. 4, UN Doc. HRI/GEN/1/Rev.7 (1991), para 18.

<sup>367</sup> UN Committee on Economic, Social and Cultural Rights, “The right to adequate housing (art. 11.1): forced evictions,” General Comment No. 7, UN Doc. HRI/GEN/1/Rev.7 (1997)

<sup>368</sup> *Ibid.* at para. 10

<sup>369</sup> *Ibid.* at para. 13

In the case of Umm al-Hieran, courts issued both demolition orders and eviction orders against the village as a means of forcibly evicting all residents. The aim to construct the Jewish town of Hiran does not seem to qualify as an exceptional circumstance justifying the eviction of Palestinians, and is in fact a discriminatory justification that is prohibited under Articles 2.2 and 3 of the ICESCR. The feasible alternative of moving to Hura was not provided after genuine consultation with the petitioners and in fact was an alternative that the petitioners have consistently refused. The courts also denied the right of the petitioners to compensation for affected property, not considering their illegal building as investment in property. Finally, adequate and reasonable notice of the eviction plans were not provided, as demolition orders were issued *ex parte*, without the affected persons being informed. Similarly, the planning authorities drew up a plan for the construction of Hiran without informing Umm al-Hieran's residents, who learnt of the plan for the land's alternative use after it was drawn up.

### **IHRL on Equality and Non-Discrimination**

In international human rights law, the principles of equality and non-discrimination are fundamental norms that are binding on all states as set forth in the Universal Declaration of Human Rights (UDHR).<sup>370</sup> Furthermore, the prohibition on racial discrimination is also considered in international law as a preemptory norm, or *jus cogens*.<sup>371</sup> The principle of non-discrimination goes beyond just providing formal equality before the law; rather it speaks to actual protection from direct and indirect discrimination and to the principle of equal access to public resources.

### Space, Representation and Power

This instance of eviction is very much about conceptions, representations and performances of 'space'. As much as it is about the right to equality, as the Bedouin respondents insisted but on which the courts refused to deliberate, or about the doctrines of adverse possession and prescriptive easement to which the court made nominal reference, it is also possible to scrutinize the occasion using spatial theory, and then come full circle to ask why the legal issues were interpreted by the court the way they were. The most obvious reason to draw on spatial theory is that this case speaks of maps and planning, what Henri Lefebvre referred to as conceived space, a

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<sup>370</sup> Article 2 states, "Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Universal Declaration of Human Rights (UDHR)*, adopted December 10, 1948, G.A. Res. 217A (III), UN Doc. A/810 at 71 (1948).

<sup>371</sup> See Report of the International Law Commission, adopted at its 53rd session, 2001, UN Doc. A/56/10, 207.

Cartesian ordering of space by technocrats and planners. However, this case is not just about cartography. It is also about the everyday practices that make this space, a spatial practice that Lefebvre identified as perceived space.<sup>372</sup> For example, as a matter of routine Bedouin residents negotiate water prices with private individuals, while scenarios of home demolitions play in the back of their minds, because the state refuses to recognize the legality of their residence. Representational/‘lived’ spaces, on the other hand, are spaces lived via their symbols, which inhabitants’ imaginations seek to alter. Take, for example, the fact that just a few hundred metres from a hilltop in Umm al-Hieran, a dog cemetery in a neighbouring Jewish individual settlement is clearly visible. When ‘Atwa and I ascended the hill, the dog cemetery came to symbolize the experience of ‘Atwa as racial other – a dog cemetery is legal, but his human settlement is not – and was also his impetus to challenge the insult by speaking of the same to reporters and pursuing legal means for more equitable access to land.<sup>373</sup> Space, then, is not about maps alone. It is *social*. In this section, I will unpack the multiple meanings embedded in Umm al-Hieran’s spatiality as a means to better scrutinize and deconstruct the magistrate and district court decisions in this eviction case.

The production of space is a dialectical process, whereby all three elements of conceived, perceived and lived space are in dialectic communication in one another. What is dialectic communication? The concept of *aufheben* or ‘sublation’ is at the heart of the dialectic. Sublation, in seeming contradiction, means both to preserve and to put an end to. When a contradiction to a proposition is sublated, this means that it is overcome. Yet, the contradiction is at the same time preserved, bringing it to a higher level, and preserving its tension in the resolution.<sup>374</sup> We can think of resistance of lived space of residents such as public squatting as being a contradiction to the propositions of conceived space that outlaws such practice. Here, squatting is overcome by regulations against squatting, but nevertheless, the act of resistance leaves an indelible mark on the use, practices and performances of public space for the future. The act of sublation is indefinite, meaning that it always leaves an opening, a ‘potentiality’ or a promise, for that which cannot be determined *a priori*.

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<sup>372</sup> Henri Lefebvre, *The Production of Space*, (trans. Donald Nicholson-Smith) (Oxford: Blackwell Publishing, 1991) at 38 [Lefebvre, *Production of Space*]

<sup>373</sup> *Ibid.* at 38-39

<sup>374</sup> Christian Schmid, “Henri Lefebvre’s theory of the production of space: towards a three-dimensional dialectic” in Kanishka Goonewardena, Stefan Kipfer, Richard Milgrom, Christian Schmid (eds.) *Space, Difference, Everyday Life: Reading Henri Lefebvre* (New York: Routledge, 2008) at 30-34 [Schmid, “Lefebvre’s theory of space”].

The maps drawn up by the planning authorities are static representations of space that attest to be two dimensional renderings of geographic 'reality'. Only in December 2010, when the planning authorities submitted a detailed master plan for the Jewish village of Hiran<sup>375</sup>, were the homes of five hundred Palestinian residents of Umm al-Hieran superimposed on the master plan map. They make an appearance, according to the map legend, as 'existent structures'. In previous cartographic representations, Atir and Umm al-Hieran homes are simply missing. What explains this? Could this have been a slip up by the authorities? Could it be they were unaware of the many hundred residents there? It is not that the authorities were unaware of the village. The villagers had various dealings with government officials and ministries over decades on issues of land lease and home demolitions and they even received flood relief and government compensation for a storm that ravaged the community in 1997. Further, in 2001, a year before the planning authorities made an amendment to the Master Plan for the Southern District to include the Jewish Hiran, the ILA referred to Atir-Umm al-Hieran as the "special obstacle" that stood in the way of future Jewish settlement.<sup>376</sup> Therefore, the authorities were aware of the villagers, yet they chose not to render them on planning maps. Did the haphazard spread of tin shacks being unplanned and illegal not represent a living space that justifies representation? What sort of explanation for this could we find in spatial theory?

In the following paragraphs, I will outline some principal ideas of spatial theory to account for this non-representation by the planners. I will then ask how the courts, in their deliberations and decisions, represent the community and probe what the overlap is, if at all, with the conception of space put forth by government technocrats. I believe that by outlining spatial theory we can reach an understanding of the role of the courts and law in shaping not only the space of Umm al-Hieran but of other Bedouin spaces in the Naqab. Further, it will also answer to how the inhabitants 'live' this space and in turn shape it. In applying spatial theory to the lived conditions of Umm al-Hieran social space, we can also learn of the materiality of this space, its symbolism, and how the two feed one another.

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<sup>375</sup> Master Plan No. 107/02/15, including detailed Stage A plan for the suburban town of Hiran.

<sup>376</sup> The Israel Land Administration (ILA), "Report on Status of New and Renewed Settlements" (August 2001) (Hebrew), cited in Adalah, *Nomads Against Their Will*, *supra* note 127 at 18. The report was submitted to the PMO as a recommendation for the setting up of Hiran and discussed the initiation of 68 new Jewish towns.

## On Spatial Theory

Doreen Massey puts forth three principal propositions for spatial theory.<sup>377</sup> First, that space is alive, not static and is a product of interrelations, from the global to the intimate. Second, that space is multiplicity as multiplicity is space, meaning that it is contemporaneous plurality where distinct trajectories exist, embedded with stories that are both multiple and varied. Finally, that space is always *becoming*, it is always under construction, never finalised. On account of these propositions, we can appreciate how the spatialization of social theory affirms heterogeneity as a sort of natural condition and supports the idea of the interrelatedness of identities and histories.<sup>378</sup>

This contemporaneous plurality of space is echoed in the work of Donald Moore, who emphasizes a concept of space that is the sedimentation of cultural practices, historical materiality, social relations and political economic processes in multiplicity, coming together. Therefore, the ‘place’ that is the subject of Moore’s ethnographic study, Karezei in Zimbabwe, is not a fixed, static location with an enduring essence but a site of a distinctive mixture where translocal influences interweave with historically contingent meanings and practices embedded in a particular geography.<sup>379</sup>

For Glen Sean Coulthard, the ‘grounded normativity’ of indigenous peoples, the modalities of organizing and being on the land, ought to force geographers to reorient their conception of land towards a “system of reciprocal relations and obligations”.<sup>380</sup>

That space is fundamental in any exercise of power<sup>381</sup> is taken up by Nicholas Blomley in his exploration of how representations of space in the cadastre enable the violence of property law.<sup>382</sup> Space, like property, is active, is constantly performed, constructing subjects and norms. Yet, property being a regime of persuasive sociality and shared understandings,<sup>383</sup> has intrinsic to its performances and productions violent socio-spatial effects. One manifestation of the same on a subject we’ve touched upon is the forceful transfer in adverse possession. Similarly, as the law has

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<sup>377</sup> Doreen Massey, *For Space* (London: Sage Publications, 2005) at 9 [Massey, *For Space*]

<sup>378</sup> *Ibid.* at 11

<sup>379</sup> Donald S. Moore, *Suffering for Territory: Race, Place and Power in Zimbabwe* (London and Durham: Duke University Press, 2005)

<sup>380</sup> Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 13

<sup>381</sup> Michel Foucault, “Space, Power, Knowledge” in Paul Rabinow (ed.), *The Foucault Reader* (New York: Pantheon Books, 1984) at 252

<sup>382</sup> Nicholas Blomley, “Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid” (2003) 93(1) *Annals of the Association of American Geographers* 121–141

<sup>383</sup> Rose, “Possession as Origin of Property”, *supra* note 332

the power to determine who has access to property and who is excluded from it, it also creates the spaces of degeneracy, dark zones of sex-trade workers,<sup>384</sup> the slum,<sup>385</sup> the reservation,<sup>386</sup> and the unrecognized village, which stand in opposition to those of respectability, and where certain bodies are more exposed to violence than others.

*Race, Space and the Law*<sup>387</sup> is a volume that explores how space becomes race, how space is constructed, organized and performed to sustain unequal social relations, which in turn shape space in a white settler society. Foundational to such societies are national mythologies, narratives that are “deeply spatialized”.<sup>388</sup> Therefore, at the primary phase of conquest in a settler society, the myth of empty land or *terra nullius* is deployed,<sup>389</sup> which justifies settlement since the land is deemed empty and open to conquest. This is precisely the myth that Nuri’s legal team sought to overturn, unsuccessfully.<sup>390</sup> As no native population exists, there is no deontological dilemma associated with settlement. Once settlement is underway, the myth of the empty land developed by hardy and enterprising European settlers circulates. As Razack expounds, here rugged independence and ingenuity, ostensibly ingredients for the settler society’s greater commitment to liberty and democracy, justify the project. This is in contrast to the characteristics of degeneracy that are the mark of non-settler societies and natives, in the case where their existence is apprehended and made intelligible. Finally, the third spatialized myth in the national lore is how these settler society spaces of tranquil order are now threatened by incursions from the ‘wild’ outside, made up of natives, immigrants and asylum seekers.<sup>391</sup>

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<sup>384</sup> Sherene Razack, “Gendered racial violence and spatialized justice: The murder of Pamela George” in Sherene Razack (ed.), *Race, Space and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) 121

<sup>385</sup> Jennifer J. Nelson, “The Space of Africville; Creating, regulating and Remembering the Urban ‘Slum’” in Sherene Razack (ed.), *Race, Space and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) 211

<sup>386</sup> Murdocca, “There is Something in that Water”, *supra* note 106

<sup>387</sup> Razack (ed.), *Race, Space and the Law*, *supra* note 146

<sup>388</sup> *Ibid.* at 3

<sup>389</sup> Dara Culhane has written about the deployment of this foundational myth vis-à-vis First Nations in her anthropological study of the Delgamuukw case, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby: Talonbooks, 1998)

<sup>390</sup> They were unsuccessful because the myth was so pervasive that it gave way to a legal doctrine, the ‘Dead Negev Doctrine’.

<sup>391</sup> See Razack, *Race, Space and the Law*, *supra* note 146 at 2-4. For example, soon after the Israeli state was established, native Palestinians who had turned refugees attempted to return to their homes. The state considered them infiltrators (*mistaninim*), and responded with a free-fire policy that took the lives of a few thousand. See Benny Morris, *Israel's Border Wars, 1949-1956: Arab Infiltration, Israeli Retaliation and the Countdown to the Suez War* (Oxford: Clarendon Press, 1993). Today, infiltrators are the asylum seekers and refugees mostly from Sudan and Eritrea, who encounter public racism that has gravitated into pogroms in Tel Aviv. In addition, official policy and legal measures have been taken to curtail their rights, imprison them en masse in incarceration camps, and deport

So what does spatial theory propose? First, spatial theory calls for denaturalizing space.<sup>392</sup> This allows for a sifting of static geographical representations, to expose the world views that make space, such as those of the national mythology repertoire. It also enables us to ask how those spaces came to be. Therefore, how do maps, courts, the law, the media, literature, settlers and natives perform space? More significantly, the heterogeneity that is the mark of space, permits us to see the multiplicity in systems of oppression – how space is race, is gender, is class.<sup>393</sup> The contemporaneous plurality of space allows us to acknowledge the interlocking nature of class, gender and racial differentials and hierarchies in the making of space. Patriarchy and capitalism make racialization, and vice versa, each feeding and playing off the other. Most significantly, spatial theory helps us see beyond, as Lefebvre’s theory of space goes, a textual reading<sup>394</sup> of space, or describing space’s materiality, that there are socio-economically disadvantaged unrecognized villages where Bedouin live alongside wealthy Jewish neighbours with gardens and swimming pools. It also helps us read past its symbolism of how such a geography is constitutive of racial, national space and the rendering of bodies and populations that belong/not. A knowledge of space goes beyond description, deciphering codes, and understanding how we perform it. It is about how the symbolic and material work through each other to constitute space.<sup>395</sup>

There have been varied explorations on the materiality of space in Israel. These have described how ideology, planning, law, History,<sup>396</sup> language and national myths, and the seemingly innocuous practice of tree planting construct the Israeli space. Scholars inquiring into Israeli space have critiqued the symbolism of space as terra nullius, the ‘informality’ and ‘gray space’ that characterize where minorities live (the native quarters), and the pine tree as symbolising the ordered, productive and refined national space.

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them in spite of there existing reasonable danger to their well-being and security. See ACRI, *The State of Human Rights in Israel and the OPT – 2012* at 16-25.

<sup>392</sup> Richard Phillips, *Mapping Men and Empire: A Geography of Adventure* (New York: Routledge, 1997), Nicholas Blomley, “Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid” (2003) 93(1) *Annals of the Association of American Geographers* 121–141

<sup>393</sup> Razack, *Race, Space and the Law*, *supra* note 146, Sherene H. Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008)

<sup>394</sup> For more on ‘textual’ production and its implicit elision of other narratives, see the *Abu Mdeghem* chapter.

<sup>395</sup> Lefebvre, *Production of Space*, *supra* note 372 at 7, Razack, *Race, Space and the Law*, *supra* note 146 at 8

<sup>396</sup> Capitalized to mean the single story, the linear narrative, as opposed to history, which is contemporaneous plurality and the heterogeneity of experiences and stories.

Oren Yiftachel has explored how conceived space as drawn up by the Israeli planning authorities serves as a tool of control of minority populations. Yiftachel identifies the marks of planning authorities as being top-down planning, imposing cumbersome bureaucracy, operating with Zionist objectives that prioritize for Jews over Arabs and spreading the Jewish population in Arab concentrated regions in the Galilee and Negev in the name of 'development'.<sup>397</sup> In *Ethnocracy*,<sup>398</sup> the name Yiftachel ascribes to the regime on account of its ethnonational expansion and control while simultaneously representing itself as democratic, he emphasizes the central role land law<sup>399</sup> and policy play in the realization and promotion of the ethnocratic regime and its effects on Palestinian citizens. Making ethnocratic space relied on the deployment of national mythologies, the deeply spatialized stories of settler societies. In the newly established settler state, these stories spoke specifically of national redemption, a return of the exiles to an empty land that was once home to forefathers. It was inscribed in the terms of the newly revived Hebrew language, so that *aliya lakarka* (ascent to the land/settlement) was undertaken to enable *ge'ulat karka*, land redemption, whose positive biblical connotations for Jewish settlement were found in the terms *hityashvut* (agricultural settlement founded on cooperative principles) and *hitnahalut* (taking possession by divine decree). There were stories of enterprising and hardy settlers that undertook *kibbush hashmama* (the conquest of the desert).<sup>400</sup> In fact, such stories continue to circulate today, for example in the story of the three dozen single family farms that constitute the Ramat HaNegev 'wine path plan', the subject of the following chapter. These spatialized myths constructed belonging and collective identity, provided the moral basis for settlement,<sup>401</sup> precluded hard questions being asked about natives that would be displaced or dispossessed, and marked the space as improved by settlers, a product of toil, thereby justifying the exclusion of those outside the national project. According to Pappé, the Zionist myth of an empty, static space awaiting settlement was actively deployed in the late 1930s. Although it was compellingly undermined with the post-

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<sup>397</sup> Oren Yiftachel, *Planning as Control: Policy and Resistance in a Deeply Divided Society* (Exeter: Pergamon, 1995)

<sup>398</sup> Oren Yiftachel, *Ethnocracy. land and identity politics in Israel/Palestine* (Philadelphia: University of Pennsylvania Press, 2006) [Yiftachel, *Ethnocracy*]

<sup>399</sup> An expert on land law in shaping conceived space is Israeli legal scholar Sandy (Alexandre) Kedar, see Kedar, "Legal Transformation of Ethnic Geography", *supra* note 60. Also see the more recent joint publication with scholars, Yiftachel, Amara. Sandy (Alexandre) Kedar, Ahmad Amara, Oren Yiftachel, *Emptied Lands: A Legal Geography of Bedouin Rights in the Negev* (Stanford: Stanford University Press, 2018)

<sup>400</sup> Yiftachel, *Ethnocracy*, *supra* note 398 at 61

<sup>401</sup> For example, based on the national myth of coming back to the homeland, Israeli legal scholar Ruth Gavison makes the argument for a Jewish right of return to Israel. See Ruth Gavison, *The Law of Return at Sixty Years: History, Ideology, Justification* (Jerusalem: The Metzilah Center for Zionist, Jewish, Liberal and Humanist Thought, 2010) 38-49.

Zionist trend of the late 1980s, the spatialized myth circulated with renewed force after the Second Intifada in 2000 and persists today.<sup>402</sup>

The national stories were supplanted by an ordering of space that took place via cartographical representations. In the late 1970s, the Green Line was erased from official maps, atlases, and state publications, coinciding with Israeli Jewish settlement in the Occupied Palestinian West Bank.<sup>403</sup> The legal and policy measures that contributed to making ethnocentric space was the widespread expropriation of Palestinian land, entrusting state land control to State-Jewish organizations that structurally excluded Arabs, registering British Mandate land as state land, transfer of land to the JNF, particularly agricultural land, prohibiting the sale of state land, transfer of land control to the ILA and discriminatory allocation of land between Arab and Jew.<sup>404</sup> Fenster argues that Zionist ideology operative in official planning institutions privileges Jewish spatial memory over Palestinian, particularly in the preservation and promotion of Jewish heritage sites, accentuating the Zionist narrative and memory of space and erasing the Palestinian. Symbolically, planners also made informality a mark of non-Jewish settlement, one where unlawful, underserviced residence was the norm.<sup>405</sup> This in turn facilitated Arab populations being avoided and contained, effectively locating them in a 'gray space' between legality and eviction,<sup>406</sup> thereby denying them full participatory and planning rights to the city.<sup>407</sup>

In *Planted Flags*, Irus Braverman illustrates how the planting of trees constructed space discursively and symbolically as Zionist space.<sup>408</sup> She demonstrates how the pine came to mark the Israeli space as a Zionist tree, both in enabling the reclamation of Palestinian land and in marking itself as the respectable field tree that stood in contrast to the forest cactus, associated with the untamed and with 'wild' Palestinians. The JNF's tree planting missions marked the organization as

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<sup>402</sup> Ilan Pappé, "Zionizing the Palestinian Space: Historical and Historiographical Perspectives" (2010) 2 *Makan - Adalah's Journal for Land, Planning and Justice*, "The Right to a Spatial Narrative". For more on the construction of spatial myths in the aim of Israeli nation building, see D. Ohana and R.S. Wistrich (eds.), *Myth and Memory—Transfigurations of Israeli Consciousness* (Jerusalem: The Van Leer Jerusalem Institute, 2006) (Hebrew).

<sup>403</sup> Yiftachel, *Ethnocracy*, *supra* note 398 at 65

<sup>404</sup> *Ibid.* at 137-140

<sup>405</sup> Tovi Fenster, "Belonging, memory and the politics of planning in Israel" (2004) 5:3 *Social & Cultural Geography* 4013-416, "Memory, Belonging and Spatial Planning in Israel" (2007) 30 *Theory and Criticism* 189-212 (Hebrew)

<sup>406</sup> Oren Yiftachel, "Critical theory and 'gray space': Mobilization of the colonized" (2009) 13:2-3 *City* 240

<sup>407</sup> Yiftachel, *Ethnocracy*, *supra* note 398 at 192, drawing on Henri Lefebvre, *Writings on Cities* (Cambridge, MA: Blackwell, 1996)

<sup>408</sup> Braverman, *Planted Flags*, *supra* note 321

an environmental forerunner, while also symbolically telling the story of empty space waiting afforestation. Here, Palestinian locals merged in with the local landscape, and were therefore not entitled to any particular legal claims to that space. Braverman discusses how the law, in particular the adverse possession provision in Article 78 of the OLC, has been deployed to claim non-private, non-urban Palestinian land as state land for non-cultivation exceeding ten years. And yet, Palestinians of that space interacted with it in different ways, interpreting perceived space and their own everyday practices simultaneously alongside conceived space as carved out by Israeli planners and technocrats. Palestinians lived through the materiality and symbolism of the space, and utilize the olive tree, imbued as it is with a plethora of socio-cultural, political and religious meaning, as a symbol of resistance.<sup>409</sup>

Ronen Shamir's influential article, 'Suspended in Space', takes on spatiality in reference to Naqab Palestinian Bedouin and the law.<sup>410</sup> Seen through the prism of law performing colonial culture, the series of case studies reveals how space is materially and symbolically constructed. Yet, not very much is said of how Naqab Palestinians perform that space or how we can understand the Lefebvrian notion of 'lived space' of the inhabitants. While Shamir explicates on how the state performs governmentality, constructs subjects, and erases native narratives and memories, the limited scope of the inquiry means we don't learn of how the inhabitants interpret this space

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<sup>409</sup> Further explorations of space in relation to Israel, can be found in Kimmerling, *Zionism and Territory*, *supra* note 148, for how Zionist ideology and political praxis shape space. See Dan Rabinowitz, *Overlooking Nazareth* (Cambridge: Cambridge University Press, 1997) for how space shapes identity formation in Nazareth/Nazerat Illit. Rachel Kallus and Hubert Law-Yone, "National Home/Personal Home: Public Housing and the Shaping of National Space in Israel" (2002) 10:6 *European Planning Studies* 765-779 looks at how public housing was used as a tool to mould new immigrants into loyal citizens of an imagined nation-state. Mark LeVine, *Overthrowing Geography: Jaffa, Tel Aviv, and The Struggle for Palestine, 1880-1948* (University of California Press, 2005) looks at identity construction in the spaces of Yaffa and Tel Aviv prior to 1948, challenging conceptions of modernity used in constructing the Israeli city of Tel Aviv. Susan Drummond, "Prolegomenon to a Pedestrian Cartography of Mixed Legal Jurisdictions: The Case of Israel/Palestine" (2005) 50 *McGill Law Journal* 899 looks at both maps and laws as ahistorical sources of authority that orient an individual's perception of reality to conform with the single story that the maps and laws tell. Drummond argues that both are actively employed in nation building in colonial contexts. See also two volumes of Adalah's land and planning journal, *Makan*. Adalah 'The Right to the City', 1 *Makan - Adalah's Journal for Land, Planning and Justice* (2006), 'The Right to a Spatial Narrative', 2 *Makan - Adalah's Journal for Land, Planning and Justice*, (2010). The first speaks of 'the right to the city' (looking at restrictions to that right for Palestinians in Nazareth, Lydd and Neve Shalom. The volume also uncovers how spatial separation is effected between Arabs and Jews in Kamoun, Atir-Umm al-Hieran and in the area of the wine path plan in the Ramat HaNegev Regional Council). The second volume explores the contours of Palestinians' right to a spatial narrative (including how *waqf* property in Yaffa is left to deteriorate by authorities as a means to Judaize space and the effects of gentrification on poor Arab residents). Erez Tzfadia and Haim Yacobi, *Rethinking Israeli Space: Periphery and identity* (New York: Routledge, 2011) explores the discourses and symbolisms of the 'periphery', inherent to colonial spatial praxis, in Israel. The authors look at how identities are constructed in periphery towns and populations, including inhabitants' forms of resistance in their dialectics with space.

<sup>410</sup> Shamir, "Suspended in Space", *supra* note 58

conceived by the authorities and challenge, negotiate and shape space in dialectic with it. This chapter attempts to identify both the symbolic and the material in Umm al-Hieran space, particularly in respect to the law, and how each feeds into the other to shape space. What can we know of the forms of resistance enunciated in inhabitants' lived space? It will also attempt an answer at why the legal doctrines were adjudicated in the manner they were using this more nuanced understanding of Umm al-Hieran spatiality.

First, however, does Shamir share the same understandings of space, as outlined above, that of space as contemporaneous plurality, a becoming, essentially social? When Shamir refers to 'space' and Bedouins suspension in it, what 'space' is he referring to? He writes, "The Negev is conceived as *vacuum domicilium*" via law's conceptualist "praxis of extracting and isolating elements from the indeterminate and chaotic flow".<sup>411</sup> In doing so, the law applies a "conceptualist grid on space – expecting space to be divided, parceled...[resulting] in the annihilation of the actions, movements and histories of people who do not fit the frame".<sup>412</sup> The law, like the map, flattens space, representing it as Space. Shamir is referring to Lefebvre's notion of conceived space, the kind *conceived* by planners and technocrats. As Drummond writes, the toponymic map, one that accords specific names to places, is a representation of one culture, one story, one History, over others, and in that sense is the triumph of that culture's historical and epistemic priorities and proclivities.<sup>413</sup> In the toponymic map, 'Atir-Umm al-Hieran' reads 'Hiran' and in conceptualist law, 'Bedouins of the Naqab' reads 'illegal dispersion in an empty space'.<sup>414</sup> Bedouins being suspended refers to them being nomadic, not going anywhere specific, and not rooted to the ground. They are also emptied of their varied histories, narratives and memories and are suspended in the sense of being undetermined, floating in limbo between being primordial matter and modern subjects, with law and government's benevolence attempting to be that bridge. Being suspended also means their cartographic representation is put off, presumably until they move to 'recognized' living centers that the grids are able to capture and make intelligible, the development townships. As we saw in Nuri's case, such representations of Space do not recognize Bedouin lifeways, their ways of organizing and being.

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<sup>411</sup> *Ibid.* at 232-233

<sup>412</sup> *Ibid.* at 234-235

<sup>413</sup> Susan Drummond, "Prolegomenon to a Pedestrian Cartography of Mixed Legal Jurisdictions: The Case of Israel/Palestine" (2005) 50 *McGill Law Journal* 899 at 923

<sup>414</sup> Shamir, "Suspended in Space", *supra* note 58 at 236

Yet, to only speak of their suspension in conceived space, is to obfuscate the fact that they are *always* becoming and actively negotiating and making their lived space. It also obscures that space is produced by the perceived, conceived and lived in simultaneous dialectic communication, making both the self and society.<sup>415</sup> Space is not the dead or inert, or really what planners say it is. Indeed, Massey cautions that this has been a common misunderstanding of the word space in the humanities tradition, whereby it has been mistaken for representation/conceptualization, or fixity of meaning. Space, in this conceptualist sense, has been contrasted with time, which is said to be multiple and continuous. Yet, representation fixes and stabilizes time *and* space, both of which are multiple, continuous and ultimately unrepresentable.<sup>416</sup> Shamir is not positing that space is a representation or fixing of time, but the absence of engagement with all of space's productive dimensions, risks leaving the reader with the common misconception of space as Space. In Space, the complexity of social relations is chopped down to the digestible form of the legal/cartographic grid, for which the agency of inhabitants is unintelligible and thereby lost; rendering them suspended in space is as if to speak of them as puppets in a marionette. Although the attempt is to show how law as culture is made operative to govern bodies and things, by eliding agency, the danger is that we do not see the full spectrum of governmentality. That is, we miss seeing governmentality beyond its arterial forms by which power flows from the state to subjects. We miss how subjects become enlisted in projects of their own subjugation as the state counters agency via capillary forms of power and cooptation, in an unfinished, unbounded dialectic of force relations that embeds natives, government, political economies, histories and geographies from the intimate to the global.

So, what can we tell of Atir-Umm al-Hieran's spatiality? Law's conception of this particular space is, as Shamir explicates, empty space. The one thousand Palestinians that live there do not have a history or have not undertaken any actions that give rise to any right to continue living there. Indeed, conceived space in this place is an 'annihilation of history'.<sup>417</sup>

Conceived space is precisely this utter destruction because it erases engagement with the everyday routines of its inhabitants that give space its meaning. Perceived space is of the material interactions and communications that shape and make space. In determining the right to space,

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<sup>415</sup> Schmid, "Lefebvre's theory of space", *supra* note 374 at 39-40

<sup>416</sup> Massey, *For Space*, *supra* note 377 at 20-30

<sup>417</sup> Shamir, "Suspended in Space", *supra* note 58 at 235

such as who has the right to live in a particular locale, it is precisely the forms of communication and interaction of perceived space that one needs to consider. Lefebvre's theory of right to the city is the right of all inhabitants that occupy a space to have a right to use of that space and a right to determine its form via participatory planning.<sup>418</sup>

Of course, perceived space is itself in dialectic interaction with the other spatial dimensions. Therefore, the fact that the government and planners have designated Atir-Umm al-Hieran unrecognized, shapes the everyday routines of its inhabitants – from obtaining water, to getting to work, to using the road network that links to the village.

### On Umm al-Hieran Spatiality

#### Visiting that Place without Toponym

At our meeting in Jerusalem, 'Atwa promised to one day show me his village. It was an offer to get a sense of his everyday. Our schedules aligned a few months later,<sup>419</sup> and agreeing to meet in Hura, easier for me to locate, it being recognized, we drove to that place without toponym down a snaky gravel road. We made a few stops before arriving at the village so that 'Atwa could breathe life into what cartographic representations rendered lifeless. However, there was no breathing life into the dessicated olive trees. Located between Hura's outskirts and his home in Umm al-Hieran was the village's agricultural land, though it could barely afford to carry that label anymore. 'Atwa blamed the lack of water. The olive trees had died because the state refuses to provide the community water as they do recognized communities, while the costs of a private water connection to maintain the native Palestinian evergreen are simply out of bounds.

We then began to speak more about water. 'Atwa described, and his son supplanted later, the difficulties in obtaining water. It costs 'Atwa's family more than twenty times for a cubic metre of water than it does for a private home connected to the water line. For a single family, a cubic metre of water is good for about five days. Every month, they spend several hundred shekels on water alone. The water is obtained from a private water connection from a nearby recognized settlement and is transported by truck. The costs associated with truck rental and gasoline also figure in the price.

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<sup>418</sup> Henri Lefebvre, *Writings on Cities* (Cambridge, MA: Blackwell, 1996)

<sup>419</sup> Interview with 'Atwa abu Al-Qi'an, son, and mother at Umm al-Hieran, March 23 2012.

In a fairly nondescript home, we break bread. First, however, I'm invited to wash my hands. I learn that there are no shortcuts to hygiene, irrespective of the scarcity of water. 'Atwa's son, who refuses to be audio recorded, then pitches in to elaborate on the challenges of obtaining water. A particular source of his displeasure is the price haggling with those fortunate to have a connection. He is unequivocal about his impatience with 'Arabs' who 'ask too many questions' before agreeing to connect him to their water supply. He is, of course, referring to fellow Arab Palestinian Bedouin living in the environs. Yet, he deploys the term 'Arab' disparagingly against the community, his own community, wishing to leave the impression that incorrigibility was a mark of 'the Arab'.

Others from the village who purchase in bigger quantities are able to secure a better, but nevertheless high rate. Salim Abu al-Qi'an, for example, pays NIS 42 (US\$11) per cubic metre for a water tanker that holds 14 cubic metres.<sup>420</sup> These prices are exorbitant considering that the January 2012 rate paid by recognized settlements is around NIS 7 (US\$1.86) per cubic metre.<sup>421</sup> Recognized private water connections, not linked to a municipal line, of which there are dozens among the Naqab Palestinian community, pay NIS10.364 (US\$2.8) per cubic metre. In fact, between July 2011 and January 2012, those with a private water connection saw a 66% price increase. The fact that households linked to a municipal line did not see a similar increase alerted ACRI to appeal to the water authorities its discriminatory impact on Naqab Palestinians.<sup>422</sup>

I thereafter spoke to 'Atwa's mother, a village elder, who remembers a time in the 1940s when water drawn from rainwater cisterns and underground wells made it much easier to come by. During the war of 1948,<sup>423</sup> however, and since,<sup>424</sup> local Palestinian water wells and infrastructure were destroyed, most often with the aim of forcing residents to move. Today, 'Atwa's family cannot depend on rainwater collection, since the practice is effectively banned for sanitation reasons.<sup>425</sup>

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<sup>420</sup> Appeal in *Salim Abu al-Qi'an v. Water Committee*, DC 51011-09-11 at para. 15.

<sup>421</sup> <http://www.water.gov.il/Hebrew/Rates/Pages/rates-update-2017.aspx>

<sup>422</sup> ACRI, "Right to Water: There are those who pay more" (February 28 2012), online: <http://www.acri.org.il/he/?p=19873> (Hebrew)

<sup>423</sup> Benny Morris, *The Birth of the Palestinian Refugee Problem Revisited* (2d ed.) (Cambridge: Cambridge University Press, 2004), Ilan Pappé, *The Ethnic Cleansing of Palestine* (Oxford: Oneworld, 2006)

<sup>424</sup> CESR – Center for Economic and Social Rights, "Thirsting for Justice: Israeli Violations of the Human Right to Water in the OPT" A Report to the 30th Session of the United Nations Committee on Economic, Social and Cultural Rights (2003), online: <http://www.cesr.org/sites/default/files/downloads/ThirstingforJustice.pdf>

<sup>425</sup> See Ehud Zion Waldoks, "New immigrant looks to make rainwater harvesting popular", *Jerusalem Post* (January 20 2010), online: <http://www.jpost.com/HealthAndSci-Tech/ScienceAndEnvironment/Article.aspx?id=166217>, where Waldoks writes on rainwater harvesting, "Acting under the Planning and Building Law, specifically the regulations governing sanitation devices, the first option is to stream the collected rainwater into the community's channeling system. However, if a private homeowner wants to use the water himself, the engineer would have to

Water access is ultimately tied to the state's water provider, Mekorot, who as a rule do not provide water to unrecognized communities.

As a matter of routine, accessing water is a sedimentation of negotiation practices, haggling, persuading, appealing to authorities and courts, and reminiscing. It is about monitoring gas prices and water prices to know how much comes out of the pocket that month for this basic resource. It is about constructing one's own identity in relation to the communications and interactions with other 'Arabs'. Memory is indelible to the mix. Pre-Nakba longings are recycled in the present and become one lens whereby inhabitants' ultimately unrepresentable time/space moments are forever differentially symbolised.<sup>426</sup> Such memory serves as persistent contest to state appropriations of memory, where the geography is told to be one of empty, barren and dry land. Memory appropriated in the service of nation building<sup>427</sup> denies that there existed a system for water provision and distribution prior to the arrival of the new settlers, and certainly not one centuries old, as far back as the time of the Nabateans.<sup>428</sup> Besides 'Atwa, there are five hundred others in the community. Each person experiences, as a matter of routine, problems of water flow, water pipes being sabotaged, negotiating with single family farm Jewish owners who live a kilometre away to draw water from their water points. Perceived space is in dialectic communication with the conceived, so that being planned as 'unrecognized' gives rise to routines, which themselves then effect how planners respond to these everyday spatial practices by raising prices, disconnecting or installing infrastructure, and petitioning courts for eviction and demolition orders.

How does 'Atwa perform the daily duty of work and work related travel? There is no public transport serving Palestinian communities in the Naqab.<sup>429</sup> This means that the vast majority of residents rely on private transportation or taxis. 'Atwa owns a four wheel drive, a handy vehicle for navigating the gravel roads. His work centers in Jerusalem, where he trades in used cars. This

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address that request, the ministry said. The Water Authority would also have to give its approval, since it is in charge of water quotas and rainwater collection systems, the Health Ministry said." And yet, rainwater collection is also banned in the OPT, though it seems highly unlikely that the interest is to promote residents' sanitation. See Amnesty International, *Israel/OPT – Troubled Waters - Palestinians denied fair access to water*, Index: MDE 15/027/2009 (2009)

<sup>426</sup> For further reading, see the anthology of essays on the interplay among memory, identity and the Nakba in Ahmad H. Sa'di and Lila Abu-Lughod (eds.), *Nakba: Palestine, 1948, and the Claims of Memory* (Columbia University Press, 2007)

<sup>427</sup> Edward Sa'id, "Invention, Memory, and Place" (2000) 26:2 *Critical Inquiry* 175-192

<sup>428</sup> Tom Perry, "Palestinians fear for ancient West Bank water source" *Reuters* (July 28 2011), online: <http://www.reuters.com/article/2011/07/28/us-palestinians-israel-cisterns-idUSTRE76R1HY20110728>

<sup>429</sup> The sole exception is public transport in the largest recognized development township, Rahat, instituted in 2009.

occupational choice is informed by the lack of industry in the Palestinian communities and the mostly low-paying, manual labour opportunities that are available to those from the community. He splits his time, and residence, between Jerusalem and Umm al-Hieran. When in Umm al-Hieran, how is it getting to and from work?

To get to Jerusalem, 'Atwa hops along a section of the 235-kilometre-long Route 60. Route 60 makes a clean slice down the length of the West Bank, from Wadi al-Khalil in the south, near the Jewish town of Meitar, to Jalameh in the north. Although it cuts through the West Bank, Palestinians are subject to regular checkpoint stops, while those not living in the vicinities or without a permit to be on that road, are barred from using it. Israelis, however, use it without restriction. Leaving Umm al-Hieran, 'Atwa travels up the snaky 316 until he reaches the Shani checkpoint. This permanently staffed crossing is named for the Israeli Jewish settlement that straddles the Green Line and falls under the Har Hebron Regional Council. Once inside the West Bank, he links with Route 60 which takes him all the way to Jerusalem. His return, however, is more eventful.

He usually faces two scenarios at the Shani checkpoint in his attempt to re-enter Israel. These two scenarios play out when those stationed at the checkpoint identify him as Palestinian. On the chance occasion that they do not identify him thus, he passes as if he were a Shani resident or Israeli Jew attempting to cross. The first scenario is that he and all those travelling with him are told to offload. Next, the men, including his young sons, are asked to raise their shirts to confirm they carry no weapons. The underside of his car is also dutifully inspected. Finally, after this security check, they are allowed passage. The second scenario is that he is denied entry and told instead to cross at the Meitar Green Line checkpoint. This rerouting takes him nearly four times as long to get to his home, which is only 9km from Shani, but 34km from Meitar.

This daily routine of travelling to work to and from Umm al-Hieran is embedded with race, class, and patriarchy signifiers, and demonstrates how the three interlock in this particular, daily spatial practice. As de Certeau informs us, space is the "intersection of mobile elements... actuated by the ensemble of movements deployed within it".<sup>430</sup> This quotidian, mobile journey also illustrates how space, as much as it is intimate, is inextricably linked to external spaces, and to the global, when we think of what Route 60 means materially to Palestinians and non-Palestinians (Israelis, foreigners) and symbolically, in terms of the reified, privileged form of Israeli mobility across Israel/Palestine

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<sup>430</sup> Michel de Certeau, *The Practice of Everyday Life*, 3d ed. (University of California Press, 2011) at 117

that this road represents. At the locus of the Meitar Green Line checkpoint, the global and intimate are similarly entwined. 'Atwa is told to reroute via this checkpoint in order to be subjected to the stricter security checks of individual scanners and biometric systems. However, how the authorities deal with someone like 'Atwa has changed over time. In the past, the crossing was notorious for giving Palestinian citizens of Israel a hard time entering Israel from the West Bank, particularly after a day of shopping in local markets.<sup>431</sup> Yet, in 2009, under international pressure to work out a two state solution, Prime Minister Netanyahu's offered instead the diversion of his 'economic peace' model, a short-term injection of life into the Palestinian economy enabled by easing restrictions on freedom of movement in the West Bank, including for Palestinian citizens visiting Palestinian towns in the OPT.<sup>432</sup>

We can also see how such spatialized practice makes individual and collective subjectivities. Here, 'Atwa is denied entry at the Shani checkpoint a few kilometres from his home because he is Palestinian. Yet, because he is Palestinian with Israeli citizenship, he is afforded greater mobility than that enjoyed by Palestinians without Israeli citizenship. This is what Parizot refers to as the different 'regimes of mobility'<sup>433</sup> instituted by the planners and technicians, subjecting OPT Palestinians, Palestinian citizens of Israel and Israeli Jews to different time regimes that increase fissures between each population, and for the Palestinian citizen, is a constant reminder of her marginality, or suspension, in Israeli society. There is more to say on the symbolism in the daily routine of work travel in its dialectic with conceived space, but I will save that for later in the discussion.

What we see is how the everyday acts of accessing water and travelling to work are imbued with social meaning and make this space. Yet, in determining who has access to this space, and who is to be excluded from it, neither the authorities nor the courts seem to take these very meaningful ingredients of space into account. For the authorities seeking their eviction, the residents, like all Bedouin in unrecognized villages are illegal trespassers. In a 2007 ILA press release on Umm al-Hieran, the cartograph is transliterated into text. The map, with its flattening of life and spatiality represents only the developed, ordered and gridded development town of Hura (though not to the

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<sup>431</sup> Cédric Parizot, "Temporalities and perceptions of the separation between Israelis and Palestinians" (2009) 20 *Bulletin du Centre de recherche français à Jérusalem*, online: <http://bcfrj.revues.org/6319> at 13

<sup>432</sup> Jonathan Cook, "Netanyahu's substitute for sovereignty", *The National* (July 15 2009), online: <http://www.jonathan-cook.net/2009-07-15/netanyahus-substitute-for-sovereignty/>

<sup>433</sup> Cédric Parizot, "Temporalities and perceptions of the separation between Israelis and Palestinians" (2009) 20 *Bulletin du Centre de recherche français à Jérusalem*, online: <http://bcfrj.revues.org/6319>

same degree as neighbouring Jewish town, Meitar) alongside a haphazard scattering of what seem illegal encampments off Road 316. This particular ILA text similarly presents a reality of the “ordered and modern city” contrasted alongside what we are told are its antipode – the disorganized and antiquated Bedouin encampments. Further, the press release is intended for the reader to be puzzled by why “health, education and welfare services” of the city would not be opted for by the Bedouin over settlements that “*have* [note how they do not use ‘are deliberately denied’] no direct connection to the water and electricity lines”. The reader would then answer the puzzle by concluding that the Bedouin are unreasonable and quite possibly greedy for insisting on higher compensation before agreeing to move. At the same time, the ILA publication tells the reader that the state provides millions of dollars to improve the living conditions of Bedouin, has made countless attempts at negotiations, has provided generous compensation and alternative land offers, and hopes for a day when Bedouin stop foot-dragging and take up the benevolent offer. Historical context is similarly missing in this representation. The story of the community begins when “the tribe received land from the state” and not when the tribe were forcibly displaced on multiple occasions from ancestral lands before finally conceding to the military order to settle in Atir-Umm al-Hieran.

As we saw the court do in *Abu Mdeghem*, the state represents the relationship between itself and the residents of Umm al-Hieran as being a dichotomous divide between order/disorder, legal/illegal and munificent/selfish. This superficial rendering of spatiality’s complexity and heterogeneity is buttressed by this case’s magistrate and district courts’ findings. For the courts, the Bedouin were granted temporary permission to stay, irrevocable at any time. Such logic is reminiscent to that of monarchical patriarchy, whereby property rights ultimately derived from kings, down the chain from God to Adam to Noah, and that if individuals held property rights this was only by the grace of the monarch who could withdraw them at will. Locke’s labour theory of property, discussed above in the context of a rationale underlying the doctrine of adverse possession, endorsed private property rights and was a seventeenth century challenge to the notion of property as founded on divine right.<sup>434</sup> Divine right meant that a king derives the right to rule directly from God, is not subject to any earthly authority, and is not accountable to the public. The logic of the court in Umm al-Hieran seems to suggest that were the community to have laid roots

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<sup>434</sup> Alison Clarke and Paul Kohler, *Property law: commentary and materials* (Cambridge: Cambridge University Press, 2005) at 82

and constructed space for another fifty years, their rights arising therein would just as easily have been denied.

### The Courts' Representation of Space

The courts conceive space in interpretation, adjudication and in setting the frames within which legal discourse must occur. This has been a matter of historical record and in contemporary court performance. Such representations are buttressed by the legislative branch, and as outlined above, by the executive. All of this contributes to how this space is represented and facilitates why both magistrate and district courts decided in the manner they did.

First, the law reinforces static, homogenous notions of space, whereby certain places are designated solely for Jews and others solely for Palestinians. In the *Bourkan* case discussed above, the judge affirmed the right of the authorities to discriminate against a Palestinian who sought to live in the Jewish Quarter in East Jerusalem, in order to maintain its Jewish character and have it be open to Jewish residents alone. Similarly, in *Avitan*,<sup>435</sup> the court upheld the administrative decision to allow only Bedouins to lease in Bedouin townships, as this was in line with the government policy of having Bedouin move out of their villages and into the towns. The Jewish policeman seeking to take advantage of the favourable leasing rates in the towns, and claiming discrimination against Jews in him being denied a lease, was unsuccessful in his petition. *Qa'adan*, cited above, was considered by many as a watershed moment in Israeli jurisprudence, a "big leap"<sup>436</sup> from the 'Jewish/Zionist' character to the 'democratic' one in the Jewish and democratic identity of the state. The court had affirmed that state bodies like the ILA are prohibited from discriminating against Arabs in the allocation of public land. Yet, many cautioned<sup>437</sup> how the state only *recommended*, as opposed to delivering a binding decision that would set precedent, that the ILA reconsider leasing to the Arab family in Jewish Katzir.<sup>438</sup> Further, both the exclusionary structure of 'selection committees'<sup>439</sup> and

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<sup>435</sup> *Avitan v. Israel Lands Authority*, HCJ 528/88, P.D. 43 (4) 297

<sup>436</sup> Alexandre (Sandy) Kedar, "A First Step in a Difficult and Sensitive Road: Preliminary Observations on *Qaadan v. Katzir*" (2000) *Israel Studies Bulletin* 3

<sup>437</sup> *Ibid.*, Ilan Saban, "Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel" (2004) 36 *New York University Journal of International Law and Politics* at 964, Ronen Shamir, "Legal Activism in a Bi-National Society: Israeli Palestinians and Jews at a Crossroad" (2000) *Adalah Newsletter*

<sup>438</sup> The bureaucratic hurdles to realizing the recommendation of the *Qa'adan* court are worth noting. It took the *Qa'adan* family a decade after the decision to finally move into their home in Katsir. See Jonathan Cook, "Arab family's home win blow to Israeli 'Jews only' policy", *The National* (December 15, 2010), online:

<http://www.thenational.ac/news/worldwide/middle-east/arab-familys-home-win-blow-to-israeli-jews-only-policy>

the historically determined exclusive zones of Arab and Jewish settlement remained intact. In fact, since the decision, the regulatory backing of the selection committees was strengthened by the legislature and given legal backing. On March 22 2011, the 'Admission Committees Law' was passed, legalizing the operation of selection committees in some 475 small community towns in the Naqab and Galilee. This historical justification of separate, homogenous zones of residence between Arabs and Jews makes almost 'natural' that both courts resolve to not examine why Umm al-Hieran's Palestinian residents were not included in the plan as future residents in the recognized and legalized village (Hiran) superimposed on their unrecognized and illegal one.

A second aspect of the court's material production of space is its interpretation of law that allows Palestinian land to be transferred to Jewish ownership but not vice versa. Various legal manoeuvres were concocted in the formative years of the state to enable this ordering of space.<sup>440</sup> In our case we see how the court's interpretation and application of Article 78 of the OLC, the adverse possession provision makes space in this manner. As described above, in the early years of the state, adverse possession doctrine was significantly modified to prevent Arab landholders from establishing title. With the *Shibli* decision of 1992, the slim possibility that title could be acquired via adverse possession was extinguished, as the judge determined that the "archaic and unsuitable" Article 78 of the OLC could not apply to Israeli state land. The stringent requirements of Article 78 are also used in one of the final bastions of land not under possession or ownership of Israel, *miri* land in the Occupied West Bank.

The *Elon Moreh* decision of 1979 meant that Israel was no longer permitted to build civilian settlements on private Palestinian land in the OPT (military settlements, however, remained permitted). It could only build civilian settlements on what was declared 'state land'.<sup>441</sup> The

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<sup>439</sup> In 80% of the land in Israel (and 89% of Jewish settlements in the Naqab) a three-party lease system exists. The three parties involved are the ILA as the public landowners' agent, the Jewish Agency, and the Jewish settlement as a legal cooperative with its 'selection committee'. In order to lease a plot of land in such a settlement, a person must be accepted as a member of that cooperative by its 'selection committee', which has the power of selection and veto over acceptance, and has been used to keep undesirables (read Arabs, LGBTI) out and maintain the settlement's homogenous character. See Alexandre (Sandy) Kedar, "A First Step in a Difficult and Sensitive Road: Preliminary Observations on *Qaadán v. Katzir*" (2000) *Israel Studies Bulletin* at 4, Hamdan, "Individual Settlement", *supra* note 302 at 1

<sup>440</sup> Jeremy Forman and Alexandre (Sandy) Kedar, (2004) "From Arab land to 'Israel Lands': the legal dispossession of the Palestinians displaced by Israel in the wake of 1948" 22 *Environment and Planning D: Society and Space* 80

<sup>441</sup> State land, according to the military issued 'Order Concerning Government Property 59-1967', is property that "belonged... to an enemy country" (the Kingdom of Jordan) or was registered in its name, on the "determining day (7 June 1967) or thereafter". See B'Tselem, *Under the Guise of Legality: Declarations on state land in the West Bank* (2012), online: [http://www.btselem.org/download/201203\\_under\\_the\\_guise\\_of\\_legality\\_eng.pdf](http://www.btselem.org/download/201203_under_the_guise_of_legality_eng.pdf) at 13. It is

government's response to this damper on the settlement enterprise was two-pronged. First, it had to show that *miri* land was not cultivated for ten years, or had ceased to be cultivated after this time. Demonstrating this would allow the Israeli government, under Article 78 of the OLC, to register the land as 'state land'. Then, once the land was declared state land, by virtue of 'Order Concerning Government Property 59-1967', a military order which like others serves as primary legislation in the OPT, the Custodian for Government and Abandoned Property in Judea and Samaria, an official of the ILA, is allowed to assume possession of 'state land' and "take any measures he deems necessary for that purpose". Most often the purpose is the construction of civilian Jewish settlements on occupied Palestinian land. Given that the requirements under Article 78 have been extremely hard to satisfy, and that Palestinians face restrictions on access to land and a discriminatory water policy in the OPT,<sup>442</sup> converting *miri* land to 'state land' has been a successful undertaking, allowing the government to realise its goal. In this manner, adopting the jurisprudence on adverse possession as it developed within the Green Line, the government, with the backing of the court, has converted massive amounts of *miri* Palestinian land to state land, and used it to house Jews.<sup>443</sup> It is interesting to note that settlers also encroach and cultivate on Palestinian land in order to acquire title via adverse possession.<sup>444</sup>

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worth noting that the government does in fact also build on private Palestinian land and settlers regularly encroach on private Palestinian land. The High Court has ruled for the demolition of such settler houses built on private Palestinian land in certain cases, for example regarding the Ulpana neighbourhood in the settlement of Bet El, north of Ramallah in September 2011. However, given the political backlash from settler constituents, such rulings are seldom implemented immediately, as in the Ulpana case, with a government request for an extension on the set demolition date, a request to reopen the case and conduct further hearings, and Prime Minister Netanyahu's own attempts to circumvent the demolition. See Barak Ravid, "Netanyahu working to prevent demolition of new outpost in West Bank", *Haaretz* (April 4, 2012), online: <http://www.haaretz.com/news/diplomacy-defense/netanyahu-working-to-prevent-demolition-of-new-outpost-in-west-bank-1.422570>, Yesh Din, "Illegal Construction in the Ulpana Neighborhood (Jabel Artis) – Background" (undated), online: <http://www.yesh-din.org/hotspotview.asp?postid=18>.

<sup>442</sup> Amnesty International, *Israel/OPT – Troubled Waters - Palestinians denied fair access to water* (2009) Index: MDE 15/027/2009 at 41

<sup>443</sup> According to the State Comptroller, on account of this legal manoeuvre, 'state land' increased to 1.44 million dunams in 1992, from 527,000 dunams in 1967 when the Occupation began. See State Comptroller, *Annual Report 56A* (2006) at 206.

<sup>444</sup> However, in March 2012, the High Court ruled against settler Michael Lessens who had taken possession of land belonging to the Palestinian village of Qadum and was claiming title under the doctrine of adverse possession. President Beinisch held that in order to establish such a right to title, the possessor would have to prove that he had not offended the rules of equity, such as illegal trespass. As the settler failed to demonstrate the same, and as he was unable to prove cultivation for ten years, the Court denied his claim and issued an absolute order to evacuate the land and return it to its Palestinian owners. The decision hints that in establishing a right to title via adverse possession doctrine, the new standard of proving that rules of equity were not violated will be applied, and this may make it harder for settlers to attain such title in the OPT in the future. See Yesh Din, "High Court of Justice orders eviction of settler from Kedumim who invaded private Palestinian land belonging to residents of the village of Qadum" (March 20 2012), online: <http://www.yesh-din.org/infoitem.asp?infocatid=188>, *Ahmad Abd-al-Qader v. Military Appeals Committee*, [2012] HCJ 5439/09. Yet, does the decision suggest a major bump in the road of Israeli

In early 2017, the legislature passed the ‘Law for the Regularization of Settlement in Judea and Samaria – 5777’ that ushered in a new era for how Israeli law deals with the expropriation of private Palestinian land. The new law retroactively expropriates the land on which settlements have been built from their rightful private Palestinian landholders. While it does not transfer ownership to the settlers, the new law paves the way to expropriate vast swathes of private Palestinian land in clear violation of the Geneva Conventions.<sup>445</sup>

It is this material making of space whereby lands under historical use by Palestinians are brought under Israeli possession and ownership in Israel/Palestine that makes it possible for the courts in Umm al-Hieran’s case to inadequately scrutinise whether there arise rights to prescription for the Palestinian residents, on what is *registered Israeli land*. Had either court attempted to answer whether or not long-term use and possession of the land gave rise to certain prescriptive rights, even though ultimate title would remain with the state, it would likely have come to a very different set of conclusions.

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expropriation of more Palestinian land? Not likely. As Deputy Prime Minister Dan Meridor elucidated, there is “an internal debate about where it is necessary to settle”. In the case of Qadum, there were those in government who were opposed to Lessens encroachment, and prior to the villagers filing their petition, the governmental Civil Administration (CA) had issued an eviction order against Lessens (though it was not executed since the CA’s Appeals Committee found in Lessens’ favour and recommended cancellation of the eviction order). While the overarching governmental strategy is to increase state possession and ownership of Palestinian land, political exigencies such as fear of international condemnation and isolation, as well as the need to appear democratic by upholding the right to private property and abiding by the landmark decision of *Elon Moreh*, demand that the government favour *strategic* settlement, meaning that which is authorised by a majority of the higher echelons in government. Wanton settlement, such as that of the individual outposts and emblematic of Lessens’ undertaking is seen as more expendable. See Geoffrey Aronson, “The Rule of Law vs The Rule by Law”, 22:3 *Foundation for Middle East Peace, Settlement Report*, (May-June 2012), online: <http://fmep.org/reports/archive/vol.-22/no.-3/the-rule-of-law-vs-the-rule-by-law>. In any case, appropriation of Palestinian land does not mostly take place under the aegis of individual settlers. A few months earlier, in December 2011, President Beinisch offered a very different sort of ruling in the case of stone quarries in the West Bank. She held that the prolonged occupation meant that Israeli quarries were entitled to operate in the West Bank, even though 94% of their produce makes its way to Israel. The ruling was in clear violation of the law on occupation, where, as the occupying power, Israel is obliged to manage the territory for the benefit of the local population. Rather, it strengthened the uni-directional schema whereby Palestinian natural resources are being depleted for the increasing benefit of the Israeli economy. *Yesh Din v. Commander of IDF Forces in Judea and Samaria*, [2011] HCJ 2164/09, Aeyal Gross, “Israel is exploiting the resources of the occupied West Bank”, *Ha’aretz* (December 28, 2011), online: <http://www.haaretz.com/print-edition/news/israel-is-exploiting-the-resources-of-the-occupied-west-bank-1.403988>, David Kretzmer, “The law of belligerent occupation in the Supreme Court of Israel” (2012) 94:885 *International Review of the Red Cross* 207 at 220-22.

<sup>445</sup> Adalah, “Knesset approves law that lets Israel expropriate vast tracts of private Palestinian land” (February 5 2017), online: <https://www.adalah.org/en/content/view/9021>, Allison Kaplan Sommer, “Explained: Israel’s New Palestinian Land-grab Law and Why it Matters” *Ha’aretz* (February 7 2017), online: <http://www.haaretz.com/israel-news/1.770102>

Although acquisition of title to state land cannot happen under adverse possession doctrine, the long-term use, settlement and possession for a period spanning 50 years, could in theory give rise to certain prescriptive rights, such as the right to a long-term lease. Such a justification can be found in the spirit of Article 78 of the OLC read alongside Article 94 of the Land Law<sup>446</sup>. Therefore, based on the *Shibli* decision, title would not be transferred from the state to local residents, but other accommodations, that do not interfere with ownership rights of the state and so do not seek to balance Article 78 with the Basic Law: Israel Lands, could be made. These could be made owing to the adverse possession doctrine justifications of attachment and personality theory and Lockean labour theory. Long-term use should give rise to an entitlement as the long-term possessor, by virtue of her extended use of the land has come to expect continued control of it,<sup>447</sup> and indeed as both Hegelian and spatial theory assert, as the land becomes part of her.

But more significantly, the *Al-Kilab* case<sup>448</sup> established that land from which a Bedouin community were displaced from in 1948 under military order should be seen as giving rights to land in that area to where they were transitioned. Local case law has also affirmed that certain prescriptive claim rights arise on account of long-term use and possession. In the *Shibli* court's decision (para. 13), the court held that although Article 159(b) of the Land Law 1969 excludes claims of a prescriptive right from applying to settled, immovable property under the Prescription Law 1958, procedural rights, such as a claim right that protects the long-term user against an eviction lawsuit could apply. Such procedural claim rights in lieu of prescriptive rights would accrue in Umm al-Hieran, as its land was registered in the name of the state in 1978,<sup>449</sup> meaning that in 2003 the twenty-five-year prescription period was satisfied. This fact is of enormous significance to the residents of Atir-Umm al-Hieran, as well as those in other unrecognized villages threatened by forced evictions under the Praver Plan, who have lived on settled, immovable property for over twenty-five years, and who can claim a right not to be evicted under the Prescription Law 1958.

A third aspect of the court's conception of space is that it sets the frames within which the issues can be discussed. The residents' interpretation of this particular ordering of legal narratives, an

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<sup>446</sup> Article 94 of the Land Law provides for prescriptive easement rights to both 'settled' and 'unsettled' land if a limitation period of thirty years has elapsed. However, the provision does not apply to public land by virtue of Article 113c.

<sup>447</sup> Margaret Jane Radin, "Time, Possession, and Alienation" (1986) 64 *Washington University Law Quarterly* 723 at 744

<sup>448</sup> *Al-Kilab v. Ben Gurion University*, CA 496/89, PD (4), 343, 351 (1991)

<sup>449</sup> See *The State of Israel v. Ibrahim Farhoud Abu al-Qi'an*, CC 3326/04, Protocol of February 25 2007

aspect of their 'lived space', means that the scope of remedies that they seek is correspondingly conditioned. I've flagged this point in the *Abu Mdeghem* case, whereby historical amnesia envelopes the issues of structural, quotidian violence and the contested legal status of Naqab land, so that the remedies sought, and attained, offer only limited respite.

This manifested in a ban being issued on crop destruction via aerial spraying with *Round-up* pesticide, but allowed, and even encouraged, that those same crops be destroyed by a tractor plough. This outcome was in keeping with the court not seeing crop destruction as a form of food insecurity and thereby structural violence, and not appreciating how the status of the land was contested, implying that this was not simply a case of a landowner asserting his right to evict squatters. The violent events of 1948 and law's own violence are simply foreclosed to the court's recollection and so, unsurprisingly, no attempt is made to raise them in the petition. In our case, the scope of the remedies sought is conditioned by similar frames set by the court, which also informs the tone of the Bedouin defendants. Elements of defence narration, however, need to be translatable to the court for fear that if they fail to catch the court's ears, the larger argument that the defence narration buttresses will be lost.<sup>450</sup> What this means is that in their attempt to appeal to the ethnocentric leanings of the court, Bedouin petitioners tend to replicate the racialized hierarchies on which they are founded. I will take this point up further in the following section on the residents' interpretation of conceived space. This will help clarify how their resistance via legal avenues, an element of their 'lived space' and a symbolic making of space, feeds into the materiality of legality, and is contoured as a result.

Yet, if courts reify homogenous, static notions of space, allow for land to be transferred from Palestinians to Israeli Jews but not vice versa and set strict frames for how the issues of land and rights arising therein can be discussed, is it fair to conclude that courts do not make intelligible Bedouin lifeways in a particular space, or would it be more accurate to conclude that courts deliberately refuse to make intelligible Bedouin lifeways?

#### Residents' Interpretation of Perceived and Conceived Space: Their 'Lived' Space

The spatiality of Umm al-Hieran symbolises a few things to Palestinians who interpret both its perceived and conceived space. It symbolises racialized and securitized space, where Bedouin bodies are marked by illegality. Elaborating on these symbolisms I believe will help facilitate our

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<sup>450</sup> *Supra* note 92

understanding of why the court decided in the manner they did. It also demonstrates the forms of agency and resistance performed as a matter of residents' 'lived space', and how in dialectic with space's materiality, a more nuanced sense of Umm al-Hieran's spatiality can be understood.

Unequal social relations in this space are enabled via the creation and deployment of racialized hierarchies, whereby the Arab and Jew are marked as essentially different. Being essentially different makes possible, and ethical, a differential exclusion whereby one group is less entitled than the other.

In adjudicating on the applicability of adverse possession and prescriptive easement, neither court adequately scrutinized its underlying principles to ask if they applied in the case. For example, applying Hegelian personality theory, the court could have asked if an emotional bond develops between the adverse possessor and the land. Does the passage of fifty-six years of use and possession of the land suffice to create an emotional bond? Is it fair to assume that the property has become part of the person on account of long-term use for these many decades? What harm is caused if the property is severed from the person? In fact, this final question was posed by the Bedouin respondents in their defense. In critiquing how the eviction lawsuits are injurious to the residents' human dignity, they emphasized the harm caused in severing the bond between the possessor and the land. To demonstrate this, they cited the Gaza beach case, where the Supreme Court stated, "Disengagement cuts the Israeli from his home, his surroundings, from his synagogue and the cemetery where his dead are buried".<sup>451</sup> Of course, the argument foregrounds a specifically Jewish personhood with its associated cultural and religious identifiers. The frames of discussion in the court accommodate the idea that personhood theory applies to Jewish persons, that is Jewish people build emotional bonds with the land. As such, this does not make a normative claim that Arabs do not build emotional bonds with land. Yet, is that not the implication when the court evades discussing its applicability in the present case?

Nor is Lockean labour theory considered.<sup>452</sup> Did the court acknowledge that the respondents performed labour on the land? It is a matter of public record that the ILA leased the community

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<sup>451</sup> *Ibrahim Farhoud Abu al-Qi'an v. The State of Israel*, [2011] Civil Appeal (CA) 1165/09 at para. 85, citing *Wechselbaum v. Minister of Defence*, [1993] HCJ 5688/92 IsrSC 47(2) 812, 827

<sup>452</sup> Locke's labour theory of property was concerned with the original acquisition of property rights and not with natural resources under some form of ownership at the time labour was performed on them. Nevertheless, the theory remains a cornerstone of property law as it determines whether the original acquisition was legitimate and

land for residence, agriculture and grazing. Was the construction of homes, planting of crops and grazing of livestock not considered examples of the resident mixing his labour with a state of nature to the point that it becomes part of his person? What about the great effort of residents in performing the daily routine of accessing water, whether acquiring water tanks or private water connections in the present or constructing water wells and reservoirs in the recent past? Were these not considered labour on the land? Or was this not the *right sort of labour* on the land? What of the laying down of paths and dirt roads to facilitate travel?

In its decision, the court does consider how the residents built homes. However, posing the question if those homes had investment 'value' deserving of compensation upon demolition, the court found in the negative.<sup>453</sup> Yet, the court failed to distinguish between two essentially different concepts of value, that of 'use' value and 'exchange' value.<sup>454</sup> 'Exchange' value refers to the value of a thing, usually money, for which property can be exchanged. This is what the court meant when referring to the investment value of the homes in Umm al-Hieran. 'Use' value, however, is subjective, and is based on human needs and the desires it fulfills. In our case home as property provides shelter, comfort, a sense of belonging and a locus for family life. Although the exchange value on the Israeli property market of a home in Umm al-Hieran would be relatively low given the use of substandard building materials and the lack of basic infrastructure in the community, its use value is far higher than its monetary worth and it is reasonable to assume that it would parallel with neighbouring Jewish homes, which equally serve the basic necessities of providing shelter, comfort and a locus for family life.

By not considering how Palestinian labour in Umm al-Hieran would give rise to certain property rights, or essentially that it is of no investment value, is to say that Palestinian labour is not *really labour*. Palestinian labour neither gives rise to entitlements nor does it have intrinsic value, as Lockean labour theory establishes. Indeed, this is what Adam Smith<sup>455</sup> recognized when he wrote that labour is the real measure of exchange value. What a man is able to purchase when he purchases a commodity is the labour of persons that contributed to the exchange value of the

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implications for holdings in the present. With regard to adverse possession, the scope of labour performed on the land by the adverse possessor is a determining factor as to whether she acquires right to the property or not.

<sup>453</sup> Para. 11, Magistrate Court decision, Para. 8, District Court decision

<sup>454</sup> Alison Clarke and Paul Kohler, *Property law: commentary and materials* (Cambridge: Cambridge University Press, 2005) at 53-54

<sup>455</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (London: Methuen & Co. Ltd., 1776)

commodity. By saying that homes in Umm al-Hieran have no exchange value is to say that the labour of persons in building such homes can be purchased without money, that is, their labour is effectively without worth.

Racialized space is also apparent in the different regimes of mobility that operate between Palestinians and Jews at the Shani checkpoint, as 'Atwa experiences as a matter of daily routine.

In fact, 'Atwa experiences the racialized milieu without having to be mobile. It only takes him a cursory glance from the village to experience the same. After visiting 'Atwa's home and family, and before I departed, he took me to a lookout in the village. From there, he pointed out the three single family Jewish settlements – Yehudah, Tsan Ya'tir and Shoham - that sprung up in the eighties, all a few kilometres from his village. Each is a several hundred dunam allotment, and is equipped with basic amenities via electricity and water lines that in some cases run for twenty kilometres from the mains. He laughs as he points out that the shortest distance from his village to the settlements is half a kilometre, entreating, "so hook us up to your connection". He turns sombre, however, as he tells how one of the settlements, Tsan Ya'tir, hosts a dog cemetery. "If someone's dog dies, they bury them here... each dog gets a headstone." That dead dogs have more right to this space than living Palestinians is a cruel irony not lost on him.

Racialized space is also symbolised in the notion of Arabs and Jews representing degeneracy/filth and respectability/sanitation, respectively. Such representations parallel with the Foucauldian premise by which a biopolitics<sup>456</sup> is performed to separate the wheat from the chaff, the desired from the undesirables among citizenry. This is represented by government documents such as that of the ILA's on Bedouin trespass addressed above, and in cartographic representations that represent the descending scale of order and respectability from the ordered Jewish town to the semi-ordered Palestinian township to the disorder of the Palestinian unrecognized village.

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<sup>456</sup> Foucault described 'biopower' as that which encompasses a series of practices controlling or exerting power over life by regulating it and creating disciplines around it. Biopower includes both disciplinary power and 'biopolitics'. As capital punishment came to be seen as challenging the purposes of governing, a biopower took its place so that in moving away from the ancient right to *take* life or *let* live there was a move towards *fostering* life or *disallowing* it to the point of death.

Umm al-Hieran also symbolises securitized space, space conceived so as to enable a low probability of damage to acquired values, to use David Baldwin's definition of security.<sup>457</sup> Securitized space goes hand in hand with racialized space, whereby certain bodies and geographic loci are identified and marked as prospective threats to the acquired values of a space. In our case, it functions to mark the Arab outlaw from the Jewish in-law, so to speak. Security was the basis for the institution of Jewish Hiran, informed the rationale behind and mode of governmentality in the construction of Atir-Umm al-Hieran subjects, and was my own take home message in conducting fieldwork there.

The institution of Hiran was grounded in security rationale. It coincided with the Prime Minister's Office deciding in 2002 to establish Jewish settlements in the Naqab and Galilee as a matter of "national necessity".<sup>458</sup> What was meant by national necessity? It meant assisting in Jewish population distribution towards the peripheries, preserving state lands and protecting borders.<sup>459</sup> Jewish settlement, particularly in the area of Wadi 'Atir, the locus of our case, was part of Sharon's nineties political programme to create a contiguous Jewish area as an offset to Palestinian populations on either side of the Green Line.<sup>460</sup> The PMO's 2012 programme is similarly informed by security considerations, and aims to establish between seven to ten new Jewish villages, among them Hiran, on a 180 square kilometre stretch of land along the Green Line, between Arad and Meitar. The Settlement Department at the World Zionist Organization is at the heart of this plan that will create an unbroken Jewish bloc from the West Bank settlement of Susia and across the Green Line to the Israeli town of Arad.<sup>461</sup> The materiality of security has been regularly relayed in the courts, for example in the *Abu Mdeghem* case, when Justice Arbel stressed the importance of land as a national asset and the various security considerations that go along with it, such as the government's duty to distribute the population and preserve land. In *Qa'adan*, the Jewish Agency argued that its purpose is to settle Jews all over the country, particularly in border areas and those

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<sup>457</sup> David A. Baldwin, "The concept of security" (1997) 23 *Review of International Studies* 5–26 at 13. For a thorough exploration of the theme of security and its appropriation as a 'fundamental principle' in Israeli adjudication, see the 'Wine Path Plan' chapter that follows this one.

<sup>458</sup> Hamdan, "Individual Settlement", *supra* note 302 at 2

<sup>459</sup> *Ibid.* at 2-3, Zafir Rinat, "Sharon is promoting establishment of 30 settlements in the Negev and Galilee," *Ha'aretz* (July 20, 2003), online: <http://www.haaretz.co.il/misc/1.896967> (Hebrew)

<sup>460</sup> Rinat, *Ibid.*

<sup>461</sup> Lia Tarachansky, "Israel's New West Bank", *The Real News Network* (February 28, 2012), online: [http://therealnews.com/t2/index.php?option=com\\_content&task=view&id=31&Itemid=74&jumival=8002](http://therealnews.com/t2/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=8002), Ranit Nahum-Halevy, "Judaization of the Negev at any Cost", *Ha'aretz* (January 9, 2012), online: <http://www.haaretz.com/print-edition/business/judaization-of-the-negev-at-any-cost-1.406251>, ACRI, "Petition for an Order Nisi: Summary of Arad Petition" (August 2012), online: [http://www.acri.org.il/en/wp-content/uploads/2012/08/Summary\\_of\\_Arad\\_Petition\\_-\\_English\\_2.pdf](http://www.acri.org.il/en/wp-content/uploads/2012/08/Summary_of_Arad_Petition_-_English_2.pdf)

with a sparse Jewish population.<sup>462</sup> Justice Barak did not find fault with these priorities and affirmed that executive bodies like the ILA administer land so as to prevent it from coming under the ownership of 'unwanted entities', to disperse the population, absorb immigrants and to implement security policies.<sup>463</sup> Security in these instances is both a material making of space and its symbolism. That is to say, security policies are buttressed by all branches of government, and in doing so, space more generally comes to symbolise securitized space, the marking of bodies, groups and loci as threats to the principal acquired value of Jewish primacy in Israel/Palestine space.

Second, security concerns of the state meant that all Arab Palestinians were under Military Administration rule for the first two decades following the state's foundation. In the case of the Abu al-Qi'an tribe, one means by which the government ensured better monitoring of their activities was to encourage them being brought under the patronage of Sheikh Salman Al-Huzayyel. Sheikh Al-Huzayyel was considered a 'good Arab',<sup>464</sup> meaning he regularly colluded with the authorities in helping them acquire Bedouin land and in enlisting members of the community into the military.<sup>465</sup> The government attempted to relocate certain members of the Abu al-Qi'an tribe and drew on Sheikh al-Huzayyel's assistance for the task. The government's aim was not "to expel them from their encampment" but "under the protection of the head of their tribe, Salman al-Huzayyel, to allow effective security monitoring of their activities."<sup>466</sup> As Sheikh al-Huzayyel himself admitted, Sheikhs became 'nawatir kumbania', or kibbutz field guards,<sup>467</sup> implying that their primary purpose was to directly manage the native population, while freeing the government from the task. Security concerns were the rationale for recruiting the Sheikh, while his monitoring for security breaches

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<sup>462</sup> *Qa 'adan v. Israel Lands Administration*, HCJ 6698/95, P.D. 54 (1) 258 at para. 10

<sup>463</sup> *Ibid.* at para. 19

<sup>464</sup> See Hillel Cohen, *Good Arabs: The Israeli Security Agencies and the Israeli Arabs, 1948-1967* (London, Berkley, Los Angeles: University of California Press, 2010) at 181-185 [Cohen, *Good Arabs*] for a description of collusion between the Sheikh and the Israeli authorities. However, Cohen, depending on certain archival documents where his name is wrongly noted, refers to him as 'Suleiman' instead of 'Salman'.

<sup>465</sup> *Ibid.* at 182. His 'goodness' was not lost on other characters in this study - such as Nuri al-Oqbi, whose family was allowed to return to their land in al-'Araqib and whose father was released from prison in 1954 after attempting to return to al-'Araqib following his expulsion three years prior, both on account of the Sheikh's intervention. See Chapter 1. To the Abu Freih family, also of al-'Araqib, it was Sheikh Al-Huzayyel's patronage that granted them permission by then Military Governor Avraham Shemesh to return to the land in 1958 and farm on it. See Rego 2012b. Others, however, claim that he undertook fraudulent land sales in exchange for Israeli lira, the national currency until 1980. Interview with Ibrahim Hussein Abu Al-Tayyif (Rahat), December 7 2011. The interviewee claims Sheikh al-Huzayyel sold his family's land to the state in 1980, two years before passing away. Sheikh al-Huzayyel later swore under oath that it was not he who made the land sale.

<sup>466</sup> Israeli State Archives Document no. 149/4/1905 (August 28 1957), Adalah, *Nomads Against Their Will*, *supra* note 127 at 13

<sup>467</sup> Here Al-Huzayyel is referring to sheikhs granted their position by the Israeli state, which after 1948 made and unmade sheikhs, cited in Cohen, *Good Arabs*, *supra* note 464 at 183.

was the particular mode by which this village chieftain was woven into this particular project of governmentality.

When I first travelled to the Wadi Atir area, I found it hard to imagine how the JNF could sell it as being a place for 'recreational tourism fashioned with scenic hiking trails'.<sup>468</sup> There seemed something artificial to the claim, much like the forest in which it was housed, Yatir, a 30,000 dunam expanse of man-made forest, home to the seemingly innocuous pine.

I had arranged a meeting with the local residents of 'Atir to hear from them about the looming demolition and eviction orders. As I zigzagged down the serpentine Route 316, I noted how on either side of the narrow gravel road concrete slabs told me that I was charting down the middle of a military firing range.<sup>469</sup> The road's sudden bends made me feel as if I was now part of the military exercise. As I proceeded, the martial milieu became all the more apparent as helicopter rotors whirred overhead.

As if appearing out of nowhere, I caught a white Toyota Hilux in my rearview mirror. The driver sounded his horn, signaling for me to pull over. I misread the signal, and instead sped up.

The pick-up swerved to the left, pulled up in parallel to me, and this time the driver signaled with his finger for me to pull over. I did.

"Assalmu 'alaykum", I greeted them in Arabic, assuming they were most likely from the al-Farhoud family, had been expecting me, and now that they had caught up to me, wanted to guide me to the community.

"Boker tov" ['good day' in Hebrew], they responded.

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<sup>468</sup> JNF, "Yatir Forest", online: <http://www.kkl.org.il/eng/tourism-and-recreation/forests-and-parks/yatir-forest.aspx>

<sup>469</sup> The extent of land in Israel under army control is considerable. Army firing ranges alone span a third of the land inside the Green Line in Israel. In fact, the IDF controls 39% of land (8.7 million dunams) inside the Green Line, while an additional 40% of land (8.8 million dunams) is under building restrictions because of military considerations. 84% of the land held by the army is in southern Israel, in the Negev. See State Comptroller, "Annual Report 2010", Report No 61 (March 29, 2011), online: <http://www.mevaker.gov.il/serve/contentTree.asp?bookid=594&id=193&contentid=&parentcid=undefined&sw=1366&hw=698> at 39-118, Anshel Pfeffer and Yossi Melman, "State Comptroller: IDF controls 39% of Israel's land within the Green Line", *Ha'aretz* (March 29, 2011), online: <http://www.haaretz.com/news/national/state-comptroller-idf-controls-39-of-israel-s-land-within-the-green-line-1.352642>

I was obviously using the wrong vernacular. So I switched to English. My experience has taught me that for a non-Hebrew speaker addressing a Hebrew speaker, speaking Arabic is generally ill-advised for at least two reasons. First, that it is not understood by the other and second, because it is likely off-putting.<sup>470</sup>

They asked where I was going.

“Yatir”, I responded, referring to the recently constructed Jewish town that shares its name with the older Arab ‘Atir, though I was not certain that the Jewish town had yet been populated.

As I slowly gathered my thoughts, I made out that my interrogators were Israeli, attached to some security apparatus, and operating clandestinely in the area. Increasingly I became aware of the irony that I was in a mobile interrogation meant to ensure my immobility. I felt like a blip on the radar that tells the monitors something is out of place.

“Where are you coming from?”

This is a question I often receive when flying out of Ben-Gurion airport. Its purpose is to determine if the person is an Arab or a Jew without directly posing the question. The answer is easily garnered owing to the essentially homogenous make-up of the two populations’ localities.

“Ben-Gurion University”

Obviously, my answer sidestepped the question’s purpose. Still, it was a half-truth as I spend a significant amount of time conducting research there.

Eventually, they gestured with a nod to signal the interrogation had concluded. As they did not have cause to detain me further, they relented and u-turned, and as when they appeared, they disappeared into thin air.

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<sup>470</sup> A poll conducted by Geocartographica revealed that a majority of Israeli Jews are put off by Arabic speakers. Around 50% feel either fear or ‘discomfort’, and 18% feel hate. See Jack Khoury and Eli Ashkenazi, “Poll: 68% of Jews would refuse to live in same building as an Arab”, *Ha’aretz* (March 22, 2006), online: <http://www.haaretz.com/news/poll-68-of-jews-would-refuse-to-live-in-same-building-as-an-arab-1.183429>

I continued cautiously. In this securitized space, I was identified as a threat of sorts that needed to be immobilized and determined. The experience reminded me of Derrida's characterization of policing as phantom-like in the aim of maintaining the social order.<sup>471</sup> Although my interrogators were army or police, they did not identify themselves as such and drove a car with a civilian license plate. They were the ungraspable, faceless form that appeared out of nowhere, yet seemingly always watching; a threat of violence always looming.

Spatiality also symbolizes the marking of Bedouin bodies as illegal. As myths about their nomadism circulate in the courts, representing lack of fixity and uncertainty, the law is presented as its counterpoint – the stable and the certain. Bedouin bodies are represented as personifications of nomadism, a lifestyle pattern that transgresses modern, legal norms. Both nomadism and Bedouin bodies, then, are that which the law attempts to correct by fitting into recognized, legalized patterns of living and being.

Illegal settlement was the basis on which the state requested the residents' eviction. The principal argument on which the lawsuits rested was that the residents were illegal trespassers. The Bedouin respondents presented to the court official proofs that the Bedouin were not illegal trespassers; rather, they were authorised to settle in the Wadi Atir area after having been granted permission by the authorities to do so. One such proof was the 1957 letter from the Office of the Adviser on Arab Affairs, an office attached to the PMO, which confirmed that the Military Governor exerted pressure on the community to live there, that lands were subsequently leased to them, and that they were cultivating on it. "Following pressure by the Military Government and after the arrest of many members of the tribe for various criminal offences, about two-thirds of them, led by Azam Jaber Abu Raj'an, agreed to relocate to the area of Atir. They received state land under lease, in accordance with the regulations of the Ministry of Agriculture, and they are cultivating it".<sup>472</sup> Accordingly, the Magistrate court determined that there was no basis for the state's claim that the Bedouin were illegal trespassers, and even chastised the authorities for being factually inaccurate on the matter.

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<sup>471</sup> Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'", in Drucilla Cornell and Michael Rosenfeld (eds.), *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) 3-67 at 44-45

<sup>472</sup> Israeli State Archives Document no. 149/4/1905 (August 28 1957), Adalah, *Nomads Against Their Will*, *supra* note 127 at 12-13

However, in the concurrent case of *Abu Musa'ed*,<sup>473</sup> relating to Umm al-Hieran and other Bedouin villages, and concerned with water provision, district-level judges referred to the Umm al-Hieran community as trespassers and illegal squatters in their decision.<sup>474</sup> The *Abu Musa'ed* decision was on June 5 2011, more than three months after our case's District Court decision of February 28 2011. How is it that one court refers to the community as illegal trespassers while months earlier another court chastised the government for claiming as much? In *Abu Musa'ed*, the court's decision rests on the "element of illegal settlement" which is rendered a relevant consideration that should be taken into account when considering whether another water point should be created.<sup>475</sup> In fact, great emphasis is placed on illegality, where 'illegal settlement' is referred to forty-four times in the twenty-three page decision.<sup>476</sup> If indeed for the *Abu Musa'ed* court the legality of the settlement is a 'relevant consideration', why is it inadequately scrutinized?

It appears that there are two possible explanations. First, the court, as a matter of routine, lumps all unrecognized Bedouin communities under the banner of the illegal. Another way of framing it is that unless there is explicit recognition granted to a Bedouin community, such as those in government constructed development townships, Bedouin bodies and their settlements are by default illegal. This remains the convention unless explicit, official evidence exculpates Bedouin bodies from that illegality, as official documents did concerning Umm al-Hieran for the case at issue. Second, the court, as upholder of the image of law as society's moral compass, cannot but chastise that which has been publicly exposed to be false. The lawsuits case, unlike the water provision case, concerned only Umm al-Hieran, meaning the question of its legality was given the opportunity to be duly considered. Second, the central question the court sought to answer in the lawsuits case was whether the residents had acquired certain prescriptive rights to the land that should prevent their eviction, for example the right to adverse possession, which would theoretically arise had settlement been hostile, and not authorised. In the *Abu Musa'ed* water provision case, the illegality of the settlements was a 'relevant consideration', but certainly not the principal question the court sought to answer. The principal question was "to what extent Bedouins living in various illegal places of settlement in the Negev have a legal right to demand that the State install private

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<sup>473</sup> *Abu Musa'ed v. Water Commissioner*, CA 9535/06. The judges in this case were Justices A. Procaccia, E. Arbel and Y. Alon.

<sup>474</sup> *Ibid.* at para. 1, 48.

<sup>475</sup> *Ibid.* at para. 42.

<sup>476</sup> See Sharmila L. Murthy, Mark K. Williams and Elisha Baskin, "The Human Right to Water in Israel: A Case Study of the Unrecognized Bedouin Villages in the Negev", Working Paper (January 10, 2011) for an extended discussion of this case

connection points to water in their illegal places of accommodation.”<sup>477</sup> The principal question in *Abu Musa’ed* takes for granted the illegality of Bedouin settlement; whether or not the community is legal is not up for discussion. It is this particular encompassing of Bedouin in shifting legality/illegality frames that I wish to take up at the end of this chapter.

Residents’ lived space is also about the forms of resistance deployed against space’s materiality. Symbolism is both the linking of signifiers to space’s materiality, whereby Umm al-Hieran signifies racialized, securitized space where Bedouin bodies carry the mark of illegality, as it does encompass the spheres of residents’ imaginations that attempt to alter space. In Umm al-Hieran, I’ve identified three particular forms of resistance, though certainly the list is inexhaustible. As space is always a becoming, so are the resistances of ‘lived space’, meaning they can never be fully represented. Residents resist via outreach to the public sphere by engaging journalists and researchers so that they can tell their stories, via performing ‘checkpoint cheek’, or confronting racism when they encounter it, and finally, by using the forum that is the launching point for our study, the court.

I encountered some difficulty in arranging meetings with local residents. I put this down to the sensitive nature of looming evictions of the entire community, residents’ busy schedules, and an understandable wariness about people unfamiliar. Nevertheless, there were those who were eager to meet with me, both as a researcher and as someone who would be writing in the press about their issue. For those that met with me, it was clear that they were attempting to get their side of the story out. They sought to show the disjuncture between the state’s claim to be democratic, and their experience. They were motivated by a longing to show how space for them was not at all as it was conceived by the planners or courts, but how it was subjective, multiple, continuous, and productive. After meeting with local residents, I was able to communicate to the public the issue of disparate provisions of water and electricity between Arabs and Jews, the similarities between Umm al-Hieran and Palestinian villages only kilometres away in the OPT, and the racism encountered in residents’ daily travel, in spite of carrying the privilege of Israeli citizenship.<sup>478</sup> Residents have similarly invited other journalists and researchers, who have conducted field tours

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<sup>477</sup> *Abu Musa’ed v. Water Commissioner*, CA 9535/06 at para. 1

<sup>478</sup> Nasser Rego, “Checkpoint Cheek”, *Al-Akhbar* (May 31, 2012), online: <https://english.al-akhbar.com/content/checkpoint-cheek-confronting-israel%E2%80%99s-green-line-racism>

and fact-finding missions in the community, produced video reports, and written news and analytic pieces for the print and online press.

A second form of resistance is confronting the racial experience. When discussing particular daily routines in the production of space, I gave the example of 'Atwa's travel to and from the community. I wrote of how he is racialized at the Shani checkpoint on account of being Palestinian, either made to reroute or subjected to a bodily search. However, on one occasion, 'Atwa chose to confront that racism in my company.<sup>479</sup> After presenting his Israeli ID, from which the checkpoint stationed soldier could tell he was an Arab with Israeli citizenship, he is told that he "needs a permit" to pass through the checkpoint, even though he is crossing into Israel and is an Israeli citizen. The soldier clarifies that only residents of Shani drive by here, though 'Atwa knows this to be untrue. 'Atwa has passed through the checkpoint on the chance occasion that the soldier manning the checkpoint at that moment fails to identify him as a non-Jew.

Looking the soldier in the eye, 'Atwa retorts, "Do you get what is happening here? I brought this doctoral student [me] to show the discrimination between Bedouin and the residents of Shani".

The soldier's embarrassment is obvious, and in his defence, he states "But there is a possibility for a few...".

"...I know there is a possibility for a few to pass [referring to those who 'work with' the government]. But I brought him especially so he can see the face of things. What kind of thing is this? Israelis should be Israelis".

Still blushing, the soldier insists, "I know, but it has nothing to do with me personally".

The soldier is not incorrect. The racial/securitized logic of the checkpoint cannot be a personal decision. Rather, it needs to be, and indeed is, systematic and structural.

By confronting the racism he encounters, 'Atwa metaphorically dissolves, or defoliates, the Green Line, allowing for the differentiated spaces, and differentiated subjects, across the Green Line to be exposed for their commonality. The take home message for the soldier, then, is that a racial logic is

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<sup>479</sup> *Ibid.*

operative at this checkpoint for which he is being taken to task. Further, the racial logic in operation at the checkpoint challenges official myths of citizenship privilege, since 'Atwa's lived experience, Israeli citizen or not, is a racialized one, similar to those of occupied Palestinian subjects of the OPT.

Although 'Atwa held no illusions about the legal process, he, like other Palestinian Bedouins in this study, has chosen to use it. Isolated remedies are possible and individual victories have been won, as evidenced in *Qa'adan*. Nevertheless, to go back to a point raised earlier, in the court's conceptual production of space, the frames of discussion are predetermined. What this means is that legal resistance is necessarily enunciated within the contours of those frames, thereby replicating the racialized hierarchies on which the law is founded. For example, we see how the petitioners foreground specifically Jewish religious and cultural identifiers by citing the Gaza beach case. It therefore affirms that Hegelian personhood theory applies to Jewish persons, that is they form emotional bonds to the land, a parallel the court does not make vis-à-vis the Palestinian petitioners themselves. Further, we are told that the moral issues that arise out of Jewish settlement in Occupied Gaza begin when that settlement is undone, and not before. From this we can infer another aspect of the court's production of space, that in Gaza, as in Hiran, Jewish persons have a form of natural right to settle in the place of Palestinians whether it be those Gazans from Gaza or Palestinian Bedouin from Umm al-Hieran. The Bedouin respondents subscribe to previous legal recommendations concerning Naqab Bedouin. Specifically, they cite Justice Arbel in the *Abu Mdeghem* decision when she calls for a prompt, comprehensive solution to the Bedouin issue and Bedouins' integration into Israeli society.<sup>480</sup> Similarly, they appeal to the spirit of the Goldberg Commission's recommendations, including a line that critiques Bedouin illegal expansion.<sup>481</sup> The endorsement of these official government positions on the Bedouin – the need for their integration and the critique of their illegality – elides the racialized logic of governmentality on which they hinge.

The Bedouin respondents would do well to investigate further the court's endorsement of Bedouin integration. Doing so, one conclusion they could reach is that integration would mean granting recognition of Bedouin as authentic 'others', a fixed, static community with its isolated living environs, with little say in the ability to question this representation and to influence it for different, for example, by enforcing their right to the city. Integration could be interpreted then as a means to

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<sup>480</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 90

<sup>481</sup> *Ibid.* at para. 91

facilitate Naqab Palestinians' envelopment into the fold of liberal citizenship in a Jewish state where they are indefinitely differentially excluded. Second, the appeal to the Goldberg Committee's recommendations undermines very real concerns of the Bedouin community, many of whom have been unequivocal in their critique of the Committee's findings and recommendations for their inability to acknowledge historical rights to the land, to address decades of injustice and in their leaving open the possibility of forced relocation of tens of thousands of Bedouin.<sup>482</sup> Nevertheless, this phenomenon of arguing in the language of the court can hardly be said to be particular to this case. It would apply to any party petitioning the court, where the court's underlying assumptions and elements of fact and precedence are starting points for the legal discussion.

Why do I mention these challenges to legal resistance? We see here how resistance is in dialectic communication with the law. This dialectic communication I've explored earlier in the Introduction's discussion on recognition and the Hegelian master-slave dialectic which pivots on the concept of sublation or *aufheben*. In our present case, resistance is the contradiction to the law, yet the law overcomes it by setting the frames of discussion, by foreclosing certain themes, by constructing subjects and conceiving space in two-dimensional form. Nevertheless, the germ of the contradiction remains within the law, that is to say, although resistance is overcome, it is also preserved because it is written into the resolution, which brings law to a higher level that contains within it the tension of resistance. What does this mean in practical terms? We can identify the implications of resistance within the law in philosopher Etienne Balibar's ideas on 'political heteronomy'.<sup>483</sup> Balibar asserts that politics necessarily exists with its contradictions. That is, politics creates the space for counter-narratives to exist. Yet, these counter-narratives are overcome and preserved, which is to say sublated, within politics. Therefore, to affirm that legal resistance can exist and can be deployed is an affirmation of political heteronomy, the space given to resistance, the possibilities of political emancipation. Yet, this also means that resistance does not fully undermine the political system, but could also be seen to justify it because it seemingly allows for difference, which thereby allows the political system to persist. In arguing against political heteronomy, Balibar underlines how the system needs counter-hegemonic agency to sustain its hegemony, that is, the system exists because of itself and its contradiction.

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<sup>482</sup> See for example the response of The Regional Council for the Unrecognized Villages (RCUV) (2008), the largest popular, grassroots Bedouin NGO in Israel.

<sup>483</sup> Etienne Balibar, *Politics and the Other Scene* (trans. Christine Jones, James Swenson and Chris Turner) (London: Verso, 2012)

## Taking Stock

In their appeal to the district court to overturn the lower court's decision to issue the eviction lawsuits, the Bedouin petitioners argued that the state's decision did not meet the limitations clause test to justify multiple constitutional violations to the human rights to dignity, equality and property.<sup>484</sup> Further, they held that the eviction was not based on legislation, but on an administrative decision<sup>485</sup> and failed to demonstrate a compelling public interest to justify eviction, as prescribed for in case law.<sup>486</sup>

As in past land cases involving Naqab Palestinians, and as we showed specifically in Nuri's land claims case, the imposition on them<sup>487</sup> of the burden of proof and stringent evidentiary rules make it a nearly insurmountable task to establish land claims, given the discounting of oral evidence, tent encampments not seen as 'settlements' and a pastoral lifestyle not seen as productive use of the land. The courts also apply unreasonable time barriers, inappropriately apply the Ottoman Land Code to the semi-nomadic pastoral lifestyle of Naqab Palestinians, and display a lack of respect for indigenous customary land law.<sup>488</sup> In land claims cases, the burden of proof has been placed on Palestinians to demonstrate that the land they claim is not of the *mawat* category, and owing to the above mentioned rules of procedure and evidence, have greatly facilitated and offered legal justification for state expropriation of land.

In our present case, the magistrate court placed the burden of proof on the respondents as opposed to on the appellants, on whom it would usually fall under the rules of civil procedure. This is because in the court's evaluation the state has established the threshold by establishing its claim as

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<sup>484</sup> For a violation of human rights to be lawful, the limitation clause of Section 8 of the *Basic Law: Human Dignity and Liberty* sets out four conditions that need to be satisfied: that there is authority in statute for the violation, that the violation befits the values of the state; that the violating norm has a proper purpose; and that the violation is not excessive (the fourth condition being the proportionality test).

<sup>485</sup> Petition in *Ibrahim Farhoud Abu al-Qi'an v. The State of Israel*, [2011] Civil Appeal (CA) 1165/09 at para. 55

<sup>486</sup> *Ibid.* at para. 6

<sup>487</sup> Others have argued that similar impositions of burden of proof were placed on Jewish landholders whose land was sought to be expropriated by the state. See Yifat Holzman-Gazit, *Land Expropriation in Israel: Law, Culture, and Society* (Hampshire, England: Ashgate Publishing Limited, 2007)

<sup>488</sup> See the *Abu Mdeghem* chapter and the discussion of the legal decision in Nuri's land claims case. Kedar, "Legal Transformation of Ethnic Geography", *supra* note 60 at 953-964, Shamir, "Suspended in Space", *supra* note 58, Meir, "State and Pastoral Spatiality", *supra* note 59; Ahmad Amara, "The Al-Oqbi Judgment and the Court Testimony of Prof. Ruth Kark" *Hagada Hasmalit (The Left Bank)* (April 16, 2012) (Hebrew); Yiftachel, Kedar, Amara, "Dead Negev Ruling", *supra* note 74; for more on Bedouin customary land law see Noa Kram, "The Negev Bedouins: Struggles for Land Rights and Cultural Survival in Israel" (Beersheba: Robert H. Arnow Center for Bedouin Studies and Development at Ben-Gurion University, 2010).

fact that it is the owner of the land.<sup>489</sup> The *Qa'adan* decision seemed to establish that was a government action to result in differential treatment on an ethno-national basis, then that action would be 'suspect' and *prima facie* discriminatory. Accordingly, the burden of proof would then fall on the state to show justification for the action. However, neither court in our case saw the eviction as being discriminatory.

In their concluding arguments to the magistrate court, the petitioners pointed out how this particular government eviction attempt was reminiscent of racial segregation in the pass laws and racial zoning laws of the antediluvian regimes of apartheid South Africa<sup>490</sup> and early twentieth century USA,<sup>491</sup> respectively. The lawsuits were issued within the framework of the 2002 amendment to the Southern District Master Plan to construct the Jewish settlement of Hiran in the same space where Palestinians resided. Both courts offer the government rather generous leeway in not interpreting the aim to replace one particular ethnic group, Palestinians who had been present since 1956, with another, Jews who would be newly settled in their place, as discriminatory.

Strangely, both magistrate and district courts chose not to address the differential treatment by the executive and both confirmed that neither was the appropriate forum to deliberate the constitutional issues raised. However, district court judges have the authority to rule on administrative law issues when a party is harmed by public officials and in fact are legally obliged to do so.<sup>492</sup> So why did they refuse to do so?

### Inside/Outside Law

At this juncture, I would like to segue into the inside/outside subjective relation to law, the location of individuals inside the law when they perform as legal subjects and their conceptualisation as outside the law when they are marked as illegal. Earlier, I drew in Ronen Shamir's insight into Naqab Bedouin as being suspended in space, that is, being conceptualized as fixed, static, floating subjects in a space of contemporaneous plurality. Their nomadism, their floating in limbo between

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<sup>489</sup> *The State of Israel v. Ibrahim Farhoud Abu al-Qi'an*, CC 3326/04 [2009] at para. 10

<sup>490</sup> Concluding Arguments, Petition in *Ibrahim Farhoud Abu al-Qi'an v. The State of Israel*, [2011] Civil Appeal (CA) 1165/09 at para. 199

<sup>491</sup> *Ibid.* at para. 200

<sup>492</sup> See for example Navot, *Constitutional Law*, *supra* note 351 at 143. In an interview conducted with Suhad Bishara, Adalah's attorney on September 22 2011 she confirmed that it is within the jurisdiction of the District Court to decide on constitutional matters.

traditionalism and modernity, and their deferred accounting into cartographic schema are all court representations that sustain suspension in that sense. Yet, I think there is a more significant suspension outside of that sustained by legal discourse or in the cartographic sense. I am referring here to the citizen subject's inside/outside relation to law and the implications thereof.

In *Homo Sacer*, philosopher Giorgio Agamben explores the ontology of sovereignty, and one of his key questions asks, what is the originary political element on which sovereignty is founded?<sup>493</sup> Looking at ancient Rome, monarchies and present-day states, Agamben demonstrates that being sovereign is deciding who is part of the political body and not. In doing so, the sovereign both produces biopolitical subjects, a theme explored extensively by Foucault,<sup>494</sup> and it excludes others from endowment with political recognition, say as legal subject or citizen or moral person. It is this exclusion or exception, the 'ban' whereby one is abandoned by the law, that Agamben identifies as the originary political element on which sovereignty is founded.

The exception is possible as sovereignty distinguishes between two forms of life, the Greek *zoe*, meaning bare life or simple life with no political signifiers, and *bios*, or politically significant life. Located, then, in the intermediate between these two forms of life is *homo sacer*. This was the term used to refer to the man in ancient Rome that was both 'sacred' and 'taboo',<sup>495</sup> who could not be sacrificed to the gods because his life was of no value and yet could be killed by anyone with impunity. The Romans understood the affinity between this unconditional authority of the sovereign and that of the father as encompassed by the law of *vitae necisque potestas* that gave unconditional authority of the father over his sons, including the right to take his son's life.<sup>496</sup> *Homo sacer* then is one who is included within the law, but defined therein as one who is excluded. The unsanctionable violence that he is exposed to, which is neither homicide nor sacrifice, demonstrates his double exclusion from human and divine law. This of course is the mirror image of the sovereign, who is legal within the law and executes and regulates it, and at the same time is external to it, by being able to declare a state of emergency or exception whereby its actions fall

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<sup>493</sup> Giorgio Agamben *Homo Sacer: Sovereign Power and Bare Life* (trans. Daniel Heller-Roazen) (Stanford: Stanford University Press, 1998) [Agamben, *Homo Sacer*]

<sup>494</sup> See *supra* note 456 for the Foucauldian distinction between biopower and biopolitics

<sup>495</sup> The ambivalence of the word 'sacer' or sacred is explained by Agamben drawing on various theorists, among them Emile Durkheim who writes that the religious also inspires horror, while fear of some malignancy also denotes a sort of respect; therefore, the sacred is both the auspicious and inauspicious. See Agamben, *Homo Sacer*, *supra* note 493 at 77-80.

<sup>496</sup> *Ibid.* at 88-89

outside the scope of legal scrutiny. The sovereign decision then is “one that suspends law in the state of exception and thus implicates bare life within it”.<sup>497</sup>

Agamben asserts that the ability to declare someone *homo sacer* is a fundamental aspect of sovereignty, and embodied in the logic of modern states. We can see as much from Guantanamo Bay detainees designated unlawful combatants and Abu Ghraib prisoners subject to military abuse who are located in physical zones where the law does not apply, and so the fundamental protections offered by it such as habeas corpus are not available to these *homines sacri*. When the state of exception becomes the rule, the space of the camp is opened.<sup>498</sup> Agamben sees the camp, and not the city, as the fundamental biopolitical paradigm of the West,<sup>499</sup> where all inhabitants are potentially *homo sacer*.

The figure of *homo sacer* is a disquieting mirror of Naqab Palestinians. I do not take this to mean that Naqab Palestinians are exposed to death more than other subjects of the state, but that the particular inclusion/exclusion logic of the state as it applies to them, whereby they are encompassed within the law only to be defined as essentially illegal, is what raises alarm. The logic of the sovereign ban or exception suspends legal protection from being displaced, from accessing water and from being exposed to other forms of structural violence, thereby rendering Naqab Palestinians particularly vulnerable and their lives more acutely precarious. Being *homo sacer* and not possessing politically significant life also enables the courts to ignore scrutinizing how Hegelian personality theory or Lockean labour theory would apply to the community, as such concepts are only relevant to those considered moral persons or political subjects. The community’s suspension in the zone between bare life and politically significant life takes practical form in the shifting significance of their citizenship.

Although accorded formal citizenship, the spectrum of protections offered citizens seems to be suspended in their case. There exists historical precedence for this. First, Naqab Palestinians in Israel were late in acquiring citizenship compared to other Palestinian citizens of Israel. Accordingly, being recognized as politically significant actors with the associated protections only happened in the 1950s, when they were accorded citizenship and the state abandoned the idea of

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<sup>497</sup> *Ibid.* at 83

<sup>498</sup> *Ibid.* at 169

<sup>499</sup> *Ibid.* at 181

forcibly expelling them outside the new sovereign borders of Israel. During the two decades of Military Administration rule, fundamental human rights were suspended, indicating a sort of expulsion from the political community. More recently, we see the suspension of the fundamental right of citizen enfranchisement as elections to the Abu Basma Regional Council in the Naqab have been postponed by the authorities. The Abu Basma Regional Council was founded in 2003 and encompasses 13 Bedouin villages that have recently received recognition. However, the twenty-five thousand Palestinian residents have been denied the right to vote in local council elections by the Interior Ministry on multiple occasions. In 2012, the postponement of elections was enabled by splitting the Abu Basma regional council into two separate councils, Neve Midbar and al-Qasoum. At the time of writing, no elections have been held, though they have been promised in 2017.<sup>500</sup> The authorities partly justified the postponement of elections on account that the Bedouin residents are inexperienced and traditional.<sup>501</sup>

To return to the question posed at the start of this chapter, in the Umm al-Hieran evictions lawsuit case, why were the legal issues decided in the manner they were? Why did the courts refuse to appreciate Bedouin lifeways as they were lived in that space? Why did the courts refuse to adequately take up the argument that equality, human dignity and the right to property of those facing eviction were being violated? Why were international human rights standards on forced evictions and equality and non-discrimination not referenced? I believe the figure of *homo sacer* and the originary political element of the exception/exclusion or ban in sovereign rule offers some clues.

In order to conceive of the space as Jewish Hiran, the eviction of Palestinians in the area would have to be undertaken. However, in a state that self represents as democratic, this eviction cannot occur by the use of wanton force. Surely, it can take place by force, and in fact does take place by force, yet the force is qualified. It is qualified because it finds justification in the law, either on the basis of a court approved eviction lawsuit or in statute, for example in the Planning and Building Law 1965. The law, therefore, needs to contain Bedouin within itself. This envelopment also needs to show fidelity to essential characteristics of the law, such as being factually accurate and consistent. This is

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<sup>500</sup> Ma'an News, "Rights group demands Israel allow Bedouin village to register to vote in Negev" (May 9, 2017), online: <http://www.maannews.com/Content.aspx?ID=776951>

<sup>501</sup> Adalah, "Segmenting the Naqab (Negev): Israel Redistricts to Postpone Local Elections for Arab-Bedouin Citizens" 97 *Adalah's Newsletter* (October 2012), online: <http://adalah.org/Public/files/English/Newsletter/97-October2012/Redistricting-Naqab-Dividing-Abu-Basma-Thabet-Abu-Ras.pdf>

why Justice Sarah Dovrat in the district court decision critiques the executive for referring to the Bedouin as 'illegal trespassers' when it was public knowledge that they were granted permission by the authorities to settle there. She reprimands the authorities for composing the text of the lawsuits in a manner "unfit" for a public authority, a criticism echoed by her colleague Justice Ariel. The judges make clear that they take offence to the state being factually inaccurate.<sup>502</sup> Yet, while the law envelops the Bedouin, it is at the same time unable to deliver on fundamental reliefs that it in theory provides, such as freedom from discrimination and protection from arbitrary government action. Therefore, the law is used to envelop subjects, yet fails to deliver substantively on what the law promises.

It seems then that the reason why the issues were decided in the manner they were, in spite of the many inconsistencies in formal legal reasoning, was because it was motivated by the need to maintain a project of colonial governmentality. Only such a structural, routine form of governing populations by differentiation could sustain and grow a settler colonial society.

Using spatial theory helped me interpret the courts' decisions. Although the discriminatory action, effects and intent of the eviction lawsuits would not require too great a leap of the imagination to work out, all courts refused to take up the claim of discrimination. This was enabled by conceiving of space as flat earth and by conceiving of Bedouin as not full political subjects. Indeed, if we were to return to the star-gazing metaphor, we could say it was enabled by conceiving of outer space as revolving around Earth, and fully known, as opposed to acknowledging that there are numerous heavenly bodies (lifeways) outside the self, each with their own makeup and rules that one cannot fully know, but one nevertheless is obliged to acknowledge exists.

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<sup>502</sup> That the residents were trespassers was the state's grounds for eviction in their filed eviction lawsuits. That the court found that the residents were not trespassers left open the possibility for the court to dismiss the lawsuits. Of course, the court did not dismiss the lawsuits, but it was placed in an awkward position whereby it had the grounds to dismiss on a false claim. Further, were they in fact trespassers opens the possibility for a statute of limitations to apply against an adverse possessor, in the spirit of utilitarian theory, and as confirmed by the court. In such a case, the state would not be able to evict the residents "at any time". Also, this is the second case in this study where we note the court critiquing the executive for pushing legal boundaries, though nevertheless concurring with the fundamentals of state policy in the Naqab. In the crop-spraying *Abu Mdeghem* case, the court critiqued the executive's excessive use of violence, it preferring more tempered, qualified violence. State actions threatened to expose government policy as intentionally insensitive and disrespectful to Bedouin (see *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62 at para. 44, 45) and ostensibly *ultra vires* of the Plant Protection Law.

Using spatial theory also allowed me the opportunity to explore the concept of legal resistance as a form of the Lefebvrian notion of lived space. This helped further the idea that Bedouins are not just suspended in space as explored by Shamir, or even just hanging in the interstices between zoe and bios as *homo sacer*, but are in dialectic with space via such practices of lived space, such as legal resistance. I will pick up on the different iterations of agency in the community and the possibilities of fracturing the assemblage in the dissertation's concluding discussion.

If discrimination was rather plain to see in this case, whereby one ethnicity was being forcibly displaced to house another, we should use the opportunity to probe what this means for the normative content of *equality* in Israeli jurisprudence. If only particular lifeways are made intelligible to the exclusion of others, enabling discriminating spatial policies like we see in Umm al-Hieran, what *value does equality have in determining access to land* – whether it be land ownership in Nuri's case, land use in *Abu Mdeghem*, or land allocation in the following Wine Path Plan case?

This question will be taken up in the following chapter. The inquiry will hinge on the idea that fundamental principles should inform adjudication as proposed by former Chief Justice Barak, the most human rights conscious of the Israeli Supreme Court Justices. Yet, how do the fundamental principles of equality and justice weigh against public order or security? How are balances reached when deciding in equality cases? Building on the findings in this chapter, the following chapter will explore the Wine Path Plan case. Decided in 2010, the Wine Path Plan case concerned a petition brought on behalf of Bedouin interest groups to challenge what they claimed was a discriminatory plan favouring single family Jewish farms in the Negev as a means to prevent Bedouin access to land. The Supreme Court rejected the petition on the grounds that it did not find any procedural faults in the execution of the plan to warrant its cancellation nor could it be determined that there was a discriminatory policy that informed it. In the chapter, I will draw on the work on fundamental principles by Ronald Dworkin, the legal scholar that had a notable influence on Barak and explore further both the liberal and authoritarian dimensions and influences of Israeli law, particularly for the principle of equality.

## Chapter 4 – The Wine Path Plan, Security, Equality

### SECTION 1

#### 4.1 Ethnographic Tour and Case Study

##### Introduction

I had the uncertain privilege of taking Nuri wine-tasting in the Naqab.<sup>503</sup> I considered myself privileged because Nuri usually has more important things to do – from appearing in court, participating in demonstrations and public organizing, to just being a family man. Yet, he had chosen to make time for me as I explored the ‘wine route’, a single-family farm tourist endeavour that had sprung up in the Ramat Hanegev area some two decades earlier. And yet, I was uncertain how much of a privilege it was to drag Nuri along these twenty three allotments that constituted the wine route, to smile, swirl and spit, knowing full well that what he had been fighting for his whole life, recognition and the opportunity to live a life in dignity in the Naqab, had rather effortlessly been made possible for so many of the Jewish families we’d be visiting. I had also requested that he not speak Arabic before our Israeli hosts so that they would not detract from the custom of self-satisfied chattiness.

It seemed, then, that privilege had little to do with it; at least it was not our privilege to enjoy. Neither Nuri nor I seemed privileged in the sense of being free from constraint to speak as we wished. But I was certain of one thing, the uncertainty. Uncertainty that we might be made out to be faux-tourists undertaking critical research on the wine route and uncertainty about how bitter the brackish water fed vines would really make the tannins taste. I also felt unsure about the conclusions I would reach as I worked through this chapter probing both a privilege and an equality not to be had by Nuri, and my once early optimism about the possibilities of justice in the law.

The case<sup>504</sup> I was studying was a petition brought by Adalah to the Supreme Court demanding the cancellation of the ‘wine path plan’,<sup>505</sup> which authorized the construction of 30 private individual farms in the Naqab. Adalah’s petition rested on two grounds. The first related to the policy that informed the plan, which Adalah argued was discriminatory as it sought to secure the land for Jewish citizens in order to deliberately exclude Arabs. Second, the petitioners cited administrative

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<sup>503</sup> Our excursion, and all the meetings therein, took place on 23 August 2012.

<sup>504</sup> *Adalah v. The National Council for Planning and Building*, HCJ 2817/06

<sup>505</sup> Regional Master Plan TAMAM 14/4/42 : Partial District Master Plan for the Southern District – Amendment No.

flaws at the procedural level, such as the retroactive issuance of permits and non-compliance with tender issuance procedures. The Supreme Court rejected the petition on the grounds that the petitioners were not able to prove flaws at the policy or procedural level that would justify judicial intervention.

As we drove south on Route 40 to visit the Nahal Boker farm, Nuri shared a funny, yet disheartening, story. With the onset of Ramadan, the period in which adherent Muslims fast from before sunrise to sunset, residents of Khirbet al-Hura made out a police car parked clandestinely behind a tree, not far from the village entrance. Sitting in the car was an officer who was issuing fines to those turning left out of the village and onto Route 31. Turning left on 31 was a course frequently taken by residents and visitors on their way to the city center in Beersheba, to Tel Aviv or any of the other unrecognized villages and Bedouin towns. The basis of the traffic violation was that a left was not allowed from Khirbet al-Hura's main road, a dirt road, onto Route 31, an inter-city highway. Those leaving the unrecognized village were expected instead to turn right onto the highway, drive down a few kilometres before u-turning to head in the desired direction.

Khirbet al-Hura, being an unrecognized village, has deliberately not been provided paved roads or a traffic authority regulated link to the 31 inter-city highway. Nuri himself had filed an official request to the Ministry of Transport and the relevant police authority for a pedestrian bridge over 31, a sidewalk and a paved street into the village. Part of his impetus was that the al-'Uqbi extended family had lost over a dozen family members in traffic related accidents owing to the lack of these basic road provisions. Nuri's brother, Sheikh Sa'eed Al-'Uqbi, the shariah court judge I had interviewed for my research, lost his pre-adolescent daughter in this way.

The policeman succeeded in fining many drivers. Nuri suggested that those fined appeal to the courts. However, they didn't want that, fearing they'd lose the case and have their licenses revoked. They preferred to pay the fine, no matter how unjust it seemed. The rather funny part of the story was how one day the policeman came to the site, ready to assume his position behind the tree, only to find that it had been chopped down by a local resident the night before. The local resident was known to the policeman because he had earlier in the week threatened to cut down the tree. When the policeman warned in no uncertain terms that this would mean jail time, the local resident retorted that he had been to jail enough times that the policeman's threat carried no sting.

Our first stop was meant to be the Nahal Boker farm, home to merlot and cabernet sauvignon grapes. The farm was also home to a pomegranate grove, a wine cellar and guest houses. It was marked with the typical tourist signage on Route 40 which made it easy to find. However, upon calling the number posted at the farm's metal gate, we learnt that owner Moshe Zohar was not at the farm and his wife Hilda was not available to show us the vineyards.

Moshe's case troubled my preconceptions about eviction and displacement in the Naqab. Prior to the Adalah petition, in 1999, Moshe was respondent in a petition brought by an environmental organization, the Israel Environmental Protection Society<sup>506</sup> that sought to challenge the illegality in the institution of individual farms in the Naqab. As a result of the petition, Moshe, an Israeli Jew, was threatened with eviction from the farm. In response to the threat of losing his considerable investment, Moshe remarked, "I put a lot of money into this... If I'd known this would happen, I never would have come."<sup>507</sup>

Along with Moshe, the authorities issued half a dozen farms eviction notices as the proper planning and leasing procedures were not followed in their cases. Learning about Moshe's story, and this earlier petition, made me aware that while the Bedouin, as a community, were under persistent threat of eviction and displacement since the time of the establishment of the state, individual Jewish families also experienced some form of the same. The wine path plan was instituted by the Ramat HaNegev Regional Council, Israel's Agriculture Ministry and the Israel Lands Authority (ILA), yet the ILA was the authority that issued eviction notices once irregularities were discovered. The vulnerability of individuals and families to being uprooted by the government seemed, then, to be experienced by both Palestinians and Jews.

The next stop was Nahal Haro'ah, a bed and breakfast that advertised its home made goat cheese and dairy products. This farm, belonging to the Saragusti family, was east of Merhav Am, a religious communal settlement whose name means 'wide open spaces'. Indeed, besides the army base located a few kilometres east of the farm, arriving at the farm felt like we were in the middle of nowhere. The farm advertised itself as one that 'blended beautifully into the desert scenery', though I struggled to understand how they had reached that conclusion.

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<sup>506</sup> *Israel Environmental Protection Society (Adam Teva V'Din) v. The Minister of Agriculture*, [2001] HCJ 243/99

<sup>507</sup> Sue Fishkoff, "Negev wine farmers claim battle over land is sour grapes," *Jewish Telegraphic Agency* (August 2, 2010), online: <http://www.jta.org/2010/08/02/news-opinion/israel-middle-east/negev-wine-farmers-claim-battle-over-land-is-sour-grapes>

There was no vineyard in sight. I noted a few olive trees that seemed to arbitrarily dot the area, and desert shrubs. From where I was, I could see a modest, single-level family home and a sheep pen, home to a dozen sheep. As I approached the home, I was careful not to let off any of the toy guns at my feet. I caught a glance of the mini-pool and surfboard on the porch, and I couldn't help but wonder if the sea simulations, in the middle of the desert, left the kids feeling deceived at all.

I knock. The little surfers come to the door. They don't speak any English, so they run to the phone to call someone that does. In a couple of minutes, the father approaches from the direction of the sheep pen. There is urgency in his pace. The mother follows and is quick to close the home door, leaving Nuri and me with Avi Saragusti.

The regular wallops of dry wind have us screaming at one another in order to be heard. Avi tells me he doesn't make wine and two years ago he had stopped making cheese. So what did he do? "We have sheep... for meat". Apparently, not too many people were keen on travelling to the middle of nowhere to taste goat cheese, making its economic potential limited. Cheese could not be stored for very long, it needed to be sold soon after its manufacture, and he did not like making the two-hour trek to Tel Aviv to sell it at the big stores. With the sheep, the buyers come to him, allowing him to make as much meat as he likes.

Avi then directed us to a number of wineries in the vicinity. As we entered the car to continue on to our next stop, Nuri remarked, "He raises sheep to make profit from meat sales". He turned to me, asking rhetorically, "Who used to raise sheep in the past?" The Naqab Bedouin community were an agricultural and pastoral society before 1948.<sup>508</sup> However, since then, the expropriations of the community's lands, their forced expulsions, governmental restrictions on grazing, and the seizure of their livestock<sup>509</sup> has meant that only a fraction of the community raise livestock today.<sup>510</sup> Yet, among those that do, the use of sheep for slaughter is mostly reserved for special occasions and is

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<sup>508</sup> According to the 1931 Census of Palestine, 89.3 % (42,868 persons) derived their livelihood from agriculture, while 10.7% (5,113 persons) were occupied solely in cattle raising. E. Elath, "The Bedouin of the Negev" (1958) 45:2 *Royal Central Asian Journal* at 129-130.

<sup>509</sup> For more on government imposed restrictions on Bedouin livestock raising, see 'Aref Abu-Rabia, "Displacement, Forced Settlement and Conservation" in Dawn Chatty and Marcus Colchester (eds.) *Conservation and Mobile Indigenous Peoples* (New York, London: Berghahn Books, 2002) at 206-208

<sup>510</sup> In 2006, flock owners from the unrecognized villages accounted for 8% of the Bedouin population. See Ilan Stavi, Gideon Kressel, Yitzchak Gutterman and A. Allen Degen, "Flock Use among Bedouin in 'Spontaneous' Settlements in the Negev Desert, Southern Israel" (2006) 10:1 *Nomadic Peoples* at 53.

not a regular practice. More commonly, the Bedouin community use sheep's wool for the family's quilts and pillows, sheep's milk for personal consumption and the animal's manure to fertilize agricultural land.<sup>511</sup> Nuri's rhetorical question was intended to emphasise the Bedouin community's fundamentally different relationship to the land than that of this Israeli Jewish settler who set up shop some two decades ago. The community's relationship seemed to be more intimately tuned in to the rhythms of the land and those living off it. Sheep were not seen as meat which could be sold for profit, but as intertwined with the people in a common existence. Sheep rearing was sustainable, and it was allowed to be so, because it was not informed by the logic of capitalism. That logic pursued, as its ultimate objective, short-term profit by 'selling as much meat as one wanted'. I flag this point because it is one manifestation of the plethora of meanings that land carries in the formation of identity in the community.

We then head south west, down Route 204 until we link up once more with the second longest highway in Israel, Route 40. From there it is a short drive south west to the Sde Boker winery, one of the region's oldest wineries. It was setup in 1999 by Zvi Remak, a native of San Francisco, who immigrated to Israel in 1980.<sup>512</sup> The allure of the winery is that it is located near the former home of David Ben Gurion, the first Prime Minister of Israel.<sup>513</sup>

We parked in a roomy lot, which probably appeared bigger than it actually was given there were few visitors. After a pit stop at the skylit washroom, we enter the winery to find ourselves alone with a native of the US standing against the tasting table in a disinterested slouch. To all appearances, he was not paying much attention to the fact that Kylie Minogue's 'Do the Locomotion' was jingling in the background. He offers us a tasting of the Cabernet Sauvignon and some chit-chat.

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<sup>511</sup> *Ibid.* at 55-6.

<sup>512</sup> <http://www.sde-boker.org.il/winery/EnWinemaker.html>

<sup>513</sup> The pioneering spirit of the settlers likely took clue from Ben Gurion's attitude towards the Naqab. In the early 1940s, Ben Gurion saw the Naqab as being central to Zionist settlement policy, prompting him to direct the JNF to purchase land there. Eric Engel Tuten, *Between Capital and Land: The Jewish National Fund's Finances and Zionist National Land Purchase Priorities in Mandatory Palestine*, PhD Dissertation (Utah: Department of History: The University of Utah, 2000) at 208, 252. For Ben-Gurion, such a settlement policy would be facilitated by the 'Bedouinization' of Jews, where Jews became desert people who would combine 'the modern' (the pioneering Zionist) with 'the traditional' (the Arab Bedouin) cultural skills to settle the Naqab. See David Ben-Gurion, *The Negev is Still Waiting* (Tel Aviv: The Labour Party Archive, 1954) (Hebrew), cited in Avinoam Meir and Ze'ev Zivan, "Sociocultural Encounters on the Frontier: Jewish Settlers and Bedouin Nomads in the Negev", in Oren Yiftachel and Avinoam Meir (eds.), *Ethnic Frontiers and Peripheries: Landscapes of Development and Inequality in Israel* (Boulder, Colorado: Westview Press, 1998) at 250-1.

He explains, “Two thousand years ago, the Nabateans made wine... and we decided that if *they* can do it, we can do it”.

Zvi, the owner, soon joins us. We talk about soil salinity, Malbecs, water conservation and more about Nabateans. However, at no point does the Bedouin community come up. He asks if I would like to visit more wineries, and then traces on a tourist map of the Ramat Hanegev region where I could go. The map dutifully marks wells, springs, national and JNF parks, archaeological sites, museums, children’s attractions, spas, 4X4 trails, homemade cheese sites and wineries.<sup>514</sup> Yet, the space is conceived by the map’s architects as being without Bedouin. None of the villages of Bir Hadhaj, Wadi al-Meshash or ‘Abda are mentioned though they make up more than seven thousand residents;<sup>515</sup> Bir Hadhaj, the most populated of the lot, is officially a recognized village, its master plan approved in 2003, so it is quite surprising not to find any mention of it on this map.<sup>516</sup>

After two tasting glasses, I offer to take home a malbec. The bottle is dressed with a rag paper label that emphasizes the settler, pioneer spirit of the winery - a young, broad shouldered, white male with a grape harvesting bucket in hand and unmistakable resolve in his eyes. Dressed in Israeli-blue khaki, he has his back to us and his head turned west towards the setting sun. I walk out feeling uneasy about purchasing a bottle of wine from this single family farm, knowing that it is part of a project intended to sideline the Bedouin population. Yet, I feel embarrassed taking up their time without giving something in return. When I tell Nuri that I’d be purchasing a bottle, he only gives me a silent nod. Before heading to the car, I remark to the hosts that Zvi made a good choice setting up shop near Ben Gurion’s old home, as it likely brought him more traffic than if he had set up elsewhere. In response, the server had another slogan, “If you build, they will come”.<sup>517</sup> And then, we left.

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<sup>514</sup> Masa Israeli, 39 *Map of Tourist Attractions in Ramat Hanegev* (2011) at 6

<sup>515</sup> The Association for Civil Rights in Israel (ACRI), *The Unrecognized Villages: Chief Characteristics* (2012), online: <http://www.acri.org.il/en/wp-content/uploads/2012/03/Unrecognized-Villages-list.pdf>

<sup>516</sup> Or Kashti, “For Bedouin father, Israel is his children’s ‘No. 1 enemy’”, *Ha’aretz*, (November 16, 2012), online: <http://www.haaretz.com/weekend/week-s-end/for-bedouin-father-israel-is-his-children-s-no-1-enemy-1.478370>. The *Ha’aretz* article reports how Bir Hadaj was also the site of unprecedented police violence during an operation to curb ‘illegal construction’ on November 12 2012. Police arrested 19, including 6 minors, one of whom was shot in the stomach with a rubber bullet. 29 children were rushed to Soroka Medical Center for tear gas inhalation.

<sup>517</sup> I mistakenly took him to be stating Scripture, and only later learnt that in fact he was quoting a Kevin Costner Hollywood hit about divine inspiration convincing the protagonist to build a baseball field on his corn farm. Sections of the divine monologue read, “Ray, people will come Ray... They’ll arrive at your door as innocent as children, longing for the past... They’ll pass over the money without even thinking about it: for it is money they have and peace they lack... The one constant through all the years, Ray, has been baseball. America has rolled by like an army of steamrollers. It has been erased like a blackboard, rebuilt and erased again. But baseball has marked

As we enter the car, I tell Nuri how remarkable it was that they didn't even talk about the Bedouin. To which he responds, "It's not that they didn't talk about them. They are not even on the map, there are no Bedouin.... The land is empty, without people. There are no Bedouin." I didn't realize it at the time, but it must certainly have been unnerving to Nuri to listen in on Zvi and me talk and joke about North American things, while being silent the whole time, feeling invisible in that tasting room. It could not have been easy to see his entire community similarly rendered invisible on that tourist map.<sup>518</sup>

Two weeks later, on 5 September, the two-day sixth annual Salut Wine and Beer Festival would launch in Beer Sheva in the compound of an Ottoman-era mosque closed to public worship by the Israeli authorities. Despite protests by the Palestinian community that the sanctity of the site would be violated by staging an alcohol festival in its premises, the event went ahead as planned, adjacent to the mosque compound.<sup>519</sup>

What follows will be a discussion of the wine path plan case, which I will use as a launching point to probe how the principle of equality is understood and adjudicated in Israeli jurisprudence, particularly through the lens of legal liberalism, that which reached its epoch during the tenure of Chief Justice Aharon Barak. The purpose of exploring legal liberalism is an exercise in chiasmus, as described in the Introduction. To interrogate if 'Israeli law' is indeed 'liberal', we ought to reverse the structures of the two to identify the inherent tensions where they are said to meet. If these tensions exist, then why do they escape being named?

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the time. This field, this game: it's a part of our past, Ray. It reminds us of all that once was good and could be again. Oh... people will come Ray. People will most definitely come." So maybe I was not altogether off course in thinking he was citing some sacred text. If I were to give myself the license to make a reasonable assumption, it seems that the divine decree of setting up a baseball field was, for the server, figurative of how he and Zvi should settle the Negev as a fulfilment of the religious promise of Jewish exiles returning to the Promised Land. From Internet Movie Database (IMDB), "Field of Dreams (1989) – Quotes", online: <http://www.imdb.com/title/tt0097351/quotes>

<sup>518</sup> For critical takes on tourism in Israel/Palestine that show how tourist endeavours support colonial settlement and also help Israelis discover and negotiate their place in the region, see Rebecca Stein, *Itineraries in Conflict: Israelis, Palestinians, and the Political Lives of Tourism* (Duke University Press, 2008). For the role of Israeli archaeology in supporting colonial settlement and nation building, see Nadia Abu el-Haj, *Facts on the Ground: Archaeological Practice and Territorial Self-Fashioning in Israeli Society* (The University of Chicago Press, 2001).

<sup>519</sup> I wrote about the wine festival at the mosque on the English language, Israeli blog '972'. In the piece I show the hypocrisy of the liberal lament that the case was about fundamentalist Muslims imposing a conservative agenda on the Israeli public. An introspective look would illustrate the various limits on free expression and civil liberties in Israel owing to Jewish religious dictates, from freedom of movement to civil marriage. See Nasser Rego, "Dispute over wine festival in Be'er Sheva mosque: 'Muslim rage' or Israeli hypocrisy?", *972 Blog* (September 19 2012), online: <http://972mag.com/dispute-over-wine-festival-in-beer-sheva-mosque-muslim-rage-or-israeli-hypocrisy/56075/>

Therefore, I'd like to offer a critique, internal to legal liberalism, of equality as fundamental principle in adjudication. I will do this by comparing Barak's approach to that of Ronald Dworkin's, given the latter's influence on legal liberalism and therefore on Barak's legal thought. Fundamental principles constitute norms, stemming from society and the constitution, that make up the rule of law, and can be seen as 'rights' that exist prior to law. In Dworkin's reading, when deciding a case dealing with the infringement of rights, fundamental principles should trump policy, the latter which has nonindividuated, societal goals as ends. Where Dworkin makes a distinction between principles and policy, Barak does not.<sup>520</sup>

I will then look at the discord between Barak and Dworkin with regard to the value of security (the ever-looming southern star, Canopus) being assigned a fundamental principle in adjudication, as it is in Barak's jurisprudence, and the implications thereof. What this chapter attempts to work through, via a deep exploration of relevant strands of thought in legal and political philosophy, is what the wine path plan case, and the earlier Umm al-Hieran eviction orders case, both say about equality as fundamental principle in Israeli adjudication. By doing so, I intend for the analysis to also speak to how we may come to understand the normative content of 'rights' and 'privilege' and their operation in the Naqab space, and, by extension, Israel/Palestine.

### The Case

Approved in September 2005, the wine path plan authorizes the construction of thirty single family farms, retroactively approving some two dozen farms, and allowing for the construction of a few new ones.

The main aim of the 'Wine Path Plan' is to promote agro-tourism and further landscape protection.<sup>521</sup> The plan permits one housing unit to be built in each settlement as far as such a unit is necessary for the project's operation. It clarifies that the authorization for the establishment of a lone farm would be an exception, and would not be issued on a regular basis, and that the exception would only apply to the Beersheba (Naqab) region. Second, that its establishment would be in line with national planning policy, would contribute to the area's development and would not conflict

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<sup>520</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 57-8, Ronald Dworkin, "Hard Cases" (1975) 88:6 *Harvard Law Review* 1057

<sup>521</sup> 'The Ramat Hanegev Wine Path Plan' - Regional Master Plan TAMAM 14/4/42 : Partial District Master Plan for the Southern District – Amendment No. 42 at para. 6.1, 6.2

with the interests of existing communities, but would be of benefit to current and future inhabitants. The location of settlement should 'protect forests and groves, natural resources or the land' as determined by either the JNF, the Nature Reserves Authority or the ILA. A local plan for the authorization of a lone farm would be brought to the Committee for Principle Planning Issues at the National Council for Planning and Building. A permit for a lone farm would only be issued if in line with the above principles and if the existing planning and building laws and tender laws were observed.

Adalah's petition called for the cancellation of the plan on two grounds. First, they argued there was discriminatory intent behind the plan as it sought to prevent so-called 'Bedouin take over of land'. Second, there existed procedural anomalies. The farms, which were now to be 'retroactively approved' under the plan, had not followed the relevant tender issuance procedures in obtaining leases as prescribed by law, namely the Mandatory Tenders Law (1992)<sup>522</sup> and the Mandatory Tenders Regulations 1993<sup>523</sup>. In addition, the petitioners claimed that the farms failed to acquire the permits necessary in order to be connected to the water, telephone and electricity infrastructure as called for under Section 157A of the Planning and Building Law (1965).<sup>524</sup>

### *Procedural History*

The current petition was filed following an earlier petition filed in 1999 by the Israel Union for Environmental Defense and the Society for Protection of Nature in Israel.<sup>525</sup> This earlier petition sought to rectify the illegality in the establishment of individual settlements, claiming that they had been established either in the absence, or in contravention, of a regional master plan or that their establishment contravened the designated usage for the specific plot of land, for example land used for housing when specifically designated to be used for agriculture alone.

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<sup>522</sup> Mandatory Tenders Law, 5752-1992

<sup>523</sup> Mandatory Tenders Regulations, 5753-1993. In case law, *Poraz* affirmed that the leasing of public lands must be guided by the principles of fairness and equality and therefore must have a tender or lottery. HCJ 5023/91, *Poraz v. Minister of Housing and Construction*, 46(2) P.D. 793. See also Daphne Barak-Erez, "Law and Politics in Israel Lands: Toward Distributive Justice" (2008) 14:4 *Israel Affairs* 662 – 680 as she emphasizes that lack of issuance of tenders means that uninfluential public groups cannot adequately access public land. Yet, she offers a word of caution regarding the issuance of tenders, since the relevant legal provisions still give the ILA broad discretion in setting the priorities for a tender and also allow the Minister of Finance to issue tender exemptions. Also, the issuance of tenders does not automatically equate to fairer access to public land, since economically weaker groups may be less able to participate in the tender process.

<sup>524</sup> Planning and Building Law 5725-1965

<sup>525</sup> *Israel Union for Environmental Defense v. Minister of Agriculture*, [2001] HCJ 243/99

As a result of this earlier petition, the most senior tier in the planning system, the National Council for Planning and Building (NCPB), took a decision on December 7 1999 whereby it concluded that the establishment of single family farms ran contrary to national planning objectives. However, the NCPB made an *exception* for the establishment of farms in the Beersheba (Naqab) region, stating that decisions would be made on a case by case basis by the planning authorities and in accordance with the law.<sup>526</sup>

In 2002, the Ministers Committee for the Development of the Negev and Galilee adopted a decision, which was approved by the government, to say that the ILA would be responsible for submitting to the Ministers Committee a plan for lone farms in the Negev and the Galilee.<sup>527</sup> The ILA undertook the necessary steps to prepare the plan, which became known as the ‘Ramat Hanegv Wine Path Plan’, and submitted it in December 2004.<sup>528</sup> Objections to the plan were filed with the NCPB, including those submitted by the petitioners on February 24 2005.<sup>529</sup> However, on September 13 2005, the Sub-Committee on Principal Planning Issues, under the auspices of the NCPB, rejected the objections and approved the plan.<sup>530</sup> Thereafter, the current petition was filed.

The state’s response to the petition was that there were no statutory violations in the approval of the Wine Path Plan nor was there an improper purpose that would justify its cancellation. As regards past irregularities, such as the setting up of settlements without following tender issuance and leasing procedures, these would be dealt with by the ILA and the State Attorney’s office. The state stressed that contrary to the claims of the petitioners that the Plan was not in accordance with national outline plans, the NCPB took a decision in 1999 that individual settlements in the Beersheba region alone were concordant with overall planning policy, owing to their agro-tourism purposes. The state also underlined the various stringent procedural checks and balances in place in the framework of the Wine Path Plan to ensure compliance with the law and planning regulations.<sup>531</sup>

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<sup>526</sup> *Adalah v. The National Council for Planning and Building*, [2010] HCJ 2817/06 at para. 4

<sup>527</sup> *Adalah v. The National Council for Planning and Building*, [2010] HCJ 2817/06 at para. 6

<sup>528</sup> Hana Hamdan, “Individual Settlement in the Naqab: The Exclusion of the Arab Minority”, 10 *Adalah’s Newsletter* (February 2005) at 3.

<sup>529</sup> *Ibid.*

<sup>530</sup> *Adalah v. The National Council for Planning and Building*, [2010], HCJ 2817/06 at para. 7, 9, *Adalah’s Petition in Adalah v. The National Council for Planning and Building*, HCJ 2817/06 [June 15 2010] at para. 90.

<sup>531</sup> *Adalah v. The National Council for Planning and Building*, [2010], HCJ 2817/06 at para. 14-19.

The court sought to determine if its intervention to cancel or modify the Wine Path Plan was justified on the grounds that the administrative decisions taken or discretion applied were unreasonable or undertaken in bad faith.<sup>532</sup> The court determined that the decision to establish the Wine Path Plan, in particular that Beersheba be an exception to the NCPB decision that lone farms do not concord with the national planning scheme, was within the jurisdiction of the planning authorities. It determined that such a decision was 'clearly' a matter for the relevant, professional administrative body to decide and that they would be justified to intervene only if the planning authorities acted unreasonably or in bad faith.<sup>533</sup>

### *Reasonableness*

A reasonable administrative decision is one with moral considerations, that which is concerned with the right and the good.<sup>534</sup> Reasonableness is an assessment concept, one that acknowledges the relevance of a plurality of factors to a particular case and accords each factor its relevant weight in reaching a decision.<sup>535</sup> Reaching a reasonable decision, then, is about finding an appropriate balance between these various context-dependant factors. It also requires logic, coherence, empirical truth or reliability and means/end-rationality. A reasonable decision also entails interpreting and criticizing interests and giving expression to the idea of generalizability or impartiality.<sup>536</sup>

To ensure impartiality in ascribing weight to a relevant factor, the judge as impartial spectator, would need to consider role exchange, meaning "to put himself in the situation of the other, and to bring home to himself every little circumstance of distress which can possibly occur to the sufferer".<sup>537</sup>

According to former Israeli Chief Justice Barak, ascribing a particular weight to competing values is determined by the relative importance of that value to society at large. These attitudes, in turn, are

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<sup>532</sup> *Ibid.* at para. 23.

<sup>533</sup> *Adalah v. The National Council for Planning and Building*, [2010], HCJ 2817/06 at para.23.

<sup>534</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 48-53.

<sup>535</sup> See Neil MacCormick, *Rhetoric and the Rule of Law* (Oxford: Oxford University Press, 2005) at 173.

<sup>536</sup> Robert Alexy, 'The Reasonableness of Law' in Giorgio Bongiovanni, Giovanni Sartor, Chiara Valentini (eds.), *Reasonableness and Law* (Dordrecht, London: Springer, 2009) at 8.

<sup>537</sup> Adam Smith, *The Theory of Moral Sentiments*, (eds. D.D. Raphael and A.L. Macfie) (Oxford: Clarendon Press, 1976 [1759]) at 21, cited in Robert Alexy, 'The Reasonableness of Law' in Giorgio Bongiovanni, Giovanni Sartor, Chiara Valentini (eds.), *Reasonableness and Law* (Dordrecht, London: Springer, 2009) at 12.

expressed by the judge.<sup>538</sup> In judicial review of administrative decisions, however, the judge's discretion does not replace that of the public official. The judge only determines if the administrative decision falls within the 'zone of reasonableness', which means that the action is one possibility within the range of reasonable possibilities under the authority's jurisdiction, and is not patently unreasonable.<sup>539</sup> I will later unpack the weight formula to perform 'balancing' in a reasonable decision as developed by legal philosopher, Robert Alexy.<sup>540</sup>

### *Good Faith*

To act in bad faith means to transgress the standard of behaviour that defines a particular relationship, in this case, between the administrative authorities and the appellants. In Israeli jurisprudence, this standard has been defined by what is honest and fair as required by society's sense of justice. Acting in good faith entails that taking care of one's own interest must be done fairly and in consideration of the justified expectations of the other party.<sup>541</sup> However, administrative bodies bear a heavier duty than the one stemming from the good faith principle that is primarily associated with private law.<sup>542</sup> Nevertheless, where the executive has been accused of acting in bad faith or unreasonably, the burden of proof is placed on the party making the claim.<sup>543</sup>

### *Rationale*

The court first sought to answer if there was an 'improper purpose' behind the plan, such as discriminatory intent in the plan's policy or content as the petitioners claimed.

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<sup>538</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 71. In *Ganor v. Attorney General*, HCJ 935/89, 44(2) PD 485 at 513-514, Barak talks about balancing weights in reaching a reasonable decision.

<sup>539</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 72-74. See also Justice Zamir's elaboration of the concept of 'zone of reasonableness' in *Movement for Quality Government v. Government of Israel*, HCJ 2533/97, 51(3) PD 46 at 57. In common law, the Wednesbury reasonableness test was developed in the judicial review of administrative decisions. It precluded judicial intervention if the administrative authority considered all relevant factors in the case, did not consider an irrelevant factor, and was not patently unreasonable that no reasonable authority could have reached that decision. *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* (1948) 1 K.B at 223-224.

<sup>540</sup> The variables in this balancing formula include the intensity of the interference with a principle, the abstract importance of a principle, and the reliability of empirical assumptions. See Robert Alexy, 'The Weight Formula' in Jerzy Stelmach, Bartosz Brożek, and Wojciech Załuski (eds.), *Studies in the Philosophy of Law*, vol. 3. (Krakow: Jagiellonian University Press, 2007) 9-27.

<sup>541</sup> *Roker v. Salomon*, CA 6339/97, 55(1) PD 199 at 279.

<sup>542</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 66.

<sup>543</sup> *Maccabi Shield Association Mutual Insurance Cooperative against Disease Ltd. vs. Minister of the Treasury* [2006] HCJ 7611/01 at para. 22.

The claimants carried the burden of proof to show that the authorities had acted in bad faith, yet the court found that they did not present any factual data to support this claim. The court determined that the discussions held by the planning authorities on the matter, the hearing of the public's objections, the modifications made to the plan, its integration with larger tourism plans for the region, and the National Council's refusal to approve another lone farm plan, all served as evidence that the authority acted in good faith.<sup>544</sup>

The above procedural steps taken by the planning authorities were sufficient for the court to conclude that "the deliberations of the planning institutions were comprehensive and intensive, and that the full, relevant data base was presented to them. The legal rights of those who objected were upheld and protected".<sup>545</sup> The court found that the second claim of the petitioners, that there were flaws in the procedural processes pertaining to the plan, was also unwarranted. For the court, it did not matter that there were procedural flaws in the past, such as the establishment of farms in the absence, or in contravention, of a regional master plan or in contravention of the designated usage for the specific plot of land,<sup>546</sup> or that farms were setup without following tender issuance and leasing procedures<sup>547</sup> and were connected to the water, telephone and electricity infrastructure without obtaining the proper permits.<sup>548</sup> What mattered to the court was that past illegalities were being rectified as the authorities had promised and delivered a new plan, to replace the 1993 one, to ensure greater compliance with the law in the setting up individual settlements.<sup>549</sup> The court was satisfied that the planning authorities were taking the necessary steps to ensure compliance with planning laws and regulations and that previous anomalies were being investigated by the South District Attorney's Office and the ILA.<sup>550</sup>

However, in reaching this decision, the court failed to appreciate how the motive behind the setting up of the individual settlements, as will be elaborated on in detail below, was discriminatory, and that even if past procedural irregularities were being rectified, the discriminatory reasons for these settlements' institution remain and do not 'disappear' with the approval of new procedures. That is,

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<sup>544</sup> *Adalah v. The National Council for Planning and Building*, [2010] HCJ 2817/06 at para. 29.

<sup>545</sup> *Ibid.* at para. 33.

<sup>546</sup> *Israel Environmental Protection Society (Adam Teva V'Din) v. The Minister of Agriculture*, [2001] HCJ 243/99

<sup>547</sup> *Adalah v. The National Council for Planning and Building*, [2010] HCJ 2817/06, State Comptroller, 'Annual Report 1999', Report No 50B (1999) at 602-607.

<sup>548</sup> State Comptroller, 'Annual Report 1999', Report No 50B (1999) at 607.

<sup>549</sup> *Israel Environmental Protection Society (Adam Teva V'Din) v. The Minister of Agriculture*, [2001] HCJ 243/99 at para. 7

<sup>550</sup> *Adalah v. The National Council for Planning and Building*, [2010] HCJ 2817/06 at para. 18.

even if there is greater compliance with the law in the administration and setting up of settlements, it does not erase the fact that one ethnic group is being deliberately denied access to these forms of living<sup>551</sup> and that their access to land is also being curtailed. Israeli geographer, Oren Yiftachel, in his critique of the plan, drew attention to how the same organizations, namely the Ramat HaNegev Regional Council and the Israel Lands Administration, that initiated earlier versions of the plan continue to play a leading role in its revised version. In addition, the revised plan contains similar spatial arrangements and transportation routes, “meaning the plan’s ethnically-motivated objectives still exist” even if they are no longer mentioned explicitly.<sup>552</sup>

### *The Petition*

Before a critique of the decision, I would like to comment on the substance of the petition itself. For all of its strengths, there were three particular weaknesses, or oversights, in the petition.

First, the petitioners claimed that the tender and leasing procedures were not followed in the establishment of a number of individual settlements. Yet, the only evidence that they provided to support their claim was the State Comptroller’s Report for 1999, which itself did not go into substantive detail on the irregularities. The petitioners did not provide enough direct evidence for procedural illegalities, but focused more on the discriminatory policy and motive behind the plan (which, as will be demonstrated below, brought with it its own challenges). The petition would have been strengthened was it able to illustrate how tender procedures, even with the formulation of the new plan, the process for which began in 1999, did not guarantee equality. This could have been shown by revealing failed attempts by members of the Bedouin community to acquire an individual settlement via tender bids.

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<sup>551</sup> In the formulation of the revised ‘Wine Path’ plan, the authorities took care to formally state that “each citizen will be allowed to submit a proposal for the establishment of a lone farm, including Bedouins who are citizens of the state”. *Ibid.* at para. 29. However, no Bedouin person owns a single family farm and given the official statements that such farms were meant to prevent Bedouins from settling on the land, it seems very unlikely that a tender bid submitted by a Bedouin would be fairly adjudicated. It seems then that the revised formulation was meant to satisfy the appearance of being egalitarian (shoring up ‘token egalitarianism’) while not in actual fact delivering on that egalitarianism. For more on tokenism, see for example the critique of tokenism regarding Black political representation in the US in Lani Guinier, "The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success" (1991) 89:5 *Michigan Law Review* 1077-1154.

<sup>552</sup> Oren Yiftachel, “Inappropriate and Unjust: Planning for Private Farms in the Naqab”, 24 *Adalah’s Newsletter* (April 2006) at 1.

A specific condition of the Wine Path Plan states that the individual settlements should not vie with the interests of existing communities or future development plans, or be in conflict with them.<sup>553</sup> Yet, when the petitioners claimed that the individual settlements would pose an undesirable competition to existing Bedouin communities, they did not provide sufficient factual evidence for the same.<sup>554</sup> The petitioners did not substantiate the claim of economic competition by performing any sort of economic competitor analysis which would have looked at rating a settlement's focus and innovation in comparison with existing Bedouin communities and would have run comparative tests on financial predictions based on the products/services on offer, facilities and personnel, and scope for growth. The petitioners could also have substantiated such a claim by drawing the court's attention to how land expropriated from Bedouin communities was subsequently used to construct such individual settlements, and how small scale economic activities such as pita and *labaneh* (Arabic sour cream) stalls and animal grazing have fallen out of reach for Bedouin communities since the setting up of individual settlements.<sup>555</sup> As the petitioners did not carry the burden of proof on this particular claim, the court accepted the state's dismissal of the claim that the new settlements were isolated, and therefore would not pose competition to existing communities and that the wine path plan would actually result in economic *advantage* as more tourists would be drawn to the region and there would be more investment in all communities as a result.<sup>556</sup>

The principal claim of the petitioners was that the authorities acted with discriminatory intent in drawing up the wine path plan and to support that claim, they offered various proofs of statements issued by officials and official bodies. While this claim was more substantiated than the procedural flaw claim or that of undesirable competition, it ran up against the challenge of proving discrimination by an executive body in the court. As discussed in the previous chapter on the eviction orders in Umm al-Hieran, to prove discrimination, the general rule has been that intent to discriminate has to be shown, in keeping with low level scrutiny of a governmental classification that disadvantages a minority.<sup>557</sup> Showing discriminatory effects to prove discrimination, as Barak

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<sup>553</sup> Regional Master Plan TAMAM 14/4/42 : Partial District Master Plan for the Southern District – Amendment No. 42

<sup>554</sup> See Adalah's Petition in *Adalah v. The National Council for Planning and Building*, [2010] H CJ 2817/06 at para. 70 77, 137, as well as the professional opinion of Prof. Hubert Law-Yone, an Israeli scholar of architecture and town planning, which was submitted with the petition.

<sup>555</sup> Human Rights Watch (HRW), *Off the Map: Land and Housing Rights Violations in Israel's Unrecognized Bedouin Villages* (March 2008) at 37-39.

<sup>556</sup> *Adalah v. The National Council for Planning and Building*, [2010] H CJ 2817/06 at para. 17.

<sup>557</sup> See for example, *Nazareth Lands Defence Committee v. Ministry of Defence*, 9 P.D. III 1261 (1955), *Wattad v. Minister of Finance*, H CJ 200/83, 38 P.D. III 113, *Agbaria v. The Minister of Education*, H CJ 3491/90, 45(1) P.D.

ruled in the *Higher Follow-up Committee* decision<sup>558</sup>, does not generally suffice to uphold a claim for discrimination. And yet, as in the *Bourkan* case, even where intent to discriminate has been shown, the court has applied a low level of scrutiny, legitimizing discrimination towards satisfying a 'national aim', which in *Bourkan* was determined to be "restoration of a national and historical site, in name as well as substance, in character and identity".<sup>559</sup> In dismissing the petition, the court proffered a similar rationale, that the Wine Path Plan would consolidate a national policy goal, stating the plan "fulfil[s] an important national objective...the interest of developing the Negev is destined to advance a national, public aim".<sup>560</sup>

### Critique of the Decision

Taking into account the above shortcomings in the petition, there is much to critique in the court's decision.

The court determined that its intervention would be justified only if the authorities had acted unreasonably or in bad faith. Yet, in determining the reasonableness of executive action, the court needed to perform a balancing between the benefits derived from the action and the costs incurred as a result of it, a balancing that is intrinsic to the proportionality test in Israeli jurisprudence. Yet, the court failed to spell out what the competing values were, how they were to be weighted, and how a balancing amongst the values was to be performed. Martti Koskeniemmi, in critiquing the High Court's *Beit Sourik* decision, where the High Court ordered the government to reroute sections of the separation Wall because it impinged on the rights of local Palestinian inhabitants, critiqued the balancing performed under the proportionality test as it did not identify how the costs and benefits are "identified, calibrated so as to make them comparable, and finally measured so as to carry out the weighting?"<sup>561</sup>

In its decision, the court dismissed the costs claimed by the petitioners. Those costs were the discriminatory intent and effects of the plan on Naqab Bedouin, takeover of the Negev by Jewish elements to restrict the amount of land available to Bedouin, unhealthy competition for existing

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221-4, *Al-Sane' v. Attorney General*, H CJ 2678/91, P.D. 46(3) 709, *Adalah v. The Minister of Religious Affairs*, H CJ 240/98 52 P.D. V 167, *Alumni Association of the Arab Orthodox School in Haifa v. Minister of Finance*, H CJ 3429/11. See previous chapter for discussion.

<sup>558</sup> *Higher Follow-up Committee for Arab Affairs in Israel v. Prime Minister of Israel*, [2006] H CJ 11163/03

<sup>559</sup> *Bourkan v. Minister of Finance*, H CJ 114/78, 32 P.D. II 800 [1978], 807-8.

<sup>560</sup> *Adalah v. The National Council for Planning and Building*, H CJ 2817/06 [2010] at para. 23

<sup>561</sup> Martti Koskeniemmi, "Occupied Zone – 'A Zone of Reasonableness'?" 41 *Israel Law Review* (2008) 13.

Bedouin communities, high infrastructure costs associated with establishing and maintaining remote settlements, and the transfer of large areas of Naqab land out of the public's hands. In fact, the claim of unreasonableness was not adequately addressed by the court as it failed to identify a single cost or harm in the decision, and so did not perform the balancing required of it by the reasonableness standard.

Yet, how are benefits and costs calibrated in balancing? Robert Alexy's balancing formula<sup>562</sup> is useful in this regard. The variables Alexy identifies are the intensity of the interference with a principle, the abstract importance of a principle, and the reliability of empirical assumptions. This relative weight of a principle is then measured against the weight of an opposing principle. The most significant relevant principles in this regard, as identified by the court, would be the principle of equality on one hand to be balanced against the principle of national development. As the court stated, the interest of developing the Negev is destined to advance a national, public aim,<sup>563</sup> realised by satisfying the subordinate aims of the Plan to promote tourism, agriculture and landscape protection.<sup>564</sup> Certainly, there are other factors to consider in the balancing, for example, the high infrastructure costs and the inaccessibility of large areas of land to the public, which would be measured against the principle of national development, though the principle of equality is far more important and weighty and so it suffices for our purposes to balance this principle alone against that of national development.<sup>565</sup>

The abstract importance of equality cannot be overstated. According to liberal legal theorist, Ronald Dworkin, the abstract right to equality entails all citizens being entitled to 'equal concern and respect in the design and administration of the political institutions that govern them',<sup>566</sup> and is the central principle from which rights flow.<sup>567</sup> In Israeli jurisprudence, the principle of equality, although not codified in statute, has been determined in case law to have constitutional quality.<sup>568</sup> In international law, equality and freedom from discrimination are fundamental norms binding on

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<sup>562</sup> Robert Alexy, 'The Weight Formula' in Jerzy Stelmach, Bartosz Brożek, and Wojciech Załuski (eds.), *Studies in the Philosophy of Law*, vol. 3. (Krakow: Jagiellonian University Press, 2007) 9-27.

<sup>563</sup> *Adalah v. The National Council for Planning and Building*, [2010] HCJ 2817/06 at para. 23.

<sup>564</sup> *Ibid.* at 8.

<sup>565</sup> I will elaborate in detail on the principle of equality in Israeli jurisprudence and in liberal legal theory below.

<sup>566</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978) at 180 [Dworkin, *Taking Rights Seriously*]

<sup>567</sup> Ronald Dworkin, "Liberalism" in *A Matter of Principle* (Harvard University Press, 1985) 181-204

<sup>568</sup> See Barak, *Judge in a Democracy*, *supra* note 349 at 86, 88, Aeyal M. Gross, "The Politics of Rights in Israeli Constitutional Law" (2008) 3:2 *Israel Studies* 80

all states,<sup>569</sup> with the prohibition on racial discrimination being a preemptory norm, or *jus cogens*, meaning absolutely non-derogable by states.

The first variable in Alexy's balancing formula measures the intensity of interference with the principle of equality. Contrary to the court's finding that the petitioners did not prove discrimination, there were numerous official statements issued, that the petitioners brought to the attention of the court, which showed the discriminatory intent behind the plan's institution.

The Ministry of Infrastructure and the Ministry of Agriculture took the decision in 1997 to encourage and promote individual settlements, and the Infrastructure Minister explained to the State Comptroller in December 1999 that the purpose behind the individual settlements was, "to save the nation's land... to prevent its takeover by foreign entities. I believe that this policy is not only reasonable, but is a proper policy that Israel needs to take, and that the main way is by the Israel Lands Administration ... This policymaking process was shared with the Minister of Agriculture. I allow myself to say that both of us are familiar with the issue of protecting the land against others for many years".<sup>570</sup> In 1997, then director of the Prime Minister's Office, Avigdor Lieberman, was quoted as saying, "This is a matter of the theft of state lands. Two million and eight hundred thousand [2,800,000] dunams of state land in the Negev, in the Galilee in the seam-line area, and in Area C have been illegally seized ... According to the recommendations of the Directors-General Committee, a Ministerial Committee on Settlement Matters will be established ... The ministers will be presented with a plan to encourage individual settlement in the problem areas, the purpose being to safeguard the land...in this case, we are talking about single individuals, who will guard extensive land areas. This is most effective...".<sup>571</sup>

A senior official at the Ministry of Agriculture was less vague about who the 'foreign entities' doing the illegal seizure were, "This is a declared and overt war... if we are not here, the Bedouin will be here...". He added, explaining the reason behind the policy to concentrate the Bedouin in development townships, "once you lock them into apartments, there is no chance to produce

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<sup>569</sup> As set forth in the UDHR, *Universal Declaration of Human Rights (UDHR)*, adopted December 10, 1948, G.A. Res. 217A (III), UN Doc. A/810 at 71 (1948), and also codified in the following treaties, ratified by Israel, ICCPR, ICESCR, ICERD and CRC.

<sup>570</sup> State Comptroller, 'Annual Report 1999', Report No 50B (1999) at 605.

<sup>571</sup> Degar Lahav, "Governmental Plan to Stop 'State Land Theft'," *Ha'aretz* (September 2 1997) (Hebrew), cited in Hana Hamdan, "Individuals Settlements in the Naqab: The Exclusion of the Arab Minority", 10 *Adalah Newsletter* (February 2005).

children in huge numbers, and instead of 20 or 30 they will be forced to settle for two or three, because they will not have room to spread."<sup>572</sup> The minutes of the meeting held on December 7 1999 at the National Council for Planning and Building, the top tier in the planning system, also revealed that the plan's policy was to save lands from usurpation by Bedouin Arabs and to ensure that Jews have greater access to it.<sup>573</sup>

The Ministerial Committee on the Negev and Galilee, in their meeting on November 6 2002, affirmed that the setting up of individual settlements is a means to maintain state land.<sup>574</sup> A 2003 draft report prepared by the Prime Minister's Office for the Negev-Galilee Ministerial Committee stated that, "The reasons for initiating [individual settlements] are to preserve state lands... [as] solutions for demographic issues".<sup>575</sup> A 2003 *Ha'aretz* article quoted Uzi Keren, the prime minister's advisor on settlements, as describing the settlers on individual farms as "a top notch group of people, each one empowered to care for vast areas [of land] and act as a state appointed 'policeman' protecting these areas."<sup>576</sup>

In the above statements, 'foreign entities' and 'illegal seizure' are euphemisms the authorities use for Palestinians and Palestinians' relationship to the land. Aside from the above statements issued by officials, the interference with the principle of equality is also evident in how the authorities deal differently with the two ethnic groups on the same issue. First, the Israel Lands Administration initiated this plan for dispersed settlements designed for the Jewish community, and yet repeatedly criticise the Bedouin for dispersed settlement<sup>577</sup> and cite the latter as the reason for the non provision of essential services.<sup>578</sup> Second, the authorities apply the law on illegal construction in an ethnically bifurcated manner, where the individual settlements although having been constructed

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<sup>572</sup> Daniel Ben Simon, "Bouki and Gouli in the Land of Bedouins," *Ha'aretz* (March 4 1998) (Hebrew), cited in Adalah's Petition in *Adalah v. The National Council for Planning and Building*, HCJ 2817/06 [June 15 2010] at para. 42.

<sup>573</sup> Adalah's Petition in *Adalah v. The National Council for Planning and Building*, HCJ 2817/06 [June 15 2010] at para. 29.

<sup>574</sup> *Ibid.* at para. 33.

<sup>575</sup> Prime Minister's Office, "Individual Settlements - Northern District and Southern District", A First Draft Report to the Negev-Galilee Ministerial Committee (February 2003) (Hebrew)

<sup>576</sup> Zafir Rinat, "Sharon is promoting establishment of 30 settlements in the Negev and Galilee," *Ha'aretz* (July 20, 2003), online: <http://www.haaretz.co.il/misc/1.896967> (Hebrew), cited in Human Rights Watch, *Off the Map: Land and Housing Rights Violations in Israel's Unrecognized Bedouin Villages* (2008) at 33.

<sup>577</sup> For example, see Israel Lands Administration, "350 Plots Prepared for Bani Issa in Hura Standing Empty" (November 26 2007), online: [http://www.mmi.gov.il/hodaotmmiint/show\\_h.asp?key=782&CodeMaarecet=1](http://www.mmi.gov.il/hodaotmmiint/show_h.asp?key=782&CodeMaarecet=1) (Hebrew).

<sup>578</sup> Israel Lands Administration, "Bedouin in the Negev" (undated) at 1, online: [http://www.mmi.gov.il/static/HanhalaPirsumim/Beduin\\_information.pdf](http://www.mmi.gov.il/static/HanhalaPirsumim/Beduin_information.pdf).

without following proper planning and leasing procedures are allowed to stand, though in the case of non adherence to planning procedures in the Bedouin community, the law is upheld.<sup>579</sup> In recent years, the enforcement of the law on illegal construction in the Bedouin community has been particularly strict, doubling in 2011 and then quadrupling the following year in comparison to 2010.<sup>580</sup> Further, in several cases, land expropriated from a Bedouin person(s) has been used to setup an individual farm for Jewish persons, as have been the cases of Sheikh Awde Abu Mu'ammad and Mohammed Abu Solb.<sup>581</sup>

The court would also have done well to consider the historical inequality in land allocation, access to land, the quality of living arrangements and the socio-economic standing between Arabs and Jews in the Naqab to appreciate how the wine path plan furthers existing inequality and would therefore be harder to justify in a balancing test. Although the Naqab Bedouin population accounts for 28% of the population in the Beersheba District, the total area of recognized Arab communities accounts for less than 1% of the District's territory.<sup>582</sup> Owing to selection committees,<sup>583</sup> around 91% of the 107 rural Jewish communities in the District are off-bounds to Bedouin wishing to live in them.<sup>584</sup> The options for types of communities are also limited to Bedouin, with there being only two rural Bedouin communities, alongside 107 rural Jewish communities,<sup>585</sup> even though the majority of the Bedouin community have expressed a wish to live in rural communities.<sup>586</sup> In 2004,

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<sup>579</sup> Oren Yiftachel, "Inappropriate and Unjust: Planning for Private Farms in the Naqab", 24 *Adalah's Newsletter* (April 2006) at 6.

<sup>580</sup> Dukium – The Negev Coexistence Forum (NCF) reports that home demolitions averaged 250 prior to 2010, shot up to 456 in 2010, and in 2011, roughly a thousand homes were demolished. See Dukium - Negev Coexistence Forum for Civil Equality, "Report on The Demolition of Arab-Bedouin Homes in the Negev-Naqab" (2011). Adalah's Naqab office Director, Abu Ras, cites similarly high demolition figures in 2012 of 862 homes, 449 of which were self-demolished as the owners were threatened with heavy fines if they failed to do so. Abu Ras, "Two years since Prawer... What's next?" (September 11 2013).

<sup>581</sup> Human Rights Watch (HRW), *Off the Map: Land and Housing Rights Violations in Israel's Unrecognized Bedouin Villages* (March 2008) at 37-38.

<sup>582</sup> Adalah, Objection to 'Partial Regional Master Plan for the Beer Sheva Metropolitan Area, Master Plan 14/4, Amendment 23', submitted to the National Council for Planning and Building (October 31 2007) at para. 14.

<sup>583</sup> See Chapter 3 on Umm al-Hieran for further discussion on selection committees. Selection committees are operable in 80% of Israeli territory, where the three-party lease system exists. If someone wishes to lease a plot of land in such a settlement, they need to be approved by the settlement's selection committee, which regularly rejects applicants on grounds of 'social unsuitability'. In March 2011, the 'Admissions Committee Law' was passed, giving legal backing to the de facto discriminatory practices of selection committees by codifying their operation in 475 'small towns', which make up nearly 50% of all communities in Israel.

<sup>584</sup> Adalah, Objection to 'Partial Regional Master Plan for the Beer Sheva Metropolitan Area, Master Plan 14/4, Amendment 23', submitted to the National Council for Planning and Building (October 31 2007) at para. 17.

<sup>585</sup> *Ibid.* at para. 21b.

<sup>586</sup> See for example, the Regional Council for the Unrecognized Villages' and Bimkom's 2011 response to the report by the 'Committee for Arrangement of Bedouin Settlement' (also known as the Goldberg Committee), which was a

the incidence of poverty was 79.2% among Bedouin from the unrecognized villages, nearly 7 times higher than the non-Orthodox Jewish population.<sup>587</sup>

Had the court considered these historical inequalities between the Palestinian Bedouin community and Israeli Jews in the Naqab, two things could have followed. First, the Bedouin community could have been identified as one that has been historically disadvantaged, and therefore a suspect class, meaning in this case the burden is placed on the state to demonstrate that the plan has been narrowly tailored to achieve a compelling government interest, and no other less drastic means, less harmful to the rights of this disadvantaged minority, could have been employed. This would mean applying stricter scrutiny to the authorities' decision to implement the wine path plan. Second, in performing a balancing of interests, the court could have reached the reasonable conclusion that privileging Israeli Jews under the wine path plan (for whom it was specifically designed and who are the only ethnic group represented in these single family farms) over Palestinian Bedouin would serve to increase existing discrepancies between the two communities and would therefore be harder to justify under the principle of equality.

The third element in Alexy's balancing formula, 'reliability of empirical assumptions', pits the empirical evidence regarding interference with the equality principle against the empirical evidence regarding interference with that of national development. As discussed above, there are numerous examples of discriminatory intent behind the institution of the wine path plan given by various officials, which do not disappear once the plan is revised, and are well documented and reported in official statements, in official minutes of meetings, in official government reports, in the mainstream media, and even by the State Comptroller who investigates the executive branch for wrongdoing upon the request of private citizens. By contrast, the authorities did not provide any evidence to show how the right to national development would be offended if the plan did not materialize. In undertaking a substantial evaluation of whether the principle of equality was

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detailed, alternative master plan concerning all unrecognized villages and called for the establishment of a particular 'Bedouin village' model, which would have rural and other culturally appropriate aspects to it.

<sup>587</sup> Suleiman Abu-Bader and Daniel Gottlieb, "Poverty, education and employment among the Arab-Bedouin society: A comparative view" (2009) 137 ECINEQ - Society for the Study of Income Inequality, online: <http://www.ecineq.org/milano/wp/ecineq2009-137.pdf> at 11. Poverty severity is measured by the Sen-Index, and is calculated by considering poverty incidence, the income gap, and the Gini coefficient of inequality among the poor. For more on the Sen-Index, see Amartya K. Sen and James E. Foster, *On Economic Inequality* (Expanded Edition) (Oxford, UK: Clarendon Press, 1997), Anthony Shorrocks, "Revisiting the Sen Poverty Index" (1995) 63:5 *Econometrica* 1225-30.

offended, should the court not have taken into account the fact of the ‘reliability of empirical assumptions’ undergirding the competing principles?

Yet, it would be difficult to demonstrate how the right to national development would be offended if the claim to the right was not grounded in empirical evidence itself. That is, it is unsurprising that the defendants did not present evidence on how the right to national development would be offended were the plan to be suspended, since they had not presented evidence to substantiate the right to national development itself. Although ostensibly about tourism, research on the same was lacking. The Ministry of Tourism was not involved, feasibility studies were not performed, estimates of tourist traffic not conducted, and according to the expert opinion of Professor Law-Yon the plan contained many contradictory statements and displayed a lack of clarity regarding the spatial arrangement of the settlements. It is hard to know, and thereby show, what is to be lost by scrapping the plan if what is to be gained by instituting it is not accurately calibrated.<sup>588</sup> Indeed, evidence of the lack of a substantive planning process is how, quickly after their institution, many farms ran into difficulties. Having not accurately studied the tourist potential of selling gourmet cheese off the beaten path in the Naqab, the Saragusti family were forced to radically rethink their alternative, organic dairy farm endeavour. In a few years after setting up, they were forced to transform into a goat slaughter farm in order for their initiative to remain economically viable. At a late summer conference in 2012, held by the individual farms from Ramat Hanegev, the vast majority of the owners complained about the numerous difficulties they encounter in staying profitable.<sup>589</sup>

As in *Beit Sourek*, the court failed to spell out what the competing values were, how they were to be weighted, and how a balancing against one another was to be performed. A proper balancing, modeled on the Alexy balancing formula as above, would have more accurately determined the costs and benefits related to the plan, and discounting the weaknesses in the petition, thereby more fairly evaluated on the petition’s merits. Had a more thorough balancing been performed, it would very likely have found the executive’s decision to be unreasonable, and therefore grounds for the court’s intervention.

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<sup>588</sup> The Berger case established that the administrative decision be a well-studied one, and if it was not, it risked being seen as arbitrary and thereby subject to being cancelled. *Berger v. Minister of the Interior*, HCJ 297/82, P.D. 29(3).

<sup>589</sup> Interview with Thabet Abu Rass, Director, Naqab Office of Adalah – The Legal Center for Arab Minority Rights in Israel, Beersheba (August 23 2012). Interview on file with author.

Even though the court did not perform a thorough balancing, yet, it divulged something important in the course of its decision. In dismissing the petitioner's claim that there were flaws at the policy level, the court emphasized how the plan fulfilled an "important national objective", linked to the 'uniqueness' of the region and its 'distinct' character.<sup>590</sup> It went on to emphasize the rather *exceptional* nature of the plan, "In practice, the plan validated the policy that this distinctive form of settlement will not be breached and *transform itself from the exception to the rule* (emphases added)."<sup>591</sup> It is this aspect of uniqueness and exceptionality that I would like to flag for now, and take up later in the discussion when I attempt to work through how the normative content of equality is evaluated in Israeli jurisprudence. The strategic decision of the court to uphold the executive's decision to render the plan as an exception that becomes the rule is embedded in the court's understanding and application of the principle of equality. In evaluating whether the principle of equality was offended, as the petitioners claimed, the court's use of 'the exception' forges an understanding of equality in Israeli jurisprudence that is more than one with just multifaceted or abstract aspects, but in one sense, is rather clearly defined. The exception allows for the court not to intervene when the principle of equality is offended, and to exclude others from the reach of equality's protections, in those cases where 'others' are considered the exception.<sup>592</sup>

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<sup>590</sup> *Adalah v. The National Council for Planning and Building*, [2010] H CJ 2817/06 at para. 23.

<sup>591</sup> *Ibid.* at para. 25.

<sup>592</sup> See the inside/outside argument I raised in the Umm al-Hieran eviction orders case, how Palestinian Bedouin as *homo sacer* are rendered both inside and outside the law, inside the law so they can be determined by it, and outside it so they can be denied its protections.

## SECTION 2

### 4.2 - Liberal Concepts of Equality

As mentioned previously, the right to equality, although not codified in Israeli law, has been determined in case law to have constitutional quality. Yet, before I delve into the conceptions around the principle in Israeli jurisprudence, in particular in the decisions and writings of who was possibly Israel's most liberal judge, former Chief Justice Aharon Barak, I would like to sketch a contemporary understanding of equality. I will discuss the work of Ronald Dworkin, being a very influential legal scholar in the liberal legal tradition (and therefore influential for Barak), and his concept of equality which he developed as an extension to John Rawls' theory of abstract equality.

Dworkin reads Rawls' theory of abstract equality as a condition for acceptance into the 'original position'.<sup>593</sup> The original position is a hypothetical situation proffered by Rawls whereby people apply a veil of ignorance so that their particular conditions and historical materialism are unknown to them. They are then asked to choose from various conceptions of justice that best assists them in pursuing their fundamental interests in society, via a social contract or agreement. According to Rawls, people will choose two principles of justice. The first principle guarantees equal basic rights and liberties needed to secure their fundamental interests and to pursue various conceptions of the good. The second principle provides fair equality in opportunities to education and employment, enabling all to fairly compete for powers and prerogatives of office and adequate income and education. According to Rawls, people will choose these two principles as rational and self-interested individuals because even if they are the worst off in society, these two principles best assist them in pursuing their conceptions of the good.

In his social contract theory of justice, Rawls distinguishes between two forms of equality. The first concerns equal distribution of goods under the second principle of justice. However, this form of equality would implicitly favour those better off. Accordingly, while two people can equally apply for acquisition of a plot of agricultural land under tender, the person better off economically is more likely to acquire it as he is able to make the higher bid. Rawl's second form of equality, however, is the more fundamental.<sup>594</sup>

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<sup>593</sup> John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972)

<sup>594</sup> John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972) at 511.

It is this more fundamental form of equality that Dworkin reads as being the abstract right to equal concern and respect. Dworkin writes that this “must be understood to be the fundamental concept of Rawls’ deep theory”.<sup>595</sup> Dworkin reads Rawls as saying that the right to equal respect is a condition of admission to the original contract, and not a product of it. As Rawls asserts, “this right is owed to human beings as moral persons”,<sup>596</sup> and is assumed as a fundamental right intrinsic to the contract’s design, not a product of it. This is a right not by virtue of birth or characteristic or merit but by simply being human beings with the capacity to make plans and give justice.

Although this understanding of equality is not as all-encompassing as that of Giorgio Agamben’s concept of ‘whatever singularity’, it nevertheless is a useful launching point to further discussion. Agamben was discussed in the previous chapter on the eviction orders in Umm al-Hieran in the framework of Palestinians’ inside-outside relationship to law, whereby they are inside the law so as to be judged by it, but outside it in the sense that they are forced to forfeit its protections. It is this distinction between politically recognized life (as, for example, citizens as political subjects and moral persons with equal access to goods and services) and bare life (life excluded from the political community and with unlimited exposure to violence)<sup>597</sup> that Agamben seeks to collapse when he proposes the concept of ‘whatever singularity’. By collapsing the distinction, there is no room for the sovereign, the Israeli state in our case, to name, and thereby no possibility to exclude.

This is because ‘whatever singularity’ is non-reducible, in a sense like Rawls, but more far-reaching. So, while Rawls proposes a right to fundamental equality, as an abstract right to equal concern and respect, and owing to an individual irrespective of social class, there is the condition that the individual be a moral person with the capacity to make plans and give justice. These conditions do not exist in the concept of whatever singularity. Agamben states specifically that a singularity cannot be reduced to a measurement of representation. Therefore, somebody matters regardless of what it is, whether if by appeal to an abstract generality such as universal humanity or something particular, such as a particular characteristic or trait. Significantly, the concept removes human

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<sup>595</sup> Dworkin, *Taking Rights Seriously*, *supra* note 566 at 181

<sup>596</sup> See John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972) Section 77, cited in Dworkin, *Taking Rights Seriously*, *supra* note 566 at 181.

<sup>597</sup> See Ewa Plonowska Ziarek, ‘Bare Life’ in Henry Sussman (ed.), *Impasses of the Post-Global: Theory in the Era of Climate Change*, vol.2 (Open Humanities Press, 2012) 194 at 194-195.

vulnerability from being made subject to human appraisal, so that people have value irrespective of a heinous crime they've committed or other normative standard they do not conform with.<sup>598</sup>

For the purposes of this discussion, however, I will confine myself to the liberal conceptions of equality as proposed by Rawls and Dworkin, against which I will attempt to evaluate the court's decision.<sup>599</sup>

### Legal Liberalism

One would assume that liberalism as ideology and normative theory would serve minority interests, such as those of the Naqab Bedouin, well, or at least better than a more conservative leaning framework. That is certainly not to say that these two are the only relevant ideologies worth considering vis-à-vis protection of minority rights. Rather, it is to point out that they are generally seen in Israel to be the dominant ideologies informing law and adjudication.<sup>600</sup>

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<sup>598</sup> Giorgio Agamben, *The Coming Community* (trans. Michael Hardt) (Minneapolis: University of Minnesota Press, 1993)

<sup>599</sup> I will be satisfied to only footnote the difficulties with Rawls' abstract right to equality at this stage. A number of these points will be taken up further in the chapter when I discuss liberalism's blind spots. First, as Dworkin notes, political liberty is given primacy over equality in material resources by situating the former as the more important justice principle. Second, inequality is justified when those worse off are better off than without that inequality. See Dworkin, *Taking Rights Seriously*, *supra* note 566 at 180. Amartya Sen critiques that Rawls tends to place an overemphasis on the equal distribution of primary goods at the expense of considering the happiness or desires fulfilled by access to or use of those goods; Amartya Sen, *Inequality Reexamined* (Cambridge, MA: Harvard University Press, 1992). Robert Paul Wolff submits Rawls' theory of justice to a Marxist critique, pointing out that Rawls implicitly proposes a continuation of the status quo, which as far as the capitalist market economy goes has various fundamental inequalities embedded in it. See *Understanding Rawls: A Critique and Reconstruction of A Theory of Justice* (Princeton: Princeton University Press, 1977). Hamid Dabashi points out Gramsci's astute critique of the self-centeredness in the Kantian categorical imperative, an observation we can extend to Rawls, who saw his original position as the procedural arm of Kant's categorical imperative. For Rawls, by agreeing to apply a veil of ignorance, persons in the original position would "act in a way that they would wish it be a universal law", that is according to the categorical imperative. Yet, the blindspot in the Kantian categorical imperative and Rawls' deployment of it in the original position is exposed by Gramsci in his deliberate misquoting of the former. In the *Prison Notebooks*, Gramsci renders the categorical imperative as, "act in such a way that your conduct can become a norm for all men in similar conditions", where 'similar conditions' is absent in the original. By adding 'in similar conditions', Gramsci is emphasizing that it is short-sighted to wish one man's ideal as the standard of a universal ethic unless all persons concerned are similarly situated, that is they see themselves as rational, self-interested individuals who wish to implement a conformism along liberal ideals as both Kant and Rawls do in their respective uses of the categorical imperative. See Hamid Dabashi, "Can non-Europeans think?", *Al-Jazeera English* (January 15 2013), online: <http://www.aljazeera.com/indepth/opinion/2013/01/2013114142638797542.html>

<sup>600</sup> One example is in the work of Menachem Mautner, *Law and the Culture of Israel* (New York, US: Oxford University Press, 2011). Mautner discusses liberalism in opposition to the more conservative streams of legal formalism and Halakhic (religious Jewish)-inspired law. Many legal scholars make the case that the historical rift between the conservative, religious and the secularists in the drafting of the Israeli constitution continues to play out in present conflicting ideologies in adjudication. See Martin Edelman, *Courts, Politics, and Culture in Israel* (Charlottesville : University Press of Virginia, 1994). The self-definition of Israel as a 'Jewish and democratic' state and the contradictions inherent in this definition are also an indication of the tension between the conservative

According to legal scholar Duncan Kennedy, liberalism as normative theory encompasses the belief in individual rights, majority rule and the rule of law.<sup>601</sup> These central aspects of liberalism promise guarantees that minorities would typically seek. Minorities would look favourably to a system that follows the rule of law since under it they are guaranteed not to be mistreated by individuals or government since, under such a system, no one would be above the law. Further, their fundamental rights, such as their right to free speech, their right to demonstrate and their right to own and dispose of property as they wish would be guaranteed, and under such a system, they are also promised access to justice. While such elements would also be in common to a conservative normative theory, liberalism would further promise a project of doing away with status-based inequality in both the legal and market arenas. In addition, it would promote cultural pluralism under the banner of ‘tolerating the other’; would encourage legal rules that increase the relative shares going to workers and other disfavoured groups; and would support a participatory framework in the exercise of legitimate authority and other participatory conceptions of democracy. These would generally stand in contrast to a conservative normative theory that tends to favour privilege and the status quo, defends authoritarian means in the exercise of authority and is generally less favourable to creating legal and institutional guarantees of cultural pluralism and accommodation for cultural difference.<sup>602</sup>

It appears that a liberal normative legal framework, one true to the tenets above, would offer Naqab Bedouin a fair chance at attaining justice, at remedying mistreatment by government authorities, at offering the possibility of working towards equalization where status-based inequality exists, such as in the realm of access to land, a central point of contention in this Wine Path Plan case, and as we’ve seen, in all the cases we’ve discussed so far. Such a framework would attempt to understand the cultural specificities that inform how the community organizes its affairs, its approach to land

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Jewish trends and the more liberal, democratic ones in jurisprudence and adjudication. This inherent tension has been discussed by, for example, Ruth Gavison and Aharon Barak. See Ruth Gavison, *Israel as a Jewish and Democratic State: Tensions and Possibilities* (Jerusalem: VanLeer and Hakibutz Hameuhad, 1999) (Hebrew), Barak, *Judge in a Democracy*, *supra* note 349. For a historico-sociological analysis of these conflicting ideologies see sociologist Yehuda Shenhav, who explores the two contradictory voices of the primordial/religious and modern/secular in modern Zionism in *The Arab Jews: A Postcolonial Reading of Nationalism, Religion, and Ethnicity* (Stanford, California: Stanford University Press, 2006). Also see Mazen Masri, *The Dynamics of Exclusionary Constitutionalism: Israel as a Jewish and Democratic State* (Hart Publishing, 2017) for the ideological negotiations that determine the ‘Jewish and democratic’ definition of the state.

<sup>601</sup> Duncan Kennedy, *Critique of Adjudication* (Cambridge, Massachusetts; London, England: Harvard University Press, 2007) at 27-28.

<sup>602</sup> *Ibid.* at 47-48.

and would work towards imagining responsive and appropriate legal solutions. Yet, as discussed above in the critique of the legal decision, the court failed to deliver on all of these promises of a liberal approach.

In an attempt to understand why a court would so consistently fail to deliver on the promises of a liberal approach, one pole in a supposedly dichotomous, active struggle with conservative/religious trends, I suggest looking more deeply at the building blocks of liberalism itself. Liberty, whereby a person is at freedom to order his actions, is liberalism's core aim. In order to rationalize the court's decision, we need to deconstruct the meanings associated with 'liberty' generally conceived and then hold it up alongside liberty as conceived and practised in Israeli law.

#### Situating the Wine Path Plan decision in the Millsian notions of liberty

*"Liberty of the individual is a thing of the past, or the future, in Palestine"*, Bernard Joseph, 1948<sup>603</sup>

There are two understandings of liberty, as seen in a formative work on the concept, John Stuart Mills' *On Liberty*.<sup>604</sup> Mills' work is primarily intended to underline the importance of individual liberty in the social and civil realm, and in particular against authoritarian government and 'the tyranny of the majority', where realizing the will of the many could oppress the few, for example in a situation where there exists discriminatory sentiment among the majority of the population towards a particular minority class who enjoy few legal protections. A discussion of *On Liberty* is taken up by Ronald Dworkin in *Taking Rights Seriously*, where he makes an important distinction between the two kinds of liberty Mills was proffering. Dworkin attempts to demonstrate how failing to distinguish between these two types of liberty could lead to a misunderstanding of what Mills was prescribing in order to realize a more just society. Failure to distinguish between the two forms

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<sup>603</sup> Bernard Joseph, *British Rule in Palestine* (1948) 226. Bernard Joseph was an Israeli government member prior to the inauguration of Israel as a sovereign state. Cited in Pnina Lahav, "Foundations of Rights Jurisprudence in Israel: Chief Justice Agranat's Legacy" (1990) 24 *Israel Law Review* at 212. In citing Joseph, Lahav assumes that Joseph, who was writing in 1948, was referring to the police state 'present' of the British Mandate. The 'past' was either a romanticized imagining or a rhetorical device to stress the oppressive authoritarian present. However, liberty of the individual, Lahav opines, referred to the possibility of its realization in the 'future', when the 'dream of a Jewish state became a reality'. Indeed, Lahav argues that the legacy of Chief Justice Agranat has admirably lent itself to a Supreme Court that has consistently expanded the repertoire of rights and liberties. Although tempered by the more authoritarian side of Janus' face with which it is in daily battle, the liberal court is nevertheless a testament to the rebirth of respect for individual liberty in Israel/historic Palestine. This chapter aims to probe this claim.

<sup>604</sup> John Stuart Mills, *On Liberty* (Dover Thrift Editions, 2002 [1859])

of liberty could even result in conservative rulings that would purportedly be made in the name of liberty and liberalism, but would run contrary to Mills' own prescriptions.<sup>605</sup>

The two understandings of liberty put forward by John Stuart Mill are those of liberty as license and liberty as independence. Liberty as license refers to the degree to which a person is free from social or legal constraint to do what he might wish to do. This is distinguished from liberty as independence, which is the status of a person as independent and equal rather than subservient.<sup>606</sup>

Liberty as license means, as in the Hohfeldian sense, that A has a liberty to X if and only if she does not have a duty not to X.<sup>607</sup> Liberty may also be restricted if another competing value arises, such as equality or justice or safety or public amenity, and the degree of that restriction depends on the weight accorded to these other values relative to the value of liberty as license.<sup>608</sup> Liberty as independence is a more complicated Millsian concept, so that an individual's independence is threatened not only by political decisions that deny her equal voice, but also by those that deny her equal respect. Therefore, a law or legal decision that constrains a person on account that he is incompetent to decide for himself, for example that he should not live in an unrecognized village because it is not in his or his family's interest, and development towns are the far better option (as is the rhetoric concerning Bedouin)<sup>609</sup>, would be considered profoundly insulting and make him "intellectually and morally subservient to conformists who form the majority, and deny him the independence to which he is entitled".<sup>610</sup>

Mills' distinction between liberty as license and liberty as independence understood that no matter how personal an act, it probably had effects on others.<sup>611</sup> Government regulation, which impinges on liberty as all regulations do, would therefore need to strike a careful balance to constrain

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<sup>605</sup> See Ronald Dworkin, 'Liberty and Liberalism' in *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978) 259-265, Chapter 11

<sup>606</sup> Dworkin, *Taking Rights Seriously*, *supra* note 566 at 262

<sup>607</sup> Legal theorist Wesley Hohfeld identified liberty (sometimes referred to as privilege) as one of the four components of rights. The others were claim, power and immunity. Wesley Hohfeld, *Fundamental Legal Conceptions* (ed. W. Cook) (New Haven: Yale University Press, 1919).

<sup>608</sup> *Supra* note 606

<sup>609</sup> See, for example, *Al-Sane'v. General Attorney*, HCJ 2678/91, P.D. 46(3) 709 at 712 and ILA - Israel Lands Administration, '350 Plots Prepared for Bani Issa in Hura Standing Empty', (November 26 2007), online: [http://www.mmi.gov.il/hodaotmmiint/show\\_h.asp?key=782&CodeMaarecet=1](http://www.mmi.gov.il/hodaotmmiint/show_h.asp?key=782&CodeMaarecet=1) (Hebrew)

<sup>610</sup> Dworkin, *Taking Rights Seriously*, *supra* note 566 at 263

<sup>611</sup> *Ibid.*

individual liberty in order to ensure that an appropriate balance is reached with competing values, but not to the degree that denies a person respect or is insulting to his dignity.

The court in the wine path plan did not view the Jewish liberty or privilege to settle in single family farms in the Naqab as being constrained by a competing value, such as the right to equality of Bedouin as claimed by the petitioners. Assuming the court interpreted liberty to mean license, then we can say that it accorded liberty a high value relative to other values and thereby granted the value a wide range for its realization.

But more significantly, the court failed to see how the Plan, in both its aim and implementation, could be seen as profoundly insulting and harmful to the dignity of Naqab Bedouin, given that its intention to prevent Bedouin takeover of land was publicly stated on numerous instances. Further, the plan's implementation compounded the plight and insult of Bedouin having a lack of equitable access to land, while living precariously on land that they do occupy.

Yet, there is no reason to justify characterizing the court's decision as liberal. There was no attempt to remedy inequality or speak in the language of cultural pluralism and 'toleration'. As it failed to deliver a liberal decision, it is not surprising that it also failed to distinguish between the two forms of liberty. The court did seek to uphold the right, specifically the liberty/privilege, of Jewish individuals to settle on expansive stretches of land within the framework of the Wine Path Plan, and in doing so it considered the claim by Bedouin that their right to equality was being violated, though did not accord it a high enough value to rule in favour of the petitioners. In keeping with the inadequate regard for the petitioners' equality claim, the court similarly failed to see how their ruling could also be seen as insulting to the dignity of Bedouins living in the vicinity of the Plan's Jewish residents. That failure to distinguish between liberty as license and that of independence is similar to how the court failed to distinguish between Rawls' two forms of equality under his theory of social justice. That is, equality is not just about equal distribution of goods, so for example both Bedouin and Israeli Jews are being provided equal opportunity to submit a tender for plot acquisition, but about equal concern and respect. In the same vein, the court failed to understand liberty as the more all-encompassing and profound idea of liberty for Mills, and that which he sought to be the vocabulary for liberalism,<sup>612</sup> that of liberty as equal respect. Marking these core tenets of liberalism in the works of Mills and Rawls as our standard by which equality cases are

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<sup>612</sup> Dworkin, *Taking Rights Seriously*, *supra* note 566 at 263

decided within a normative liberal framework, we can conclude that for the court to be considered a liberal court, or having made a liberal decision, or having upheld liberal principles, it would be these understandings of liberty and equality that would need to be affirmed. Failing this, it would be hard to sustain the argument that a liberal decision was reached. And if it was not a liberal decision, then how else could it be characterized? As conservative? Authoritarian? Or something else?

### Charting liberalism in Israeli jurisprudence

At this stage, I would like to chart liberalism in Israeli jurisprudence. What were the outstanding legal decisions, procedures and adjudicative methods that lend support to the idea of a liberal court? This genealogical mapping will serve as important background before discussing in more detail the adjudicative approach of Israel's most visible liberal jurist, former Chief Justice Aharon Barak.

According to Israeli cultural legal theorist, Menachem Mautner, liberalism in Israeli law has its roots in the *haskalah*, the Jewish Enlightenment movement that developed in Germany during the last two decades of the eighteenth century.<sup>613</sup> The *haskalah* was an attempt to merge religious, or *halakhic*, principles with those of the secular European Enlightenment and was promoted by those known as *maskilim*. In the 1880s, many *maskilim* turned to Zionism.<sup>614</sup>

The *haskalah* was viewed as a threat to the religious establishment as it undermined the authority of the rabbis and the central role of religious law in the lives of Jews and brought about a new kind of Jewish identity, that of the secular Jew.<sup>615</sup> This threat, Mautner asserts, continues today in the struggle between the liberal and/or secular trends and adjudication with the religious ones.<sup>616</sup>

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<sup>613</sup> Menachem Mautner, *Law and the Culture of Israel* (New York, US: Oxford University Press, 2011) at 11-13

<sup>614</sup> *Ibid.* at 13. See also Shmuel Feiner, "Out of Berlin: The Second Phase of the Haskalah Movement (1797-1824)" in Ezra Fleischer, Gerald Blidstein, Carmi Horowitz, Bernard Septimus (eds.), *Me'ah She'arim – Studies in Medieval Jewish Spiritual Life* (Jerusalem: Magnes Press, Hebrew University, 1991) 403 (Hebrew); Immanuel Etkes (ed.) *The East European Jewish Enlightenment* (Jerusalem, Zalman Shazar Center, 1993) (Hebrew).

<sup>615</sup> *Supra* note 613 at 13

<sup>616</sup> *Ibid.* 99 – 158. See also Suzie Navot, who demonstrates how this tension undermines the right to equality for Palestinian citizens of Israel. Navot, *The Constitutional Law of Israel* (The Netherlands: Kluwer Law International, 2007) at 633-46.

Many scholars have remarked on the progressive decisions and positive implications for rights and liberties in Israel that were the result of a liberal and human rights sensitive jurisprudence of the courts.

Pnina Lahav makes the argument that the foundations for a jurisprudence upholding human rights were laid down in the first decade following Israel's independence, in large part owing to the decisions by then Chief Justice Shimon Agranat. Agranat creatively used the Declaration of Independence as a normative instrument for rights-sensitive jurisprudence, imported American First Amendment jurisprudence on the principle of balancing interests, and imposed limits on the discretion, even in national security cases, of administrative actors. It was owing to his decisions in *Podamsky*,<sup>617</sup> *Kol Ha'am*<sup>618</sup> and *Mandelbrot*<sup>619</sup> that he helped lay down the intellectual foundations for a jurisprudence of civil liberties in the formative years of the state.<sup>620</sup>

Mautner identifies the eighties and nineties as a time when values superseded the formalism that had to that point come to signify judicial decision-making.<sup>621</sup> These values were referred to as

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<sup>617</sup> *Podamsky v. State of Israel*, [1952] Cr.A. 95, 99/51 6 P.D. 341. In *Podamsky*, two armed men arrived at a detention center in order to demand the release of prisoners. However, the prisoners were being held on an expired detention order, meaning they were being illegally detained during the time of their escape. Agranat drew in a discussion of the Hohfeldian theory of rights (as I've discussed separately above) to show that although the police had no right to detain the prisoners or deny them their freedom, because they believed they were acting on a valid order, they were at liberty to resist the escape. Hence, by coercing the police by threats of violence, the armed men violated the criminal code provision that prohibited coercion of a person to perform an act he was not legally bound to do.

<sup>618</sup> *Kol Ha'am Company Ltd. v. Minister of Interior*, H CJ 73/53, 7 P.D. 871. In *Kol Ha'am*, the Minister of the Interior suspended the publication of two Israeli communist newspapers that were highly critical of the relationship between Israel and the United States. The administrative suspension was based on the Press Ordinance (1933), a British Mandatory enactment for suspension of a newspaper publication by the Minister if he thought it was likely to endanger public peace. The newspapers challenged the Interior Minister's decision in the High Court and won. Agranat's decision in this case rooted the right to freedom of speech and freedom of the press in the concept of democracy, leveraged the Declaration of Independence to the status of a normative guide for rights jurisprudence and allowed for judicial review of administrative action, while placing tighter limitations on the use of security rationales when they impinged on civil liberties. See Lahav at 251-258.

<sup>619</sup> *Mandelbrot v. Attorney General*, [1956] Cr.A. 118/53, 10 P.D. 281; 2 S.J. 116. *Mandelbrot* was a case concerning criminal liability for murder by an insane person. Of the three judges on the panel, Agranat's decision was the most sensitive to the civil liberties of the accused, considering the social conditions that influenced the act. Agranat chose not to deliver a decision based solely on the *M'Naghten* rule, which allowed for an insanity defense only if it could be established that the accused could not distinguish right from wrong in committing the act. Agranat considered the emotions and other social considerations that impacted on the act and offered the accused a defence even though the accused knew that what he had done was wrong.

<sup>620</sup> Pnina Lahav, "Foundations of Rights Jurisprudence in Israel: Chief Justice Agranat's Legacy" (1990) 24 *Israel Law Review* at 253-258

<sup>621</sup> Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* (Tel Aviv: Ma'agalay Da'at Publishing House, 1993) (Hebrew), Menachem Mautner, *Law and the Culture of Israel* (New York, US: Oxford University Press, 2011) at 90-95

'fundamental principles' which constituted norms, and were a precursor to rights, and a central component of the rule of law and democratic rule. The rise in values and decline in formalism also entailed the Court assigning itself a more active role in shaping the normative content of the law as opposed to merely identifying the relevant legal norm and applying it to the case at hand.<sup>622</sup> It also meant a greater balancing of values based on their relative importance in society, the source of this balancing being the 1953 *Kol Ha'am* decision.<sup>623</sup> This period also signified how the court undertook purposive interpretation of the law, attempting to identify the legislator's intent at the time the law was legislated as opposed to merely performing a textual reading of the law;<sup>624</sup> how it identified creative solutions to legal dilemmas for which there was no existent statutory guide;<sup>625</sup> and how it accepted the possibility that there could be a number of solutions to a legal dilemma as opposed to the formalist understanding of each legal problem having a single solution.<sup>626</sup>

Barak-Erez refers to the passing of human rights legislation in the 1990s, namely Basic Law: Human Dignity and Freedom and Basic Law: Freedom of Occupation as signifying the shift from an unwritten constitution<sup>627</sup> to a written one, a judicial bill of rights, whereby civil rights would be protected against legislation infringing on its associated values.<sup>628</sup>

Barak, having played a major role in developing a jurisprudence of civil liberties in Israel since the 1980s until his retirement in 2006, has hailed the revolutionary work of the Israeli legal system to promote human rights and human dignity for all, even when fighting the scourge of terrorism.<sup>629</sup>

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<sup>622</sup> See *Efrat v. Director of Population Registrar, Ministry of the Interior*, HCJ 693/91, 47(1) PD 749, 764

<sup>623</sup> *Kol Ha'am Company Ltd. v. Minister of Interior*, HCJ 73/53, 7 P.D. 871. See *Reem Engineers and Constructors Ltd. v. Upper Nazareth Municipality*, CA 105/92, 47(5) PD 189, 204.

<sup>624</sup> Nir Kedar, "Interpretive Revolution: The Rise of Purposive Interpretation in Israeli Law" (2002) 26 *Tel Aviv University Law Review* 737 (Hebrew)

<sup>625</sup> See *Ressler v. Minister of Defence*, HCJ 910/86, 42(2)PD 441, 464.

<sup>626</sup> See *Valley Chicken v. Ramat Yishai Local Government*, HCJ 547/84, 40(1) PD 113, 141.

<sup>627</sup> Some examples of writings that have commended the development of the 'unwritten constitution', or progressive, liberal decisions in the courts before the passing of civil rights legislation, include Jeffrey M. Albert, "Constitutional Adjudication without a Constitution: The Case of Israel" (1969) 82 *Harvard Law Review* 1245, Amos Shapira, "The Status of Fundamental Individual Rights in the Absence of a Written Constitution" (1974) 9 *Israel Law Review* 497, Asher Maoz, "Defending Civil Liberties without a Constitution – The Israeli Experience" (1988) 16 *Melbourne University Law Review* 815.

<sup>628</sup> Daphne Barak-Erez, "From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective" (1994-1995) 26 *Columbia Human Rights Law Review* 309. Barak-Erez cautions, however, that the two Basic Laws do not provide explicit guarantees of basic rights such as the right to equality, freedom of religion and freedom of speech. Further, under these laws' provisions, she laments how past legislation detrimental to human rights or human dignity is immune from judicial review.

Similarly, numerous other legal scholars have remarked how the Israeli court has over time increasingly challenged executive action<sup>630</sup> and in doing so could be considered an activist court.<sup>631</sup> The leading scholars reach a general consensus that although the legal edifice has its constraints and challenges, such as when it comes to guaranteeing civil liberties when the cases involve Palestinian citizens or terrorism (the latter conflated in most cases to mean Palestinians from the OPT),<sup>632</sup> it can nevertheless be counted on to deliver basic constitutional guarantees of rights and liberties.<sup>633</sup>

While we find no scarcity in the positive declarations of the Israeli court's performance, it is hard not to notice a residual unease in these scholarly writings. Overwhelmingly, all positive commentaries of the Court's performance vis-à-vis civil liberties carry with them cautionary footnotes. In particular, what we can sense in such scholarly analyses is that there seems to loom the spectre of unease and tension with the religious establishment and its associated conservative ideology impinging on individual freedoms<sup>634</sup> and towards the inability or unwillingness of the courts to right past wrongs.<sup>635</sup>

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<sup>629</sup> See for example Aharon Barak, "A Constitutional Revolution: Israel's Basic Laws" (1993) 4 *Constitutional Forum* 83, Aharon Barak, "The Role of a Supreme Court in a Democracy" (2001-2002) 53 *Hastings Law Journal* 1205 at 1208

<sup>630</sup> See for example on the issue of land, Yifat Holzman-Gazit, *Land Expropriation in Israel: Law, Culture, and Society* (Hampshire, England: Ashgate Publishing Limited, 2007)

<sup>631</sup> See for example Yoav Dotan, "Judicial Accountability in Israel: The High Court of Justice and the Phenomenon of Judicial Hyperactivism" (2002) 8:4 *Israel Studies* at 87-106, Shimon Shetreet, *Justice in Israel: A Study of the Israeli Judiciary* (Norwell, MA: Kluwer Academic Publishers, 1994)

<sup>632</sup> Ilan Saban, "After the Storm? The Israeli Supreme Court and the Arab-Palestinian Minority in the Aftermath of October 2000" (2008) 14:4 *Israel Affairs* 623. Barak, *Judge in a Democracy*, *supra* note 349 at 283-305. See also Suzie Navot, *The Constitutional Law of Israel* (The Netherlands: Kluwer Law International, 2007) at 242-259.

<sup>633</sup> See for example the volume, Itzhak Zamir and Allen Zysblat (eds.), *Public Law in Israel* (New York: Oxford University Press, 1996), Pnina Lahav, "Rights and Democracy: The Court's Performance, in Israeli Democracy Under Stress," in Sprinzak and Diamond (eds.), *Israeli Democracy under Stress* (1993) 125-52, Suzie Navot, *The Constitutional Law of Israel* (The Netherlands: Kluwer Law International, 2007).

<sup>634</sup> See, for example, Menachem Mautner, *Law and the Culture of Israel* (New York, US: Oxford University Press, 2011) 99 – 158.

<sup>635</sup> This we see in one of the leading cases on the equal distribution of land, *Qa'adan*. The judge specifically mentions that the decision is forward-looking and will not correct executive action that may have impinged on the right to equality in land allocation in the past. It was in the early decades of the state that the majority of Palestinian land was expropriated and thereafter disproportionately allocated to Israeli Jews. *Qa'adan v. Israel Lands Administration* (2000), HCJ 6698/95, P.D. 54 (1) 258. For both praise and unease in commentary on the case, see land law scholar Sandy Alexandre Kedar, "A First Step in a Difficult and Sensitive Road: Preliminary Observations on *Qadan v Katzir*" (2000) 16 *Israel Studies Bulletin* 3.

In other words, what we notice in legal commentary commending progressive decisions, is also an uneasy scepticism of the rather conservative elements (meaning less challenging to the status quo), among them the tendency of the Court to defer to the executive. These trends make an appearance in the case at hand as we see how the court did not find that the executive acted unreasonably or in bad faith in spite there being considerable evidence to the contrary, in that the court refused to address historical inequalities and even lent its support to the ethnic exclusivity argument that informed the government's rationale. Pnina Lahav characterizes this unease as Israeli law being a Janus face with which forward looking, (liberal) Israeli law is in daily battle with its authoritarian antecedent.<sup>636</sup> We can borrow this characterization of the Janus face,<sup>637</sup> because I think this persistent unease helps us narrow in on a structural deficiency in the legal system that I intend to root out as I work through this chapter.

I would like to further flesh out these points, that of the conservative elements in Israeli liberal jurisprudence, and in particular the conservatism in the Court's tendency to defer to the executive.

For this, we will need to go back in time. In 1950 a debate took place in the Knesset regarding the institution of a constitution and the guarantee of civil rights via legislative guarantees. In that debate, Ben-Gurion, Israel's first prime minister stated, "in a free state like ... Israel there is no need for a bill of rights... [W]e need a bill of duties . . . duties to the homeland, to the people, to aliyah, to building the land, to the security of others, to the weak".<sup>638</sup> A constitution was never drawn up, but a resolution, termed the Harari Resolution was agreed upon, whereby the legislature would draw up a series of Basic Laws that in their whole would constitute chapters of a constitution.<sup>639</sup> Ben-Gurion's nay vote in the deliberation around drawing up a constitution is a rather curious indicator of what the underpinnings for a liberal jurisprudence would come to be. On its best day, liberalism would mean a 'free state', or one where the liberties of individuals are respected and protected, and would also mean the guarantees of personal security and assistance for the weak. Yet, at the same time that these liberties and social protections are proffered, there is also an emphasis on collective

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<sup>636</sup> Pnina Lahav, "Foundations of Rights Jurisprudence in Israel: Chief Justice Agranat's Legacy" (1990) 24 *Israel Law Review* at 268-9.

<sup>637</sup> I use this description with caution as it hinges on a binary bifurcation between progressive/regressive, liberal/conservative, which refuses to see other possibilities outside the two sided coin of, as Lahav characterizes it, 'liberal law based on utopian Zionism' versus 'authoritarian law based on disaster/catastrophe Zionism'.

<sup>638</sup> Pnina Lahav, "Rights and Democracy: The Court's Performance, in Israeli Democracy Under Stress," in Sprinzak and Diamond (eds.), *Israeli Democracy under Stress* (1993) 125 at 131.

<sup>639</sup> Ruth Gavison, "The Controversy over Israel's Bill of Rights" (1985) 151 *Israel Year Book of Human Rights* 113-54.

duty for a greater national objective, such as building the Jewish state via developing the land and institutionalizing *aliyah* (Jewish immigration). The collective duty that Ben-Gurion talks about should be understood as an instruction that imposes obligations towards state-defined objectives. Therefore, while the state may have been concerned with the liberty of the individual, the emphasis on collective duty meant that the state was also invested in non-liberty, or coercion, whereby individual liberties, while existing, do so alongside state-defined national goals. This is the argument that Aeyal Gross makes, that while a liberal jurisprudence was developing very early on in the state, it was “liberalism Zionist-style – with the context of the Jewish collective”.<sup>640</sup>

### Barak's Role in Israel's Liberal Jurisprudence

Aharon Barak played a major role in the judicial activism that marked the period since the legislation of the two Basic Laws that protected certain fundamental rights in the early nineties. Barak is generally considered to be the poster child for Israel's constitutional revolution and its right-sensitive, liberal trend upholding civil liberties, particularly for minorities and the disadvantaged.<sup>641</sup>

In *United Mizrahi Bank*,<sup>642</sup> Barak closed his opinion with the following statement on the potentiality of the 1992 Basic Laws, and the almost non-metaphysical, spiritual rationale for the principle of equality, “the prospect is of the ascent of the glory of human rights, and enhanced goodwill and fellowship among human beings, each born in the image of the Creator”.<sup>643</sup>

What Barak is purporting here is a rather radical conception of equality. It refuses to confine itself to Dworkin's restatement of Rawls' fundamental concept of equality, which is that of the abstract right to equal concern and respect. This is because this abstract right is on account of human beings

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<sup>640</sup> Aeyal M. Gross, “The Politics of Rights in Israeli Constitutional Law” (2008) 3:2 *Israel Studies* 80 at 86

<sup>641</sup> See Ariel L. Bendor and Zeev Segal, “The Judicial Discretion of Justice Aharon Barak” (2011) 47:2 *Tulsa Law Review* at 476, Sheryl Gay Stolberg, “Praise for an Israeli Judge Drives Criticism of Kagan”, *New York Times* (June 24, 2010), online: <http://www.nytimes.com/2010/06/25/us/politics/25kagan.html>. Barak ranked 39 in a public poll conducted by daily Yediot Ahronoth of the ‘200 Greatest Israelis of all time’. Ynet, “Israeli No. 1: Yitzhak Rabin” (May 11, 2005), online: <http://www.ynet.co.il/articles/0,7340,L-3083171,00.html>

<sup>642</sup> *United Mizrahi Bank v. Migdal Cooperative Village*, [1995] CA 6821/93, PD 49(4) 221-588, 1 Israel Law Reports 1-436. In the case, the Supreme Court sitting as a court of appeals held that the Basic Laws enabled judges to perform judicial review of legislation. Balancing the right to human dignity, codified by a Basic Law of the same name, with the right to property, the court overturned the decision of the Tel Aviv District Court that invalidated a statute that prevented creditors from claiming their debts in court in their full amount from the struggling agricultural sector.

<sup>643</sup> *United Mizrahi Bank v. Migdal Cooperative Village*, [1995] CA 6821/93, 1 Israel Law Reports at 258.

having the capacity to make plans and give justice. However, when Barak speaks of human beings as each being born in the image of the Creator, he ascribes an almost transcendental quality to equality. It is not that one deserves to be treated equal because he is a moral person with the capacity to make plans and give justice. Rather, there are no qualifiers to being equal. Neither is it a right one is accorded, it just is. The all-encompassing nature of this equality that Barak is purporting therefore certainly goes beyond liberal conceptions of equality, certainly those of Rawls and Dworkin. We could consider it a reformulation of Agamben's 'whatever singularity' which is similarly non-reducible, meaning that equality is on account of no particular and no universal, it simply cannot be reduced to a measurement of representation.

As Gross notes, Barak's are "noble words".<sup>644</sup> But do his actions follow suit?<sup>645</sup>

There is a sense that Barak was aware that his comments in *United Mizrahi Bank* could not be more than 'noble words'. In *The Hat Maker*,<sup>646</sup> Ariel Bendor and Ze'ev Sigal compile a series of conversations they conducted with Barak. Behind closed doors, Barak seems to be repentant about some of his decisions concerning the OPT for failing to uphold the principle of equality,<sup>647</sup> particularly on the issue of home demolitions.<sup>648</sup>

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<sup>644</sup> Aeyal M. Gross, "The Politics of Rights in Israeli Constitutional Law" (2008) 3:2 *Israel Studies* 80 at 99.

<sup>645</sup> For Gross and Ben-Israel (who Gross cites), they do not. Gross' argument is that the *United Mizrahi Bank* decision maintained the economic status quo in disfavour of more egalitarian and distributive economics. Ben-Israel argues that Barak's academic writings also betray how equality does not encompass the right to health or education and other essential socio-economic rights. See Ruth Ben-Israel, "The Effect of the Basic Laws on Labor Law and the Labor Relations System" (1994) 4 *Labor Law Yearbook* 27-47 (Hebrew), Aeyal M. Gross, "The Politics of Rights in Israeli Constitutional Law" (2008) 3:2 *Israel Studies* 80.

<sup>646</sup> Ariel L. Bendor & Zeev Segal, *The Hatmaker – Talks with Justice Aharon Barak* (Kinneret Zmora-Bitan Dvir, 2008) (Hebrew)

<sup>647</sup> Tom Segev, "The law unto Aharon", *Ha'aretz* (July 16 2009), online: <http://www.haaretz.com/the-law-unto-aharon-tom-segev-1.280147>

<sup>648</sup> Tomer Zarchin, "Former Chief Justice Barak regrets house demolitions", *Ha'aretz* (May 27, 2009), online: <http://www.haaretz.com/print-edition/news/former-chief-justice-barak-regrets-house-demolitions-1.276763>. See also Barak expressing regret for the court decision authorizing the expulsion of 415 Palestinians from the OPT to Lebanon without those expelled having the benefit of a hearing. Nomi Levitsky, *Your Honor: Aharon Barak: A Biography* (Jerusalem: Keter, 2001) at 188 (Hebrew). Cited in Nimer Sultany, "The Legacy of Justice Aharon Barak A Critical Review" (2007) 48 *Harvard International Law Journal Online* 83. For more background on the case, see also HaMoked, "The Deportation of 415 Palestinians to Lebanon in 1992" (undated), online: <http://www.hamoked.org/Case.aspx?cID=Cases0076>, *Association for Civil Rights in Israel v. Minister of Defence*, [1993] HCJ 5973/92

While Barak may have been a liberal, he was at the same time a conservative.<sup>649</sup> Although he states in his legal writings that circumstances do in fact require the law to adapt and change, he cautions that this must be balanced by stability, for without stability there will be anarchy. The need for the law to exhibit conservatism to a changing reality is so as to grant it 'certainty' and so that it not 'harm security'.<sup>650</sup> I am not making a value judgement here on whether this conservatism is a good or bad thing, but I only intend to point out that part of the thinking behind one of Israel's most liberal and rights-conscious judges, was the need for the law be cautious, conservative and stable, to evolve organically and in continuity with the past.<sup>651</sup>

On the review of administrative action, Barak writes that decisions should not be invalidated unless they were patently unreasonable, and that as long as they fell into the 'zone of reasonableness' they should be allowed to stand.<sup>652</sup> As long as the administrative branch balanced between different values, each one granted weight based on its importance in society, then the judge should respect the principle of separation of powers and defer to the executive.<sup>653</sup>

I think the *Qa'adan*<sup>654</sup> case, where Barak sat as president of the Supreme Court and delivered the majority opinion, is a telling example of how his liberalism was enunciated in a vocabulary that was specifically collectivist, conservative and Zionist. The case was hailed as a watershed moment in liberal Israeli jurisprudence where the court affirmed the prohibition on the ILA and other public bodies to discriminate against Arabs in the allocation of public land.<sup>655</sup> Yet, the court recommended that the state reconsider their decision as opposed to delivering a decision that would have set a precedent. The status quo remained intact as it would not rectify past discriminatory allocations

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<sup>649</sup> Yigal Mersel argues that the idea of 'Barak the activist' could have just as much been the consequence of perception, owing to his writings and wish to be seen as such, as it could have been the result of his decisions. See Yigal Mersel, "On Aharon Barak's Activist Image" (2011) 47:2 *Tulsa Law Review* 339

<sup>650</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 11.

<sup>651</sup> *Ibid.* at 12-19.

<sup>652</sup> *Ibid.* at 74. See discussion earlier in the chapter on the principle of reasonableness and the different tests associated with it.

<sup>653</sup> Similarly, President of the Supreme Court Dorit Beinisch emphasizes that in evaluating the constitutionality of a statute, the chief question to be answered is not whether a proportional impingement on human rights has taken place but rather it starts from the assumption that the statute is in fact constitutional, and the chief principle to be considered is that of majority rule and the separation of powers. See *Academic Center of Law and Business v. Minister of Finance*, [2009] H CJ 2605/05 at para. 14.

<sup>654</sup> *Qa'adan v. Israel Lands Administration* (2000), H CJ 6698/95, P.D. 54 (1) 258.

<sup>655</sup> Alexandre (Sandy) Kedar, "A First Step in a Difficult and Sensitive Road: Preliminary Observations on *Qaadan v. Katzir*" (2000) *Israel Studies Bulletin* 3

and it did nothing to undermine the exclusionary structure of ‘selection committees’, whose legality was strengthened *a posteriori*.<sup>656</sup>

So, while the decision exhibited many aspects of a liberal decision, such as labouring to rectify status-based inequality in the legal arena around land distribution, affirming the promotion of cultural pluralism based on the value of tolerance of the other<sup>657</sup> and encouraging regulatory amendments to increase the shares of land allocations to the traditionally disadvantaged Palestinian minority, it also contained the rather non-liberal elements of maintaining the status quo, in particular deferring to the executive to implement what was, in the end, not a binding decision, but a fairly conservative recommendation.<sup>658</sup> If this decision, attributed to Barak, is an indication of Barak’s liberalism, then what we can say is that there is more to Barak.

### Barak, the Israeli Hercules?<sup>659</sup>

At the start of this chapter, I wrote that I would look at equality as fundamental principle in adjudication by comparing Barak’s approach to that of Ronald Dworkin’s, given the latter’s influence on Barak’s legal thought. The two diverged on a number of issues, yet Barak frequently uses Dworkin as his lodestar, citing him as a point of reference for judicial interpretation, yet differing with him on a number of its finer points.<sup>660</sup>

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<sup>656</sup> Following the passing of the ‘Admission Committees Law’ which legalized the operation of selection committees in nearly 50% of all communities in Israel.

<sup>657</sup> *Supra* note 654 at para. 24.

<sup>658</sup> The *conservative* elements in *contemporary liberal thought* can also be seen among those that self-identify as liberals in Israel. See for example the work of anthropology doctoral candidate Callie Maidhof, *A House, a Yard and a Security Fence: Israel’s Secular Settlers in the West Bank*, Doctoral Dissertation (Berkeley, CA: University of California, 2016) and “Liberal Fascism”, *The New Inquiry* (December 3, 2013), online: <http://thenewinquiry.com/essays/liberal-fascism/>. There exist rather convincing external critiques of liberalism on the issues of securing minority rights and realizing claims for justice. See Duncan Kennedy, *Critique of Adjudication* (Cambridge, Massachusetts; London, England: Harvard University Press, 2007), Povinelli, *Cunning of Recognition*, *supra* note 14, Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton University Press: 2008)

<sup>659</sup> The reference here is to Ronald Dworkin’s coining the term ‘Hercules’ to refer to a judge possessing superhuman skill, learning, patience and acumen that allows him to decide ‘hard cases’. Charles Fried, former Solicitor General under former US President Ronald Reagan, thought of Barak as that Hercules. See C-Span Archives, “The Role of the Supreme Court in a Democracy”, Harvard University Law School (November 11, 2002), online: <http://www.c-spanarchives.org/program/174324-1>

<sup>660</sup> Dworkin is heavily cited in Aharon Barak, *Purposive Interpretation in Law* (trans. Sari Bashi) (Princeton and Oxford: Princeton University Press, 2005). In *United Mizrahi Bank*, the landmark decision that opened the door for judicial review of legislation, Barak draws on Dworkin to explain that Israel’s social and legal history best describes why the Knesset is empowered to adopt a constitution for Israel. Accordingly, the Basic Laws uphold the constitutional values of human dignity and equality and also allow for judicial review of legislation to determine unconstitutionality. See *United Mizrahi Bank v. Migdal Cooperative Village*, CA 6821/93 [1995], PD 49(4) 221-588, 1 Israel Law Reports at paras. 8,45, 80 of Barak’s opinion. Barak references Dworkin in discussion of the

Barak concurs with Dworkin that interpretation rests, at least in part, on the abstract intent of the legislator. They both accord ‘fundamental values’ or principles their weight in interpreting the law.<sup>661</sup> However, while Dworkin believes the law is based on integrity which aims at justice and fairness and procedural due process, Barak asserts that these values should not take primacy in interpretation and instead argues for the sum of a society’s fundamental democratic values to inform the interpretive process.<sup>662</sup>

While both agree on the importance of abstract intent of the legislative author, for Dworkin this is a far more central principle in interpretation; it is what grants the law ‘integrity’, that is to say “which mandates giving a text the meaning that casts its political history in the best light”.<sup>663</sup> Barak’s purposive interpretation gives fundamental values the same weight, or sometimes more, than the subjective purpose of the legal text’s author.<sup>664</sup>

Barak also disagrees with Dworkin that a legal problem could only have a single solution,<sup>665</sup> arguing instead for judicial discretion that would allow a judge to choose between more than one possibility.<sup>666</sup>

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principle of equality in *CAL Cargo Airlines Ltd. v. The Prime Minister*, HCJ 1703/92, P.D. 52(4) 193 and in *Recanat v. The Labour Tribunal*, HCJ 4191/97 [2000], P.D. 54(5) 330. In emphasizing the importance for respect and protection of human rights in democratic regimes, Barak cites Dworkin in *Horev v. Minister of Transportation*, HCJ 5016/96 [1997], P.D. 51(4) 1 and in the discussion on restriction of the right to free expression draws on Dworkin in *Shinui Party v. Chairman of the Central Elections Committee*, HCJ 2194/06 [2006] Tak-Al 2006(2) 4500. Dworkin is specifically cited in some four dozen Israeli Supreme Court cases and dozens more at other court levels. For more on the discord between Barak and Dworkin on interpretation and their different approaches to the principle/policy distinction in adjudication, see also Nelson Richard Dordelli-Rosales, *Constitutional Jurisprudence in the Supreme Court of Venezuela*, Doctoral Dissertation (Ottawa: Faculty of Law, University of Ottawa, 2013) at 271-278

<sup>661</sup> Aharon Barak, *Purposive Interpretation in Law* (trans. Sari Bashi) (Princeton and Oxford: Princeton University Press, 2005) at 296

<sup>662</sup> *Ibid.* at 296-7

<sup>663</sup> *Ibid.* at 297

<sup>664</sup> *Ibid.* Caleb Nelson argues that the traditional theorizing around statutory interpretation that divides the field into two camps – those seeking to interpret in light of the original, subjective intention of the legislator (intentionalist) versus those seeking to be more objective (textualist) is misplaced. Nelson argues that it is not clear that the intentionalist (less so than the textualist) considers unimportant to ensure fair notice of the law’s legal requirements to people outside the enacting legislature. Similarly, it is not unequivocal that the textualist (less so than the intentionalist) considers original intent insignificant. Rather, the issue is of rules and standards. It is safe to conclude, according to Cabel, that textualists do tend towards a more rule-based approach to interpretation than intentionalists and therein lays the difference. See Cabel Nelson, “What Is Textualism?” (2005) 91 *Virginia Law Review* 347.

<sup>665</sup> Ronald Dworkin, “Hard Cases” (1975) 88:6 *Harvard Law Review* 1057

<sup>666</sup> *Supra* note 661 at 207

Barak's drawing on Dworkin is reflective of an approach to adjudication that has been coined transnational judicial dialogue,<sup>667</sup> whereby he regularly drew on foreign courts, scholars and judges in adjudication, leaving a legacy for the same in the Israeli Supreme Court.<sup>668</sup> That is not to say, however, that the use of foreign decisions was uncommon prior to Barak. Israeli law inherited various foreign legal systems such as the Ottoman and British Mandatory and so was not averse to the use of foreign decisions,<sup>669</sup> an early example of which is the notable 1953 decision of *Kol Ha'am*.<sup>670</sup>

### 'In principle, I agree with you'

A central element of Barak's liberal approach to adjudication was judging on the basis of fundamental principles.<sup>671</sup> According to Barak, fundamental principles or values included those of tolerance, good faith, reasonableness (as proper ways of behaviour), justice (as ethical value) and public order and security (as social purposes).<sup>672</sup> These principles constituted norms, or binding rules of conduct that regulated social relations, which crystallized to constitute the rule of law<sup>673</sup> and democracy.<sup>674</sup>

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<sup>667</sup> Anne-Marie Burley, "Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine" (1992) 92 *Columbia Law Review* 1907

<sup>668</sup> Markus Wagner, "Transnational Legal Communication: A Partial Legacy of Supreme Court President Aharon Barak" (2011) 47 *Tulsa Law Review* 437

<sup>669</sup> Michel Rosenfeld & András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) at 1339-1340, Pnina Lahav, "American Influence on Israel's Jurisprudence of Free Speech," (1981) 9 *Hastings Constitutional Law Quarterly* 21, Barak, *Judge in a Democracy*, *supra* note 349 at 202, Daphne Barak-Erez, "Judicial Conversations and Comparative Law: The Case of Non-Hegemonic Countries" (2011) 47 *Tulsa Law Review* 405 at 408.

<sup>670</sup> *Kol Ha'am Company Ltd. v. Minister of Interior*, HCJ 73/53, 7 P.D. 871.

<sup>671</sup> See Barak, *Judge in a Democracy*, *supra* note 349 at 57-76. Fundamental principles have also been referred to in other, earlier scholarly interventions as 'super-statutory constitutional norms', see for example, Asher Maoz, "Defending Civil Liberties without a Constitution – The Israeli Experience" (1988) 16 *Melbourne University Law Review* at 825-6.

<sup>672</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 58.

<sup>673</sup> By rule of law I take to mean that all people, regardless of status, are held equal before the law and no arbitrary action by government is permitted. Barak understands the rule of law not as a rule-book conception, which is to say that law must be followed just because it exists. Rather, Barak sees the rule of law as being "social justice based on public order", one that balances the needs of society with that of the individual. See Barak, *Judge in a Democracy*, *supra* note 349 at 55-6.

<sup>674</sup> By democracy, I refer to the following constituent elements: elections whereby citizens vote to elect their representatives in government, participatory aspects to ensure active participation of citizenry, the respect for human rights, including those of minorities, and respect and adherence to the rule of law. Of course, to say that democracy and the rule of law are good things is to make a claim about a moral ideal. It is to say that the world is a better place because the rule of law and democracy exist. Yet, as Stephen Guest points out, Ronald Dworkin's work in interpretation, and we can certainly extend the argument to Aharon Barak, is that its starting point is that democracy and the rule of law are good things, and there is no conceptual description of the nature of law or democracy. Therefore, an important element to flag is that their work in legal interpretation is about the reconstruction of these

According to Barak, fundamental principles are the objective purpose of every legal text.<sup>675</sup> The source of fundamental principles is not the judges' subjective view but rather they originate from the "fundamental positions and beliefs of the society as found in [for example] the declaration of independence."<sup>676</sup> Principles are not static, they come and go, and Barak prescribes that they should be introduced when 'ripe for recognition' and in a gradual manner, and according to former Chief Justice Agranat, upon the will of the people.<sup>677</sup>

Fundamental principles are used as a tool in interpreting legal texts. Those fundamental principles derived from the constitution have constitutional status and a corresponding weight or 'gravitational force', so that they would trump those principles whose source is secondary, such as in regular statute.<sup>678</sup>

Among those values that Barak sees as fundamental principles is the value of tolerance. He defines tolerance as respect for the personal opinions and feelings of every individual.<sup>679</sup> It concerns respecting 'difference', "attempting to understand others, even if they behave in a way that is unusual". Tolerance is the willingness to compromise, between individual and society and between individuals. It is a value deployed not to accumulate rights for those asserting it, but a criterion for *granting* rights to others.<sup>680</sup> By enabling concessions to be made, tolerance makes proper social life a possibility.<sup>681</sup> Tolerance is not an absolute value, however, and has its limits.<sup>682</sup>

A second central fundamental value in democratic society is that of good faith. This principle establishes the standard of behaviour for individuals interacting with one another. It establishes that this behaviour be honest and fair as required by society's sense of justice and fundamental conceptions about proper behaviour. It balances between the needs of the individual and society.<sup>683</sup>

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moral ideals as opposed to working through with the reader why these are desirable concepts in the first place. Stephen Guest, "[How To Criticize Ronald Dworkin's Theory of Law](#)", (2009) 69 (2) *Analysis* 352-364.

<sup>675</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 57.

<sup>676</sup> *Ibid.* at 59.

<sup>677</sup> *Ibid.* at 60, Justice Agranat in *Shalit v. Minister of Interior*, H CJ 58/68, 23(2) P.D. 477 at 602.

<sup>678</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 62-63; on weighting, Barak is citing Dworkin, *Taking Rights Seriously*, *supra* note 566 at 25-27

<sup>679</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 64.

<sup>680</sup> *Ibid.*

<sup>681</sup> *Reem Engineering Contractors Ltd. v. Nazareth Local Authority*, CA 105/92, 47(5) P.D. 189 at 211.

<sup>682</sup> *Supra* note 679

<sup>683</sup> *Ibid.* at 65, *Roker v. Salomon*, CA 6339/97, 55(1) P.D. 199 at 279.

Good faith takes account of personal interest, “one is not required to be an angel”,<sup>684</sup> but that in realizing this personal interest, it is done fairly and “with consideration for the justified expectations and proper reliance of the other party”.<sup>685</sup> Public bodies, as a matter of public law, have a higher duty however than just that of acting in good faith.<sup>686</sup>

According to Barak, justice is law’s goal and thereby the standard by which law can be evaluated. It is a central tenet of democracy, and so democracy is weakened by a regime being unjust. It has residual value, which means that in a ‘hard case’ if the scales are balanced when pitting one value or principle against the other, the ‘more just’ decision tips the scale.<sup>687</sup> Barak, however, does not define justice so we do not know, to take one instance, if by it he is referring to a principle informed by moral, sentimental or rational considerations.

For Barak, public order, which includes public security, is a social goal that is also a fundamental principle.<sup>688</sup> Its importance stems from the fact that individuals not only have rights but duties to society as well. Without public order, the argument goes, “it is impossible to assure the realization of other democratic values, including human rights”.<sup>689</sup> As Barak himself stated in the *Laor* case, which was a free expression victory for theatre, “Every state has its collective identity, its national history, and its social aspirations. Protection of all these is among the fundamental values of the state. Democracy is not anarchy. Democracy need not commit suicide to prove its vitality”.<sup>690</sup> In the balancing of fundamental principles, principles either wrestle in reciprocal compromise (horizontal balancing) or simply trump one another (vertical balancing) on account of their relative weight. Accordingly, public order or security would play a vertical trump on free expression if it were determined that free expression would harm public safety or national security. Similarly, freedom of movement outside the country could be restricted if there existed a genuine and serious fear that such movement would harm national security.<sup>691</sup>

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<sup>684</sup> *Roker v. Salomon*, CA 6339/97, 55(1) P.D. 199 at 279.

<sup>685</sup> *Ibid.*

<sup>686</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 66-67.

<sup>687</sup> *Ibid.* at 67.

<sup>688</sup> *Ibid.* at 75-6.

<sup>689</sup> *Ibid.* at 75.

<sup>690</sup> *Laor v. Film and Play Review Board*, HCJ 14/86, 41(1) P.D. 421 at 433

<sup>691</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 170-2.

In 'Hard Cases',<sup>692</sup> Ronald Dworkin outlines the distinction between fundamental principles and policy in adjudication. While a judicial decision can be made on either principle or policy grounds,<sup>693</sup> in his article Dworkin makes the argument for adjudication on the basis of the former over the latter.<sup>694</sup>

Dworkin defines a 'principle' in terms similar to Barak; that is, originating in the legal system's institutional history and offering the law its best moral justification.<sup>695</sup> Principles are the standards to be observed because they answer to justice or fairness or some other rule of morality,<sup>696</sup> and so are quite different from rules. While rules are decided in an all-or-nothing matter, that is either a particular rule is accepted as valid or not when applied to the facts of the case, principles do not follow the same logic.<sup>697</sup> Instead, principles possess weight or importance allowing a judge to balance between competing principles.<sup>698</sup> Unlike rules whose validity is recognized because of their formal source of origin, legal principles are relevant to decision-making from their "sense of appropriateness" accorded by the legal profession and public at large,<sup>699</sup> or their match with the

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<sup>692</sup> Ronald Dworkin, "Hard Cases" (1975) 88:6 *Harvard Law Review* 1057

<sup>693</sup> Ronald Dworkin, "Hard Cases" (1975) 88:6 *Harvard Law Review* 1057 at 1060

<sup>694</sup> Dworkin's theory is not foolproof and there have been numerous critiques levelled at it, for example by Stephen Guest, *supra* and one put forth by Allan Hutchinson & John Wakefield. According to Hutchinson & Wakefield, Dworkin employs a flawed methodology for identifying a 'hard case' so that in effect all cases become hard cases, where a judge would decide on principle rather than on the basis of rules. Second, Dworkin subsumes rules to principles, yet admits that principles relevant to law are difficult to catalogue. So what solution does Dworkin provide? He suggests that one look to principles that are 'sanctioned by the soundest theory of law'. This soundest theory causes one to look at the existing body of rules. In short, Dworkin appears to be saying that "rules derive from principles which derive from rules" trapping his Hercules in a "juristic hall of mirrors". Allan C. Hutchinson & John N. Wakefield, "A Hard Look at 'Hard Cases': The Nightmare of a Noble Dreamer" (1982) 2(1) *Oxford Journal Legal Studies* 86-110.

<sup>695</sup> Ronald Dworkin, "Hard Cases" (1975) 88:6 *Harvard Law Review* 1057 at 1098-99. This phrasing is taken from HLA Hart, who was in disagreement with Dworkin regarding adjudication on the basis of principles. See H. L. A. Hart, *The Concept of Law* (2d) (Oxford University Press: 1994) at 253, cited in Jeffrey A. Van Detta, "The Irony of Instrumentalism: Using Dworkin's Principle-Rule Distinction to Reconceptualize Metaphorically a Substance-Procedure Dissonance Exemplified by Forum Non Conveniens Dismissals in International Product Injury Cases" (2004) 87:3 *Marquette Law Review* 425 at 439. Of course, it was also Hart who was Dworkin's primary intellectual sparring partner in the so called 'Hart-Dworkin' debate, sparked by Dworkin's critique of Hart's theory of legal positivism. See Scott J. Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed" in Arthur Ripstein (ed.), *Ronald Dworkin* (Cambridge University Press, 2007) 22-55, where Shapiro identifies that the central point of contention between the two is the relation between legality and morality. See also Brian Leiter, "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence" (2003) 48 *American Journal of Jurisprudence* 17.

<sup>696</sup> Dworkin, *Taking Rights Seriously*, *supra* note 566 at 22

<sup>697</sup> *Ibid.* at 24

<sup>698</sup> *Ibid.* at 26-27

<sup>699</sup> *Ibid.* at 40.

soundest ‘community morality’, which is the political morality of the laws and institutions of the community.<sup>700</sup>

As Dworkin explains, in political theory, arguments of policy justify a political decision where an action benefits the community as a whole. The example he proffers is the subsidy for airline manufacturers for national defense promotion.<sup>701</sup> In our present case, the policy justification by the judges, one that trumped the principle of equality, was that the interest of developing the Negev was destined to advance a national, public aim, realised by satisfying the subordinate aims of the Plan to promote tourism, agriculture and landscape protection.<sup>702</sup>

Dworkin adds that “arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right”,<sup>703</sup> for example anti-discrimination statutes for minorities. Nevertheless, the distinction between principle and policy is not a fine one. While deliberating an antidiscrimination programme, there may be a provision that disallows work stoppage should it be seen, from a policy standpoint, as being disruptive or non-beneficial on economic grounds. In such a case, we can say that the antidiscrimination programme is one made on principal but qualified by policy.<sup>704</sup> In summary, arguments of principle are intended to establish an individual right, while arguments of policy are to realize a collective goal.<sup>705</sup>

One reason Dworkin justifies that judges rule on the grounds of principle over policy is that it would be more accountable to the will of the people. He recommends that a policy decision be made by legislatures rather than judges. Policy decisions seek to “compromise among individual goals and purposes in search of the welfare of the community as a whole”.<sup>706</sup> This would mean having to make interpersonal comparisons of utility or preference which judges cannot be expected to make. The legislature may make such comparisons indifferently, but they still make them better than judges.<sup>707</sup>

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<sup>700</sup> Dworkin, *Taking Rights Seriously*, *supra* note 566 at 126. For more on the principal/policy distinction as a challenge to legal positivism, see Raimo Siltala, *A Theory of Precedent* (Oxford and Portland, Oregon: Hart Publishing, 2000).

<sup>701</sup> Ronald Dworkin, “Hard Cases” (1975) 88:6 *Harvard Law Review* 1057 at 1059

<sup>702</sup> *Adalah v. The National Council for Planning and Building*, H CJ 2817/06 [June 15 2010] at para. 8.

<sup>703</sup> *Supra* note 701

<sup>704</sup> *Ibid.*

<sup>705</sup> *Ibid.* at 1067.

<sup>706</sup> *Ibid.* at 1061.

<sup>707</sup> *Ibid.*

Another reason why arguments of principle are preferred by Dworkin is that they are more likely to uphold the principle of equality. Dworkin offers the example of an antidiscrimination statute promoting desegregation. This statute would be hard to defeat were it grounded in the right to equality as a matter of principle. The statute could, however, be defeated were it up against a principle of comparable importance, such as the right to life in the event that desegregation would prompt riots and expose more people to the threat of being killed. However, this consideration, in an adequately managed desegregation process, would be a rather rare case. Accordingly, defeating the antidiscrimination statute on the grounds of principle would be unlikely. Yet, if adjudicating based on policy, where general utility and welfare trumps, then a statute such as this can be defeated fairly easily if it can be shown that the majority of people would experience discomfort or displeasure by desegregation.<sup>708</sup>

While Ronald Dworkin distinguishes between principle and policy, Barak does not.<sup>709</sup> Therefore, while national security is a policy consideration for Dworkin, Barak sees it as fundamental principle.<sup>710</sup>

Before I go further, I'd like to leave suspended, in the spirit of the uneasy spectre, what it would mean to extrapolate Dworkin's assertion that arguments of principle are justified by demonstrating that they secure a group right. If Barak sees national security as principle, then does it follow that a decision made on national security grounds is justified by it securing a *group right to security*? And if so, then what does a *collective right to security* entail – what is its scope, parameters and normative content? Where does it place in the hierarchy of rights? When is its impingement or limitation justified? And who exactly is protected by this right? Who is excluded? I will take these questions up as final arguments in this chapter.

### The Israeli Multitude as Source of Fundamental Principles

For both Dworkin and Barak, principles are grounded in society's fundamental values, that is to say in the political morality of the laws and institutions of the community<sup>711</sup> and in "fundamental

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<sup>708</sup> *Ibid.* at 1073.

<sup>709</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 58.

<sup>710</sup> This non-distinction is admitted by Barak, though curiously as a footnote, where he states that he does not "insist on this distinction" [between principle and policy]. *Ibid.* at 58, footnote 96.

<sup>711</sup> Dworkin, *Taking Rights Seriously*, *supra* note 566 at 126

positions and beliefs of the society as found in [for example] the declaration of independence.”<sup>712</sup> As Israeli legal theorist and scholar Ruth Gavison has written, “Achievements of justice and human rights under a law seen as shared by all are more solid and stable than those that are based on controversial judicial decisions. If law is a part of life in a community, legal norms need to be developed and debated and articulated from within that society and its cultural sources, both legal and other”.<sup>713</sup>

Indeed, this is what democracy means – exercising the will of the people. Such a rationale is found in, for example, the Spinozan evaluation of democracy, which states that government is constituted by the will of the people, or ‘multitude’ (those who exemplify common social desires through common social behaviour), and who by a dynamic form of popular authority as ‘constituent government’ give legitimacy to democratic government as institution.<sup>714</sup> This chapter assumes, as Dworkin does in his theory of adjudication, that democracy and the rule of law are moral ideals without an ontological probing of why they are so. So, if democracy is about effecting the will of the people, then how better to realize democracy than by translating, via adjudication, society’s fundamental values and political morality that underlie the country’s laws and institutions.

Yet, what if the community holds very anti-democratic ideas for how they wish their community to run? For example, what if it is shown that the majority of Israelis hold opinions that are discriminatory towards Arabs/Palestinians<sup>715</sup> or are homophobic<sup>716</sup>? Would these inform corresponding principles to be employed in adjudication since they reflect the majority will? By both Dworkin’s and Barak’s accounting of fundamental principles, they would not. This is because fundamental principles have a validity, even if not enunciated specifically in the constitution or statute, that presupposes said constitution or statute. They have a basis that informs law’s

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<sup>712</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 59.

<sup>713</sup> Ruth Gavison, “Law, Adjudication, Human Rights and Society” (2007) 40 *Israel Law Review* 31 at 54

<sup>714</sup> Antonio Negri, *The Savage Anomaly: The Power of Spinoza's Metaphysics and Politics* (University of Minnesota Press, 1991) at xv, xvi

<sup>715</sup> A poll conducted by Geocartographica revealed that a majority of Israeli Jews are put off by Arabic speakers. Around 50% feel either fear or ‘discomfort’, and 18% feel hate. See Khoury & Ashkenazi 2006. Jack Khoury and Eli Ashkenazi, “Poll: 68% of Jews would refuse to live in same building as an Arab”, *Ha'aretz* (March 22, 2006), online: <http://www.haaretz.com/news/poll-68-of-jews-would-refuse-to-live-in-same-building-as-an-arab-1.183429>. In a poll conducted in August 2002 by newspaper *Ma'ariv*, 72% of Israeli Jews saw Arabs as a security threat. See Nimer Sultany, *Citizens without Citizenship: Mada's First Annual Political Monitoring Report: Israel and the Palestinian Minority 2000-2002* (Haifa: Mada - The Arab Center for Applied Social Research, 2003) at 129-130.

<sup>716</sup> A poll, global in scale, looking at the acceptability of homosexuality found that in Israeli society, 47% thought that homosexuality should not be accepted by society. Pew Research Center, “The Global Divide on Homosexuality” (June 4 2013), online: <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>

codification, and as far as Israel's Basic Laws that have constitutional force go, this is *not* clearly the case.<sup>717</sup> Principles are also informed by the persuasive force of various sorts of precedent, contemporary moral practices and various other standards,<sup>718</sup> including those stemming from the contemporary human rights framework that provides for the protection of minority rights.

Nevertheless, the dangers associated with a society that holds values that run counter to democratic ones has been raised by, for example, Jeremy Waldron. In making a case against judicial review on the premise that it is democratically illegitimate when compared alongside deference to the legislature, there are four assumptions that must hold true.<sup>719</sup> They include a representative legislature and judicial institutions that uphold the rule of law and are in good working order.<sup>720</sup> Crucially, among the four are two other caveats of relevance to my argument. First, that there is persisting, good faith disagreement about rights by a society committed to the idea of rights and that there is a commitment on the part of most members of society and officials to the idea of minority rights.<sup>721</sup> Failing these assumptions, judicial review would not be a less democratic process than resorting to the legislature to uphold rights and democracy. That is to say, in societies where the majority does not believe in minority rights or do hold anti-democratic views, there is less of a guarantee that the legislature would protect and fulfill its international human rights commitments or be democratic. In such a scenario, judicial review would be preferred to do what the legislature is unlikely to do.

In *United Mizrahi Bank*, Barak raises a similar concern to Waldron's. Barak quotes Dworkin to say that majority rule is legitimate only in a community of equals where all are treated with equal concern and respect, to make the argument for judicial review of legislation that fails to respect minority rights.<sup>722</sup> I do not wish to speculate if Barak was making the case for judicial review on the conviction that Israeli society was essentially a community of unequals.

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<sup>717</sup> The argument could be made that grounding the basic laws in the values of Israel as a Jewish and democratic state, reaffirming the validity of Mandatory Emergency Regulations therein, and positioning Jewish values, culture and history as the paradigm with which the laws of the state are interpreted as is found in the Declaration of Independence, does make a distinction, or discriminate, between who is Jew and who is not. It is logical to infer then that the laws and institutions of the state are informed by a discriminatory political morality or ethic. But this is not the argument I wish to make here.

<sup>718</sup> Dworkin, *Taking Rights Seriously*, *supra* note 566 at 40.

<sup>719</sup> Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 *The Yale Law Journal* 1346

<sup>720</sup> *Ibid.* at 1360.

<sup>721</sup> *Ibid.*

<sup>722</sup> *United Mizrahi Bank v. Migdal Cooperative Village*, [1995] CA 6821/93, PD 49(4) 221-588 at para. 80.

So, while anti-democratic views among a significant portion of Israeli society exist, and these have been translated into statute on the issues of marriage and conducting a family life,<sup>723</sup> choosing where one wishes to live<sup>724</sup> and free expression,<sup>725</sup> these commonly held opinions and statutes targeting *particular aspects* of non-Jewish life,<sup>726</sup> do not render adjudication on the basis of fundamental principles as prescribed by liberal jurists Dworkin and Barak an existential problem, permeating all aspects of Palestinian social life. What is problematic is that anti-democratic views of majoritarian society have crystallized around a very different center, which has the almost unrestricted potential to impact all aspects of Palestinian life. I make the argument that that center is the fundamental principle of public order, including national security.

A clarification is important. The Wine Path Plan case is not one concerning the balancing between the principle of equality and that of national security, at least not at face value. Rather, the court sought to answer if the 'national development' objective of government violated the right to equality of Naqab Bedouin. In Israeli jurisprudence, national development is not a fundamental value and so would carry less weight than national security. By this it is logical to infer that if national development as objective was not determined to be an unreasonable governmental aim or the decision to implement it was not one taken in bad faith, then neither would a national security argument, assuming it was a relevant consideration.

Yet, the objective of national security and that of development are not disparate. In fact, they both are motivated by a collectivist and materialist objective, towards a telos of 'securing' something for the state. Indeed, in dismissing the petition, the court stated that the Wine Path Plan "fulfil[s] an important national objective...the interest of developing the Negev is destined to advance a national, public aim". A similar argument was put forth by various officials, who more explicitly made the link between settlement and security, whereby the plan was justified on the grounds that settlement was a priority in order to protect and secure the state's interests, both present and

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<sup>723</sup> The Citizenship and Entry into Israel Law (temporary provision) 5763 – 2003. It is also known as the ban on family reunification.

<sup>724</sup> Law to Amend the Cooperative Societies Ordinance (No. 8), 5771 – 2011, also known as the 'Admissions Committee Law'

<sup>725</sup> Law for Prevention of Damage to the State of Israel through Boycott – 2011, commonly referred to as 'The Anti-Boycott Law'

<sup>726</sup> For a current and informative database on some six dozen discriminatory pieces of legislation, as well as proposed bills, targeting Palestinians in Israel and in the OPT, see Adalah, 'Discriminatory Laws in Israel', online: <http://adalah.org/eng/Israeli-Discriminatory-Law-Database>

future.<sup>727</sup> What this tells us is that 'Jewish settlement as an element of national development' is a subset of 'national security' objectives, so that even if national security is not the stated fundamental principle being evaluated alongside equality, its logic and considerations are.<sup>728</sup> What this also tells us is that as a concept, 'national security' is broad in scope, an aspect that I will explore further.

### Section 4.3 On Security

*"There is no security without law. Satisfying the provisions of the law is an aspect of national security"*<sup>729</sup>

Before I demonstrate the broad scope of the national security argument, we should ask, what does 'security' mean? I would like to first sketch the major theoretical arguments around the concept. Next, I would like to explore how national security was construed within the liberal jurisprudence of Aharon Barak while I remain cognizant of the historical circumstances that would likely have influenced such a construction. Finally, I'd like to investigate how the elevation of national security to the level of fundamental principle could threaten to undermine the very foundations on which fundamental principles are based, the rule of law and democracy.<sup>730</sup>

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<sup>727</sup> National development is seen as promoting national security also in the institution of Jewish Hiran (to replace Umm al-Hieran), and alongside it another nine villages along the southern West Bank-Green Line border, whereby its institution was a matter of 'national necessity' meant to assist in Jewish population distribution towards the peripheries, preserve state lands and protect borders. See Hana Hamdan, "The Policy of Settlement and 'Spatial Judaization' in the Naqab," 11 *Adalah's Newsletter* (March 2005) at 2-3. As Holzman-Gazit has shown, the public purpose behind land expropriations in Israel is justified given the national-strategic emphasis on housing for the reasons of demography, security, and immigration. Shamir and Herzog argue that security does not just relate to threat or harm but that which jeopardizes the very existence of the state as Jewish. See Hanna Herzog and Ronen Shamir, "Negotiated Society? Media Discourse on Israeli Jewish/Arab Relations," 9(1&2) *Israel Social Science Research* 55 (1994), cited in Samera Esmeir, "Introduction: In the Name of Security" in *Adalah*, 4 *Adalah's Review* (2004) 2-10 at 3. See also Alina Korn, "Political Control and Crime: The Use of Defense (Emergency) Regulations during the Military Government" in *Adalah*, 4 *Adalah's Review* (2004) 23-32 at 29.

<sup>728</sup> It is interesting to note that national development is more commonly understood in the world as improving the social welfare of the population through better access to education, health care, transportation, work opportunities, where the overall goal would be eliminating poverty and reducing inequality.

<sup>729</sup> Quote from Justice Aharon Barak in the Separation Wall case, *Beit Sourik Village Council v. The Government of Israel*, [2004] H CJ 2046/04 at para. 86

<sup>730</sup> That fundamental principles are reflective of the rule of law and democracy is something that Barak and Dworkin would assert, but is a view certainly not shared by all, particularly detractors who claim that judicial review that appeals to principles so prescribed is antithetical to a rule of law project. See, for example, American Supreme Court Justice Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (University Center for Human Values) (ed. Amy Gutmann) (Princeton University Press: 2007) and jurisprude H. L. A. Hart, *The Concept of Law* (2d) (Oxford University Press: 1994). See also Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 *The Yale Law Journal* 1346.

While the liberal concept of equality places the individual as its gravitational center around which its normative standards are constructed, the dominant historical trend in security studies has the state at its center. The state here, however, is not so much a representation of the collective, or a multitude in the Spinozan understanding of the term, as it is a generally stable institution with individuated interests. By this equation, the threats imagined against its interests (and not the threats imagined against the sum of its subjects' interests) are pitted against that of other states, or indeed, as is the formula relevant to us, against its subjects, those with the legal status of citizens of the state.<sup>731</sup>

The state-centric approach to security studies is one which we have no difficulty identifying as being the operative understanding in the Israeli state, at the level of government and the judiciary. However, it is not the only understanding of security. Since the 1980s, this (neo)realist<sup>732</sup> conception of security studies has come under criticism from what is a more constructivist approach,<sup>733</sup> whereby the *social* structure of state action, including the consideration of non-state actors and individuals key into understandings of security.

One of the iterations of the constructivist approach is that of securitization theory, which claims that security must be understood as a "speech-act".<sup>734</sup> This is to say that threats are recognized and

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<sup>731</sup> See, for example, Theo Farrell, "Constructivist Security Studies: Portrait of a Research Program" (2002) 4:1 *International Studies Review* 49-72 at 50-1. According to a 'defensive realist' approach, such as that proffered by prominent security studies scholar Kenneth Waltz, the international system is essentially anarchic and so states need to wield power and guarantee security in order to achieve other goals such as tranquillity and profit. See Kenneth N. Waltz, *Theory of International Politics* (Reading, Mass.: Addison- Wesley, 1979).

<sup>732</sup> Although neorealism and realism are often used interchangeably, there are important differences. For one, neorealism defines international politics as a distinct structure around which it is possible to build a theory, and this structural turn distinguishes it from realism. Second, realism adopts behavioural logic as the determinant of outcomes in international relations. Therefore, it takes human nature, or the urge to dominate, to be determinant of war; neorealism, however, understands anarchy and not human nature as influencing outcomes. Power as an end does not enjoy the privileged status in neorealism as it does in realism. To neorealists, power is a question of means; it is useful for states to have, though the primary concern for states is security and not power. See Kenneth Waltz, "Realist Thought and Neorealist Theory" (1990) 44:1 *Journal of International Affairs* 21

<sup>733</sup> Theo Farrell, "Constructivist Security Studies: Portrait of a Research Program" (2002) 4:1 *International Studies Review* 49-72

<sup>734</sup> Michael C. Williams, "Words, Images, Enemies: Securitization and International Politics" (2003) 47 *International Studies Quarterly* (2003) 511-531 at 512-513. It is worth noting that in this piece Williams develops the argument that although the Copenhagen school, which developed the securitization as 'speech-acts' formulation, claims to be social constructivist, it also carries the current of that which it critiques, the Realist tradition.

represented and in this act of representation so come into being.<sup>735</sup> Whether the constructivist approach is of the Copenhagen or the Welsh school,<sup>736</sup> they both look beyond the material claims of the state and towards society more generally in theorizing about security.

The idea that “the sovereign state is one of the main causes of insecurity”<sup>737</sup> is a claim put forth by the Welsh school of security studies. Drawing on critical theory, this stream focuses on emancipating humanity from insecurity, which they maintain is caused by war and other forms of social stress. As Ken Booth explains, “Emancipation is freeing people (as individuals and groups) from the physical and human constraints, together with poverty, poor education, political oppression and so on.”<sup>738</sup>

Such a human-centred view of security has also been put forth by leading human rights organizations such as Amnesty in their critique of ‘national security’.<sup>739</sup> As Dunne and Wheeler remind us, the focus on the security of human beings is evinced in international human rights developments after 1945.<sup>740</sup> This critical approach to security hinges on an appreciation of the indivisibility between security and human rights. Threats to life by government as well as the denial of subsistence rights such as to food, water and housing are violations of fundamental human rights, and by this human-centered logic of security, are violations to security. They clarify that sources of harm to security can be at the hands of the government or from private individuals, can

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<sup>735</sup> *Ibid.* at 513. See Ole Wæver, “Securitization and Desecuritization,” in Ronnie D. Lipschutz (ed.), *On Security* (New York: Columbia University Press, 1995) 46–86 at 55, “In this usage, security is not of interest as a sign that refers to something more real; the utterance itself is the act. By saying it, something is done (as in betting, giving a promise, naming a ship). By uttering “security” a state representative moves a particular development into a specific area, and thereby claims a special right to use whatever means are necessary to block it.”

<sup>736</sup> For differences between the two schools, their limitations and for prescriptions towards bridging the gap between the two, see Rita Floyd, “Towards a consequentialist evaluation of security: bringing together the Copenhagen and the Welsh Schools of security studies” (2007) 33:2 *Review of International Studies* 327-350, Rita Floyd, “Human Security and the Copenhagen School’s Securitization Approach: Conceptualizing Human Security as a Securitizing Move” (2007) 5 *Human Security Journal* 38

<sup>737</sup> Richard Wyn Jones, “‘Message in a Bottle’? Theory and Praxis in Critical Security Studies” (1995) 16:3 *Contemporary Security Policy* 299-319 at 310

<sup>738</sup> Ken Booth, “Security and Emancipation” (1991) 17 *Review of International Studies* 313-326 at 319.

<sup>739</sup> Amnesty International, *Amnesty International Report 2003*, AI Index: POL1 0/003/2003, online: <https://www.amnesty.org/download/Documents/POL1000032003ENGLISH.PDF> at 6. Third World Approaches to International Law (TWAAIL), which brings to light the generally unequal and unjust treatment of the Third World by the international legal regime, also emphasises how the resulting subjugation, subordination and domination is effected over to Third World developing *states* (the South) as much as it does to Third World *peoples*. See Obiora Chinedu Okafor, “Newness, Imperialism, and International Legal Reform in Our Time, A TWAAIL Perspective” (2005) 43: 1 *Osgoode Hall Law Journal* 171-191 at 176

<sup>740</sup> Tim Dunne and Nicholas J. Wheeler, “‘We the Peoples’: Contending Discourses of Security in Human Rights Theory and Practice” (2004) 18(1) *International Relations* 9–23 at 10

originate from within the state or from a bordering state that threatens another state's inhabitants and can be military in source or otherwise.<sup>741</sup>

So, we've outlined two principal streams of security studies, the realist and the constructivist/critical. What this chapter has demonstrated so far is that the constructivist, critical approach to security is lacking in Israeli jurisprudence. The implicit recommendation, then, is that the courts ought to look more at the sources of human insecurity in performing balances of fundamental principles as opposed to having national security, understood solely as a threat to the state's material interests, be a vertical trump as it often is. However, as mentioned earlier, the goal of this chapter is not to proffer an alternative epistemology to that which is being criticized, but rather to look at the contradictions within the referent epistemology, which in this case is the realist understanding of security in Israeli jurisprudence.

Here I arrive at the critique of the critical human-emancipatory approach. The Welsh school has been taken up on the issue that security as defined by them is seemingly limitless; critics have asked, where does security stop? If all social issues can theoretically be framed in security terms, what is the value of such a definition of security, and would it even be possible for competing security considerations to be 'weighted' against one another?<sup>742</sup>

This critique, I suggest, is one very relevant for the Israeli case. In Israeli jurisprudence, the calibration employed in according national security its weight seems unclear. Like the lack of a calibration methodology when it comes to measuring costs and benefits in a balancing test in the *Beit Sourik* decision, and in our present case when it came to deeming administrative action reasonable, the Israeli court's historical performance seems to suggest a court that does not, for reasons that could be related to inability, reluctance or indifference, to carry out a proper calibration of security considerations.

#### "Security considerations" are not magic words<sup>743</sup>

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<sup>741</sup> Tim Dunne and Nicholas J. Wheeler, "'We the Peoples': Contending Discourses of Security in Human Rights Theory and Practice" (2004) 18(1) *International Relations* 9–23 at 18.

<sup>742</sup> Rita Floyd, "Towards a consequentialist evaluation of security: bringing together the Copenhagen and the Welsh Schools of security studies" (2007) 33:2 *Review of International Studies* 327–350 at 333.

<sup>743</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 301. Barak here is making the point that just because the executive claims that its action is informed by 'security considerations' that does not make the action lawful.

So how would a calibration of security take place in cases where the principle of national security is deemed relevant?

Before we perform a calibration, there are prior steps that need to be satisfied. First, we need to arrive at a 'concept<sup>744</sup> of security', which is what David Baldwin sets out to do in his article of the same name.<sup>745</sup> Once a concept is arrived at, it is possible to identify the necessary conditions for realizing this concept of security, to propose recommendations for its realization and to calibrate when performing a balancing against other values or principles. I will now walk through Baldwin's development of the concept.

As Baldwin correctly notes, while there is a lot of discussion around the normative and empirical concerns and prescriptions around security, such as those stemming from the realist and constructivist/critical human emancipatory streams presented in brief above, the fact that a concept of security is inadequately worked out leaves empirical recommendations on shaky ground.

Baldwin takes his cue from a definition of security proposed by Wolfers,<sup>746</sup> which he then reworks to mean as the 'low probability of damage to acquired values'.<sup>747</sup> It is important to flag that Baldwin's sketch of this concept of security serves as a tool to conceptualize and calibrate but does not make the case for either human emancipation or a realist understanding that is more state-centric in focusing its concerns. Rather, this determination for one value over another would depend on the person/entity wishing to conceptualize security and her/its ethical priorities. For my own purposes, it is this working through the concept of security that the Israeli legal system would need to undertake so that security as fundamental value is far less opaque than it is at present. This would not only clarify for all concerned parties where security places in the hierarchy of values,

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<sup>744</sup> Concept is different from conception. Concept refers to a general idea, such as a concept of security or justice that is common to various streams in security studies or to moral philosophy, while conception refers to a particularity distinguished stream, distinguished from other streams in the same field. So, for example, a conception of security that defines its reason for being as the necessity to prevent anarchy (realist), as opposed to a conception of security that sees itself as necessary to ensure the well-being of individuals and communities (constructivist/critical). Rawls' theory of 'justice as fairness' is a particular conception of justice. See John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972).

<sup>745</sup> David A. Baldwin, "The concept of security" (1997) 23 *Review of International Studies* 5–26 [Baldwin, "Concept of Security"]

<sup>746</sup> Arnold Wolfers, "'National Security' as an Ambiguous Symbol", 67:4 *Political Science Quarterly* (1952) 481-502.

<sup>747</sup> Baldwin, "Concept of Security", *supra* note 745 at 13

thereby allowing them to have certain reasonable expectations concerning the resolution of their legal dilemma but crucially, security would cease to become a ‘magic word’, one that on the rather perfunctory basis of general welfare is set against fundamental values such as the right to life, to equality, free speech and other basic rights.

When defining the concept of security, two principal questions need to be posed. The first, who is the referent subject for security – security for whom; and second, what are the values to be secured?<sup>748</sup> The referent subject could be the individual, a minority group, the state or international global trade. As for values, these could be autonomy, economic welfare or territorial integrity, all depending on the referent subject and the purpose for which the question is being posed.

To operationalize the concept of security, so that we can identify its necessary conditions and perform a calibration alongside competing values, further questions need to be asked. How much security is enough? The caveat here is that ‘absolute security’ is unattainable, and that security should be a matter of degree. As Baldwin explains, security can be thought of as allocating scarce resources among competing ends and in this way, will always be a matter of degree.<sup>749</sup>

From what threats? The Cold War ‘communist threat’ much like the ‘threat of terrorism’<sup>750</sup> is a rather vague concept, because the sources of those threats are not specified. When we are told of the communist threat, we do not know if by the term we are referring to “ideological threats, economic threats, military threats or some combination thereof, thus impeding rational debate of the nature and magnitude of the threat”.<sup>751</sup>

Next, what are the means to be used in response to the specific threats? It should be clear that military means are not the only valid response.<sup>752</sup>

Finally, what are the costs incurred in pursuing such a strategy? There exist the costs of sacrificing of other goals, the spending of resources and the sacrificing of other values, such as human rights

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<sup>748</sup> *Ibid.* at 13-14

<sup>749</sup> *Ibid.* at 14-15.

<sup>750</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 285.

<sup>751</sup> Baldwin, “Concept of Security”, *supra* note 745 at 14-15.

<sup>752</sup> *Ibid.* at 14-15.

values and moral values.<sup>753</sup> Of course, the temporal limits of security should also be specified, to know if it is a short-term objective or is expected, for example in the case of a protracted conflict, to run for the long-term. As Baldwin notes, a fence may be useful to keep neighbours out in the short-term, though in the long run it may just make more sense to befriend them.<sup>754</sup>

In summary, one could specify security with respect to the actor whose values are to be secured, the values concerned, the extent of security, the types of threats, the response to those threats, the costs associated with doing so, and the relevant time period.

Now that we have on hand how to construct a concept of security, we need to ask a follow up question, which is how much do we value security alongside other values? How do we calibrate security as value alongside, for example, equality as value? Relevant to the balancing that is performed between competing fundamental principles, Baldwin identifies three classifications for the *relative* value of security, which is how to graduate its value alongside other values. The first classification is the prime value approach, which says that security is a prerequisite for the enjoyment of other values such as equality and liberty, for example. The difficulty with this argument, however, is that the same could be said if we asked, what would life be like without water? Water is also a prerequisite to the enjoyment of other values. Since absolute security is unattainable and people in real life sacrifice security for other more valued elements, so security as prime value is not very convincing.

The core value approach says that security is important but does not say how important relative to other core/non-core values. It also runs into the problem of determining what is assigned a core value and what is not, and faces the difficulty of justifying the pursuit of realizing any non-core value as policy.<sup>755</sup>

Finally, the marginal value approach, of which Baldwin is in favour, applies the law of diminishing marginal utility to security as it would to other values such as food, water or security of tenure. Security, as with these other values, does not have an essential value; rather, its value is contingent on circumstance. According to this approach, we need a minimum amount of security as opposed to

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<sup>753</sup> *Ibid.* at 16-17.

<sup>754</sup> *Ibid.* at 17.

<sup>755</sup> *Ibid.* at 18-19.

a lot of it, in constant increments, all the time. Value contingent on circumstance factors in how much of security someone has, in order to determine how much more of it one needs. Therefore, if one has more security/food/water, then one needs less in the present/future, as the factor has less value. Similarly, if one has less security, then one would need more, and so security/food/water is in such a case more valued.<sup>756</sup>

In favouring the marginal value approach, Baldwin conveys why he is in favour of security as policy rather than principle, and therefore is closer to Dworkin than to Barak in that regard. To take Barak's route of assigning security the value of fundamental principle or 'core value' "prejudges the value of security as a policy objective, and thus prejudices comparison of security with other policy objectives".<sup>757</sup>

Baldwin makes interesting observations, and poses pertinent questions, pertaining to the neorealist understandings of security, which I contend are very relevant questions to pose before Barak's adjudication method.<sup>758</sup>

Although national security is regularly cited by state-centric neorealists, there is little explanation of security as concept. If the neorealist characterization of security is taken to be 'survival',<sup>759</sup> then the concept becomes so broad it loses its utility. This leads to much confusion about rational policy directions to take and is especially dangerous given security's slippery slope nature. As absolute security is unattainable, so states need to accept that they instead ought to seek a certain *degree* of security. This degree of security is reached by determining if the marginal costs associated with a particular security measure outweigh their marginal benefits, which if determined to be the case, would mean that the state would forego that particular increment of security. Yet, this calculation is rarely dealt with in neorealist practice. Also, does one's own security make neighbours insecure in the zero-sum game of neorealism? If so, is security so practiced in the best interest of the subject state?

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<sup>756</sup> *Ibid.* at 19-20.

<sup>757</sup> *Ibid.* at 14.

<sup>758</sup> See *ibid.* at 21-22.

<sup>759</sup> Which is how one of the forerunners of neorealist theory Kenneth Waltz puts it, "In anarchy, security is the highest end. Only if survival is assured can states seek such other goals as tranquility, profit, and power", Kenneth N. Waltz, *Theory of International Politics* (Reading, MA: 1979) at 126.

### *The Concept of the Wine Path Plan*

What if we were to attempt to develop a concept of national security for the Wine Path Plan case? What would that tell us of the government's rationales and priorities in sketching out and implementing the plan? What would it recommend the government *ought* to do? Crucially, once we've reached this preliminary sketch of the concept of security, what does it say about equality in liberal Israeli jurisprudence when equality is held in juxtaposition with this concept of security?

My attempt here is not a foolproof illustration for a concept of security, but to mostly work through the parameters proposed by Baldwin to develop a concept specific to the conditions of the case.

The government's stated objective for the plan is national development. However, I've attempted to show above that 'national development', in the Israeli case, is an element of 'national security'. Where the acquired value for which protection is sought under 'national development' is economic development, for 'national security' it would be population dispersion, as identified by both the plan's initiators and detractors. Therefore, we have two scenarios, one flowing from the stated objective behind the Plan (development) and the other, the non-stated objective (security). We can imagine this sketch as being a bifurcated workflow from this point on, separated by the logical operator 'IF'.<sup>760</sup>

In both scenarios, the state has identified itself as the primary actor; it is the state's value of 'economic development' or 'population dispersion' that are sought to be protected. To what degree?

The state identified the setting up of the Plan as an objective that would promote economic development through tourism and agriculture. The degree of security sought in this sense would be indicated by a straightforward return on investment calculation. At its most basic level, this can be formulated as, if you want lots of economic development, then you would want to keep your costs down, while maximizing profit. Therefore, how much profit I make, relative to the costs invested in the project, would indicate the extent or degree of economic development as value I am realizing. It would be safe to assume that if economic development as value is highly prized, then I would aim to have a high return on investment.

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<sup>760</sup> A logical operator denotes a logical operation in programming language. Therefore, IF objective = development THEN RUN Scenario A, IF objective = national security THEN RUN Scenario B.

The costs attributable to the project included the setting up of utility and transportation infrastructure, laying down roads that connected settlements to one another and also connected the settlements with the expressway and other major roads. Another significant cost is the provision of services to the different settlements once they are setup. In addition are the human resource and logistical costs for the respective government bodies pertaining to the process of setting up the settlements – the application process, review, decision-making, implementation, legal procedures, follow-up and monitoring. This considerable investment, however, has not turned out a corresponding return. Therefore, like the Saragusti family who were forced to scale down, other owners lament about the numerous difficulties they encounter in staying profitable.<sup>761</sup> Yet, this development should not be entirely surprising as a return on investment analysis was not conducted in the framework of the plan. As mentioned earlier, the Ministry of Tourism was not involved, feasibility studies were not performed, estimates of tourist traffic not conducted and there was a lack of clarity regarding the spatial arrangement of the settlements. It would seem logical that if ‘economic development’ was the value sought, then at the very least an elementary economic cost-benefit analysis would have been performed so that it could be the value realized. Clearly, this did not happen.

If ‘economic development’ was the value sought, its realization would have to have been preceded by basic profit-expense arithmetic. If that wasn’t the case, then it is reasonable to assume that *another* value was the primary motivating factor for the initiative.<sup>762</sup> I propose that ‘population dispersion’ is the other value motivating the Plan. From here on, I will focus on developing a concept of security on population dispersion alone.<sup>763</sup>

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<sup>761</sup> Interview with Thabet Abu Rass, Director, Naqab Office of Adalah – The Legal Center for Arab Minority Rights in Israel, Beersheba (August 23 2012). Interview on file with author.

<sup>762</sup> In fact, officials openly admitted that another aim besides economic efficiency was behind the Mevoot-‘Arad settlement plan. Yaron Ben Ezra, Director of the WZO Settlement Division, asserted “Settlement is not an economic matter and the decision cannot be examined through an economic lens, but in accordance with the goal of taking possession of the land in the plan”. See Association for Civil Rights in Israel (ACRI), “Petition for an Order Nisi: Summary of Arad Petition” (August 2012), online: [http://www.acri.org.il/en/wp-content/uploads/2012/08/Summary\\_of\\_Arad\\_Petition\\_-\\_English\\_2.pdf](http://www.acri.org.il/en/wp-content/uploads/2012/08/Summary_of_Arad_Petition_-_English_2.pdf) at 4. He also went on to make the point that the plan’s goal was to “prevent further Bedouin incursion” on land and prevent “development of a Bedouin and/or Arab belt” across the Green Line between “the southern Hebron Hills and Arad” and also within Israel, towards Dimona and Yeruham and all the way to Beersheva; which is to say, the Plan seeks to prevent any contiguity of Bedouin settlements where they exist.

<sup>763</sup> It would be superfluous to further develop a concept around ‘economic development’, if as I have shown, it is not in fact the value on which national development as an element of national security depends.

For the value of population dispersion, the degree of its realization was in the state creating twenty-three single family farms (with an aim to setup thirty in total) to achieve this. These farms span the main roads 224, 222, 211 and 40 and are each typically hundreds of dunams in size. However, as the value here is *dispersion*, it is more instructive to look at the extent to which the Plan is spread. In realizing the value of population dispersion, the state had to ask itself, to what degree did it seek to disperse the Wine Path Plan population? The answer was for this dispersion to more or less correspond to the northern, eastern and western boundaries of the Ramat HaNegev Regional Council, while its southern limit would circle roughly around the Jewish development town of Mitzpe Ramon. The degree of security sought as a measure of the extent of population dispersion, then, is considerable. It is equivalent to a contiguous geographical spread of around 1.2 million dunams. It is worth noting that the total area of Bedouin land claims, which are not necessarily contiguous, amount to just under a million dunams. Therefore, the degree of security aims to exceed, in the framework of this plan, all outstanding land claims by Naqab Palestinians against the state.

The next element in developing a concept of security is identification of the threats. A threat to population dispersion would be the presence of a population who is defined as 'other' to the referent population, who impinge in some way on the referent population's dispersion. This impingement could take the form of the other population's residential zones or spaces of settlement preventing the referent population from settling in those locales. Such an impingement could also impact negatively on contiguity of the referent population, which is an essential element of realizing security via population dispersion i.e. a homogeneously defined population dispersed in settlement pockets are more secure when they are connected to one another than when they are isolated.

The response to the threat was the institution of the Wine Path Plan, to accord farms or individual settlements, spread over an area of around 1.2 million dunams, to thirty single Jewish families, while in practice to exclude the Naqab Bedouin from participation in the programme. This response works in concord with a governmental practice external to this Plan specifically. This is to say that this response is supported by the non-recognition of Palestinian villages within the Plan's borders, namely Wadi al-Meshash and 'Abda and the home demolitions that they are regularly subject to, which is also the experience of Bir Hadhaj, a recognized village that also falls within the Plan's fold.

As for the costs, we see that an economic evaluation of the Plan was not conducted. Yet, there were other costs identified, of both an ethical and a human rights dimension. The harms cited by the petitioners were to the human dignity of Naqab Palestinians and their fundamental right to equality.

The temporal dimension to population dispersion under the Plan is bounded by the time it takes to set up of thirty individual farms. In that sense, the Plan does take account of the recommendation that security measures be restricted in their temporal scope. However, there are plans external to this one whereby *population dispersion as value is actively being pursued*. The first is the Mevoot-'Arad (outskirts of 'Arad) plan being implemented by the WZO's Settlement Division which aims to create a contiguous Jewish settlement zone on both sides of the Green Line in the Negev region. The second is the expansion of Israeli Jewish settlement that continues unabated in the West Bank.<sup>764</sup>

We can assume from this exercise that had the court developed a concept of security in the manner sketched above it would have been hard-pressed to conclude, as it did, that the petitioners' claim of discrimination was "groundless".<sup>765</sup>

Had the court set out to develop a concept of security, bearing in mind the costs such as harms to equality and dignity which are fundamental rights in Israel, the outcome would likely have been very different. First off, the court would have determined that the value for which protection was sought by the state was not 'economic development' but 'population dispersion'. The degree of dispersion sought would need to be reasonable; a spread of 1.2 million dunams for population dispersion compared alongside one million dunams which account for all land claims of Bedouin would not concord with a standard understanding of equality. If the threat to Jewish 'population dispersion' was determined to be Bedouin/Palestinian/Arab presence and settlement, then this would be an explicitly discriminatory consideration. It would fail to pass the most elementary tests of proportionality with regard to a violation of the right to equality. Accordingly, no reasonable 'response to the threat' that respected the principle of equality could be envisioned. In a scenario that was more concordant with respect for fundamental human rights, the court could deem the

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<sup>764</sup> For settlement expansion in the West Bank, see generally the settlement reports produced by the Foundation for Middle East Peace (FMEP). For example, for an indication of the extent of population expansion of Jewish Israeli settlements in the Occupied Palestinian West Bank over the past decade and a half, see FMEP, "West Bank Settlement Population Growth, 1995-2011" (undated), online: [http://www.fmep.org/settlement\\_info/west-bank-settlement-population-growth-1995-2011](http://www.fmep.org/settlement_info/west-bank-settlement-population-growth-1995-2011)

<sup>765</sup> *Adalah v. The National Council for Planning and Building*, [2010], HCJ 2817/06 at para. 30

threat to population dispersion to be restrictions that were not grounded in personhoods, therefore not Bedouin persons or communities as restrictions to Jewish population dispersion. Rather, the threats could be regulatory and legal restrictions, logistical restrictions related to transport and such. When it comes to the costs associated with the plan, these would be hard to justify on a purely economic basis, given the considerable setup and administration costs compared alongside realizing the value of population dispersion; never mind the ethical and human rights costs associated with harms to dignity and equality of Naqab Bedouin.

If the approach to valuing security is the core value approach, as it would be under Barak's liberal jurisprudence where security is elevated to fundamental principle alongside other fundamental principles such as justice and equality, the court would nevertheless be hard pressed to not intervene in the Plan given the harms to other core values, chiefly to equality. Given the harms to equality, it would be becoming of a core value approach to ensure that the core value of equality is also affirmed in the trade off. The court would then be obliged to recommend or rule that the executive institute more egalitarian measures within the framework of the Plan, for example, to assign a minimum percentage of individual settlements to Naqab Palestinian single families that would practice an agricultural trade that would be supportive of tourism. So, for example, a quota whereby a quarter of settlements are assigned to Palestinian families would be in keeping with representative equality, as a quarter of the population in the Naqab is Palestinian.

As this tradeoff between two core values did not occur, would that mean that the court's approach to security is closer to the prime value approach, whereby security takes precedence over all else in a quest for the ideal of some sort of 'permanent security', more than it is to a core value approach? Or is there an ontological 'something' *intrinsic to security* that compels decisions such as the one in the Wine Path Plan even when the courts take the core value approach to security?

*"The war against terrorism turns our democracy into a 'defensive democracy'... Defensive democracy, yes; uncontrolled democracy, no"*<sup>766</sup>

What can we say national security meant for Aharon Barak? As mentioned previously, for Barak, public order, which encompasses public/national security, is a social goal that is a fundamental

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<sup>766</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 287

principle.<sup>767</sup> It appears that for Barak its importance does not stem from any intrinsic value it possesses. That is, it is not that national security is essentially good in itself, but that 'life' and 'human rights' are essential goods and have intrinsic value, and are allowed to exist and flourish *on account of* security existing. This, then, is what makes security desirable or have fundamental value, that it is a precursor to other goods. As Barak writes, without public order, and by extension public/national security, "it is impossible to assure the realization of other democratic values, including human rights".<sup>768</sup>

Why can life, democracy and human rights not flourish without national security? In Barak's view, this is because there is a "terrorism that plagues"<sup>769</sup> Israel, which has "since its founding... faced a security threat"<sup>770</sup> by enemies and terrorists. According to Barak, Israel is a "democratic state fighting for its life",<sup>771</sup> a "defensive democracy (in) battle with terrorism".<sup>772</sup> Therefore, given this existential threat to the state, a threat it has faced since its inception and continues to face today, national security needs to be elevated to fundamental principle in the spirit of protecting the state's democracy.<sup>773</sup>

Yet, besides the possibility that 'democracy' and 'human rights' are good in their own right, does Barak consider them important for other reasons? As he explicates in his introduction to *A Judge in a Democracy*, Nazism and Fascism lost out to democracy in World War II.<sup>774</sup> The takeaway lesson from the Holocaust was that democracy was not simply about majority rule, but about respect for human rights. It was because Germany did not appreciate that fact enough that Nazism took hold. Human rights, therefore, is "the core of substantive democracy",<sup>775</sup> and the argument that Barak

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<sup>767</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 75-6.

<sup>768</sup> *Ibid.* at 75.

<sup>769</sup> *Ibid.* at 293.

<sup>770</sup> *Ibid.* at 285.

<sup>771</sup> *Ibid.* at 288

<sup>772</sup> *Ibid.* at xx

<sup>773</sup> Scholars have offered different reasons for why the Israeli public also elevates security to the level of existential need. Ofer Grosbard frames it in psychoanalytic terms as trauma that has given rise to distrust and an unwillingness to compromise. Ofer Grosbard, *Israel on the Couch: The Psychology of the Peace Process* (Albany: State University of New York Press, 2003). Bar-Tal and Antebi proposed (the rather over-generalizing idea) that a history of persecution rendered the world a hostile world, reinforcing a 'siege mentality'. See Daniel Bar-Tal and Dikla Antebi, "Siege Mentality in Israel" (1992) 1:1 *Ongoing Production on Social Representations* 49-67, Daniel Bar-Tal, "The Paradox of Security Views in Israel" in Oren Barak, Gabriel Sheffer (eds.) *Existential Threats and Civil Security Relations* (Lanham, MD: Lexington Books, 2009).

<sup>774</sup> Barak, *Judge in a Democracy*, *supra* note 349 at x

<sup>775</sup> *Ibid.* at xi

seems to be making is that in order to defeat the possibility of another calamitous event transpiring, such as Nazism, a rigorous system of human rights protections needs to be in place.

Barak is keen to stress throughout the book and in his decisions<sup>776</sup> as well, that a “sensitive”, “delicate” and “difficult balance” must be struck by the judge between fighting an existential terrorist threat and upholding the rule of law and democracy. However, Barak seems to miss the inherent contradictions in this prescription, or if he sees it, chooses not to tease it out.

In order to guarantee that human rights are not abused, Barak’s formula is that you need democracy with human rights protections. In order to allow such a substantive democracy to survive, you need for it to be a defensive, substantive democracy. That is to say, you need to curb rights and freedoms (of suspected terrorists), in order that democracy survive and human rights thrive. Therefore, for a system that seeks to guarantee human rights as a central teleological principle, it is also open to regularly violating human rights in seeking that end. This is not the same as the court seeking to balance between competing human rights claims, but more about the balance of human rights against that of national security. Therefore, human rights need to be curtailed in order that other human rights survive. This is the first contradiction in Barak’s conceptualization of national security as adjudicative principle.

Second, the security consideration is one determined by general welfare. If more are better off when an element of security is protected from an external threat, then that security consideration is upheld. This is why for Dworkin issues of general welfare, such as national security, should be policy decisions, and not principle ones as they are for Barak. As policy decisions, they don’t carry as much weight and so are less likely to trump fundamental principles such as equality. General welfare is ordinarily taken to mean that the well-being of all persons, whether as moral persons or citizens or protected persons under occupation, be considered in government decisions that influence their lives. Yet, the contradiction here is that the general welfare is not the general public.

Looking at the Wine Path Plan case, what we learn is that national security is being upheld on grounds that do not consider whether *all* people in the framework of the plan are better off, but very specifically only whether Israeli Jews, who are considered full political subjects of the nation-

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<sup>776</sup> See for example *Public Committee Against Torture in Israel v. The State of Israel*, [1999] HJC 5100/94, 53(4) PD 817 at 845

state,<sup>777</sup> are better off; Jewish welfare is conflated to general welfare. If Palestinians were considered full political subjects, then it would be their considerations that would inform ‘general welfare’, and within the territorial space of Israel/Palestine this would not be to an insignificant degree, given that they are a narrow majority over the Jewish population within these spatial limits; nevertheless, security considerations virtually always hinge on a general welfare enunciated in Jewish terms.

### The Pervasiveness of National Security

What we’ve sketched so far points to very tangible conservative elements to the adjudication of the court that claims to be and has been hailed as liberal. However, there are other very problematic contradictions that become apparent in adjudication on the grounds of national security. I opine that the reason for the unease that looms in scholarly praise of Israeli law’s liberal progressiveness is because the authors tussle with the fact that the project’s logic is not uncommonly contradictory. These contradictions expose the legal system to being susceptible to the accusation that on issues related to national security, the project of upholding the rule of law and being democratic is still very much a work in progress.

We’ve looked at security as adjudicative principle, particularly in relation to Aharon Barak’s jurisprudence. Yet, how pervasive is national security in Israeli law and in the considerations of the executive, with which the law is in reciprocal exchange? According to Ronen Shamir and Hanna Herzog, because security is not evoked in response to the perception of a tangible, particular threat but against the wide reaching and vague concept of sovereignty defined in Jewish terms, security is indeed very pervasive. Security is an issue concerned with *protecting the ability of the state to remain sovereign, in a sovereignty enunciated in Jewish terms.*<sup>778</sup>

To return to Baldwin’s concept of security, we can therefore say that the primary value for which a ‘low probability of damage’ is sought is that which other security-concerned values, such as ‘population dispersion’ and ‘economic development’ make possible, namely the value of ‘Jewish

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<sup>777</sup> For more on the full political subject, see Agamben, *Homo Sacer*, *supra* note 493 at 130.

<sup>778</sup> It may be understandable why it would wish to remain sovereign, as a means to better consolidate its power, but why on specifically *Jewish* terms? Could this be justified on something along the lines of simply ‘culture’? Raef Zreik’s piece, ‘Why the Jewish state now?’ is illuminating in this regard. As he remarks, the Jewishness of the state is the *raison d’être* of Israel. If the state was not Jewish, there would be no legitimacy to its founding and displacing native Palestinians; Israel came to be because it was seen as a refuge for the Jews of the world. See Raef Zreik, “Why the Jewish State Now?” (2011) 40:3 *Journal of Palestine Studies* 23

sovereignty'. Now, because security is enunciated in ethnic terms, the threats to it take a corresponding ethnic form. So, just as the primary security consideration of the state is remaining sovereign on Jewish terms, the primary threat is that related to the Arab/Palestinian. This is not to say that there are threats other than the Palestinian to Jewish sovereignty, indeed this could take the form of foreign threats not specifically Arab, a major natural disaster, or a radical reimagining of the definition of the state in non-ethnic terms.<sup>779</sup> While the Wine Path Plan case and the other cases that this dissertation engages with are concerned specifically with Naqab Bedouin, they are also concerned with the place of Palestinians (more broadly conceived as citizens of Israel / OPT) in Israeli law. And, as I will show, Palestinians are a significant source of preoccupation when it comes to thinking about security in Israel.

Given the terms on which the value of 'Jewish sovereignty' is enunciated, it becomes unsurprising that Palestinians have, since 1948 and the institution of the Military Administration, been marked as enemy.<sup>780</sup> As Israeli scholars, Ruth Gavison and Sammy Smooha have conceded, Palestinians cannot expect to be treated as equal in the Jewish state.<sup>781</sup>

As Rouhana and Sultany assert, the marking of Palestinian citizens as an existential security threat has become part of a hegemonic<sup>782</sup> discourse in Israel.<sup>783</sup> This marking is effected through a governmentality that legislates,<sup>784</sup> implements policies,<sup>785</sup> and is discursive,<sup>786</sup> meaning it not only

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<sup>779</sup> Indeed, this is the central argument that Raef Zreik makes when he says that the urgency to secure recognition from Palestinians for the Jewishness of the State is prompted by a reframing of the political discourse in Israel in recent years to one that should be "a state for all its citizens", the political platform of the *Tajamaa* (Balad) party. Raef Zreik, "Why the Jewish State Now?" (2011) 40:3 *Journal of Palestine Studies* 23

<sup>780</sup> Alina Korn, "Political Control and Crime: The Use of Defense (Emergency) Regulations during the Military Government" in *Adalah*, 4 *Adalah's Review* (2004) 23-32, Alina Korn, *Crime, Political Status and Law Enforcement: The Israeli Arab Population During the Military Government (1948-1966)* (Thesis Submitted for the Doctor of Philosophy Degree, Hebrew University, 1997) (Hebrew).

<sup>781</sup> Ruth Gavison, "Can Israel be both Jewish and Democratic?" (2000) 25:6 *Moment Magazine* at 2, online: <http://members.ngfp.org/Courses/Gavison/Moment.pdf>, Sammy Smooha, "The Model of Ethnic Democracy: Israel as a Jewish and Democratic State" (2002) 8:4 *Nations and Nationalism* 475-503 and "The State of Israel's Regime: A Civil Democracy, a Nondemocracy, or an Ethnic Democracy?" (2000) 2 *Israeli Sociology B*, 565-630.

<sup>782</sup> Taking from Comaroff and Comaroff and Sibley, I understand hegemony to refer to systemic power, often informed by transactions that are legal in character, that become habituated as practices and result in routinized subordination that becomes 'invisible'. See Susan S. Silbey, "After Legal Consciousness" (2005) 1 *Annual Review of Law and Social Science* 323-368 at 330-1, Jean Comaroff and John L. Comaroff, *Of Revelation and Revolution: Christianity, Colonialism, and Consciousness in South Africa* (Chicago: University of Chicago Press, 1991) at 23-4.

<sup>783</sup> Nadim N. Rouhana and Nimer Sultany, "Redrawing the Boundaries of Citizenship: Israel's New Hegemony" (2003) 33:1 *Journal of Palestine Studies* 5-22 at 9.

<sup>784</sup> Some examples of the laws passed that have a central security concern about the threat to Jewish sovereignty, and implicitly (or sometimes explicitly) refer to Palestinians, include the *Order for the Prevention of Terrorism* (1948), *Basic Law: The Knesset*, section 7A (Amendment No. 351), *The Knesset Members (Immunity, Rights and Duties)*

represents a certain particularity (Arabs) as reality (security threat), but in its representation also constructs it (Arabs as security threat), as a speech-act.<sup>787</sup> As we have seen, there is a spatial element to security, given that sovereignty is expressed by governing social relations across particular geographic locales, and this development has a genealogy both pre-1948<sup>788</sup> and during the Military Administration.<sup>789</sup>

Shalhoub-Kevorkian draws our attention to how the Bedouin are sometimes not seen as citizens in whose interests the state must act, but rather as a “threat” against whom the state’s interests must be protected. At the 2006 Herzliya Conference on National Security,<sup>790</sup> Israel’s National Security

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*Law* (2002) (Amendment No. 29), *The Citizenship and Entry into Israel Law (temporary provision) 5763 (2003)*, *Law for Prevention of Damage to the State of Israel through Boycott* (2011). For more, see Adalah, ‘Discriminatory Laws in Israel’, online: <http://adalah.org/eng/Israeli-Discriminatory-Law-Database>, Amichai Cohen and Stuart A. Cohen, *Israel’s National Security Law: Political dynamics and historical development* (London, New York: Routledge, 2012) at 120-2.

<sup>785</sup> These policies include the policy to ban family reunification for those with Palestinian spouses from the OPT. By referring to all Palestinians as potential security threats, the state’s counsel exposed the racist underpinnings of the security rationale. See Rina Rosenberg, “Special Inquiry: Security Practices and Legal Challenges” in Adalah, 4 *Adalah’s Review* (2004) 82-90 at 86. There are also the policies of racial profiling of Palestinians or those married to them, at the airports and in public spaces; see Badi Hasisi and David Weisburd, “Going beyond Ascribed Identities: The Importance of Procedural Justice in Airport Security Screening in Israel” (2011) 45 *Law & Society Review* 867–892, Arab Association for Human Rights and the Center Against Racism, *Suspected Citizens: Racial Profiling against Arab Passengers by Israeli Airports and Airlines* (Nazareth: HRA, 2006).

<sup>786</sup> Therefore, looking at legal decisions and obiter, that have both the force of a legal decision and that of the speech-act, Palestinians have been marked as a persistent, homogenous threat to national security. In 1978, the High Court of Justice used a security argument to reject the appeal against the requisition of private Palestinian land to establish two Jewish civilian settlements in the Occupied West Bank, “The principal is that from a pure security standpoint there is no doubt that the presence in the settlements - even “civil” ones - of citizens of the ruling power contributes significantly to the level of security and eases the task of the army and the carrying out of its tasks . . . There is no need to be a security expert in order to understand that terrorists act more freely in areas populated by apathetic people or supporters of the enemy...” See *Ayub v. Minister of Defense*, [1979] HCJ 606/78 33(2) P.D. 113 at 119. See also Gad Barzilai, “The Argument of ‘National Security’ in Politics and Jurisprudence” in Daniel Bar-Tal, Dan Jacobson and Aharon Klieman (eds.), *Security Concerns: Insights from the Israeli Experience* (Greenwich: JAI Press, 1998) 243-265

<sup>787</sup> For more on discourse theory, see Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (2d) (London, New York: Verso, 2001)

<sup>788</sup> As exemplified by the Zionist policy of purchasing land for Jewish settlement, including in the Naqab, as an element of securing a stake for Jews in Palestine. See Eric Engel Tuten, *Between Capital and Land: The Jewish National Fund’s Finances and Zionist National Land Purchase Priorities in Mandatory Palestine*, PhD Dissertation (Utah: Department of History: The University of Utah, 2000)

<sup>789</sup> Alina Korn explains how Palestinian spatio-temporal presence and movement were defined within the security sphere: their movements were suspect, and their links to the land were portrayed as a threat to national security. See Alina Korn, “Political Control and Crime: The Use of Defense (Emergency) Regulations during the Military Government” in Adalah, 4 *Adalah’s Review* (2004) 23-32 at 29.

<sup>790</sup> The annual Herzliyya conference is a gathering of the most prominent politicians in Israel, where national and security policy is discussed and recommendations stemming from the conference are often taken up as government policy. The Disengagement Plan from Gaza was introduced first to the general public by Ariel Sharon at the conference in 2003. See Yonatan Mendel, “Diary – at the Herzliya Conference” 29:4 *London Review of Books* 34-35 (22 February 2007), online: <http://www.lrb.co.uk/v29/n04/yonatan-mendel/diary>, IPS – Institute for Policy and

Council (NSC), the central body for the development and implementation of national security policy, presented a position paper outlining the threat posed by the illegal settlement of Bedouin in the Negev and recommended intervention to be headed by the police. Subsequently, there was a considerable increase in the policing of the community.<sup>791</sup>

The pervasiveness of national security is so significant that the law has a poor history of being able to contain it.<sup>792</sup> As Cohen and Cohen describe in their in-depth study of national security law,<sup>793</sup> on national security issues, justices of the Supreme Court deliberately stop short of striking down action by the executive, preferring to defer to the executive or the Knesset to make the necessary amendment.<sup>794</sup> Nevertheless, the Supreme Court “has never annulled the declaration of [the] emergency situation, and has almost never put actual limits on the broad use of emergency powers”.<sup>795</sup>

There has been similar deference to the executive on the spatial dimension of national security law, that is to say with regard to its application in the OPT, which since the second intifada the State no longer refers to as ‘occupied’ but as a region of ‘armed conflict short of war’.<sup>796</sup> Accordingly, the

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Strategy, “The Annual Herzliya Conference Series”, online:

<http://www.herzliyaconference.org/eng/?CategoryID=436>,

<sup>791</sup> Nadera Shalhoub-Kevorkian, “The Grammar of Rights in Colonial Contexts: The Case of Palestinian Women in Israel” (2012) 4 *Middle East Law and Governance* 106–151 at 119–120.

<sup>792</sup> See Yoav Dotan’s empirical study on how the Court did have *some* influence on government policy, though it was unable to curb the everyday, pervasive violations of human rights by the military regime in the OPT, through the process of facilitating out of court settlements. Yoav Dotan, “Judicial Rhetoric, Government Lawyers and Human Rights: The Case of the Israeli High Court of Justice during the Intifada” (1999) 33 *Law & Society Review* 319–63. But see Menachem Hofnung and Keren Wienshall-Margel “Judicial Setbacks, Material Gains: Terror Litigation and the Israeli High Court of Justice” (2010) 7:4 *Journal of Empirical Legal Studies*, 664–692. which concludes that the “Court did act as a reasonable defender of human rights”.

<sup>793</sup> Amichai Cohen and Stuart A. Cohen, *Israel’s National Security Law: Political dynamics and historical development* (London, New York: Routledge, 2012).

<sup>794</sup> *Ibid.* at 162–4. The few exceptions concerned the ban on the IDF’s use of civilians to coax suspects out of their homes during an arrest or detention operation and permission to Palestinians to use Route 443 following them being barred its use. See also *Ressler v. Minister of Defense*, [1988] HCJ 910/86 PD 42(2) 441

<sup>795</sup> See Amichai Cohen and Stuart A. Cohen, *Israel’s National Security Law: Political dynamics and historical development* (London, New York: Routledge, 2012) at 194. For example, it took the court thirteen years to reject the petition that called for the end of the emergency regulations in *Association for Civil Rights in Israel v. The Knesset*, [2012] HCJ 3091/99, finding that Israel’s *exceptional* emergency situation demanded that the emergency regulations stay on the books in order to protect the Israeli population.

<sup>796</sup> Amos Harel and Avi Isacharoff, *The Seventh War* (Tel Aviv: Miskal, 2004) (Hebrew) at 195, cited in Amichai Cohen and Stuart A. Cohen, *Israel’s National Security Law: Political dynamics and historical development* (London, New York: Routledge, 2012) at 194. Similarly, in military operations in the OPT, Palestinians are no longer identified as occupied persons or combatants, both categories bestowing their respective protections under international law. Rather, they are designated ‘illegal combatants’, thereby making them legitimate targets while

Court has adopted the executive's position towards facilitating the incorporation of the OPT into Israel,<sup>797</sup> providing the legal backing for the construction of the separation wall,<sup>798</sup> allowing for electricity provision to Hebron in the Occupied West Bank to be controlled by Israeli interests,<sup>799</sup> a decision which paved the way for the Court to legitimize the withholding of fuel and electricity to the Gaza Strip as a form of collective punishment.<sup>800</sup> The Court has also allowed for targeted assassinations of suspected terrorists without due process.<sup>801</sup>

Further, as scant as the Court's consideration has been towards developing a 'concept of security', it has similarly produced little clarity on who does what when it comes to national security law.<sup>802</sup>

### "Liberal security"?

I have looked so far at the contradictions inherent in liberal conceptions of security. Yet, I think it is important, as far as this dissertation speaks to critical theory, to outline other takes on security external to a specifically liberal vocabulary.

In Foucault's lectures at the *Collège de France* in 1977-78, he builds on his conceptualization of governmentality as disciplinary power and biopower by speaking about governmentality informed through the diffusion of security apparatuses.<sup>803</sup>

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removing the protections associated with being a prisoner of war. See Adam Roberts, "The Laws of War in the War on Terror" (2002) 32 *Israel Yearbook on Human Rights* 193-246.

<sup>797</sup> See *Abu Aita v. The Regional commander of Judea and Samaria*, [1983] HCJ 69/81, P.D. 37(2) 197, *Jami'at Ascan Elmualamin v. The Regional commander of Judea and Samaria*, [1983] HCJ 393/82 PD 37(4) 785, and *Yesh Din v. Commander of IDF Forces in the West Bank*, [2011] HCJ 2164/09 where the Court justified mine quarrying by private Israeli enterprise in the OPT on account of the unique situation of 'prolonged occupation' that necessitated the amendment of traditional occupation law applicable in the case of the OPT.

<sup>798</sup> *Mara'abe v. The Prime Minister of Israel*, [2009] HCJ 7957/04

<sup>799</sup> *Electricity Company for Jerusalem District v. Minister of Defense*, HCJ 256/72, P.D. 27(1) 124.

<sup>800</sup> *Bassiouni Ahmed v. The Prime Minister*, [2008] HCJ 9132/07

<sup>801</sup> *Public Committee Against Torture v. Government of Israel*, [2006] HCJ 769/02 2 *Israel Law Review* 459

<sup>802</sup> For example, it has not provided clarity on the constitutional principles that apply in national security law or taken steps to establish a regulatory body to monitor adherence of the security agencies to international and national norms. See Amichai Cohen and Stuart A. Cohen, *Israel's National Security Law: Political dynamics and historical development* (London, New York: Routledge, 2012) at 193, 202, 208.

<sup>803</sup> Michel Foucault, *Security, Territory, Population: Lectures at the College de France, 1977-78* (1d) (Arnold I. Davidson Francois Ewald, Michel Senellart (eds.), Graham Burchell (trans.)) (Palgrave, Macmillan: 2007). See also Samera Esmeir who speaks to the Foucauldian notion of disciplining as security, a performance that aims to establish certainty, to fix a certain position, and thereby to compel a particular behaviour. In Israeli jurisprudence, security as disciplinary praxis suppresses, excludes, and prevents, both action challenging the status quo and knowledges and memories similarly insurgent.<sup>803</sup> Samera Esmeir, "Introduction: In the Name of Security" in *Adalah*, 4 *Adalah's Review* (2004) 2-10

Foucault explains that security in contemporary society can be understood as being formulated on the edifice of law, discipline, and mechanisms specific to security itself. Therefore, the governmentality of social control (disciplinary power) and the governmentality of modifying the biological destiny of species (biopower), together 'biopolitics', in the modern state is economizing power through the apparatuses or mechanisms of 'security'.<sup>804</sup>

How can we understand Foucault's conception of security? Foucault doesn't present a definitional account of security but speaks more to its relationship with 'population'.<sup>805</sup> Security can be understood by the motif of pastoral power, which, Foucault argues, is how the modern, secular state governs.<sup>806</sup>

The rather curious element of security is that it depends in many ways on ideas of liberty, otherwise known as privilege, which developed in the eighteenth century. Therefore, just as the Hohfeldian notion states that liberty/privilege, as one of the four components of right, allows one the freedom to do X because there is no corresponding duty to not do Y, so security operates with a similar modality of needing freedom in order to exist. As Foucault explains, "An apparatus of security... cannot operate well except on condition that it is given freedom... the possibility of movement, change of place, and processes of circulation of both people and things."<sup>807</sup>

Security requires freedom for itself in order to exist and operate well. And yet, freedom is typically associated with liberal modes of governance. Does that mean that security needs liberal government/law in order to efficiently operate? Foucault makes the claim that it does. Therefore, it is not that security and liberalism are incompatible elements of government/law, as Barak and

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<sup>804</sup> Michel Foucault, *Security, Territory, Population: Lectures at the College de France, 1977-78* (1d) (Arnold I. Davidson Francois Ewald, Michel Senellart (eds.), Graham Burchell (trans.)) (Palgrave, Macmillan: 2007) at 10

<sup>805</sup> See Elizabeth A. Povinelli, "Defining Security in Late Liberalism: A Comment on Pedersen and Holbraad" in Martin Holbraad and Morten Axel Pedersen (eds.), *Times of Security: Ethnographies of Fear, Protest and the Future* (New York, London: Routledge, 2013) at 28

<sup>806</sup> Michel Foucault, *Security, Territory, Population: Lectures at the College de France, 1977-78* (1d) (Arnold I. Davidson Francois Ewald, Michel Senellart (eds.), Graham Burchell (trans.)) (Palgrave, Macmillan: 2007) at 364. Foucault explains that pastoral power has a genealogy, from the Hebraic tradition, with essential characteristics that include the pastor not exercising power over a fixed territory but over a multitude of flock moving towards an objective, where the pastor's role is to provide subsistence, to constantly monitor and to ensure the salvation of the flock.

<sup>807</sup> *Ibid.* at 48-49

other scholars<sup>808</sup> reiterate, speaking of the need to strike a delicate balance between the needs of national security and the liberties of individuals.

Rather, the procedures and interventions required by the double exigency of liberty and security is “the paradox of liberalism and [liberty and security] are at the origin of the ‘crises of governmentality’ that it has experienced for two centuries”.<sup>809</sup> The art of governmentality, then, is the ability to be liberal and offer citizen subjects the freedoms and liberties associated with liberalism, allowing these liberties to run their course, to flow, and also functioning alongside similarly pervasive apparatuses (*dispositifs*) of security. Therefore, as opposed to conceptualizing security and liberty as distinct rationales/operatives/modes of governance, we are advised to look at the two as being co-constitutive in a sense.<sup>810</sup>

#### Section 4.4 – Israel, (and) the State of Exception

##### *Exceptional Grapes*

As mentioned earlier, on December 7 1999, the National Council for Planning and Building (NCPB) took a decision confirming that the institution of single family farms ran contrary to national planning objectives. However, the NCPB made an *exception* for the establishment of farms in the Beersheba (Naqab) region.

In its decision, the court emphasized that the Plan’s geographical focus on the Naqab, which was *unique* and *distinct* in character, fulfilled an “important national objective”.<sup>811</sup> It stated, “In practice, the plan validated the policy that this *distinctive* form of settlement will not be breached and [would] *transform itself from the exception to the rule* (emphases added).”<sup>812</sup>

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<sup>808</sup> See for example, Darren W. Davis and Brian D. Silver, “Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America” (2004) 48:1 *American Journal of Political Science* 28-46, Susan M. Akram and Kevin R. Johnson, “Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims”(2001) 58 *NYU Annual Survey of American Law* 295, Natsu Taylor Saito, "Whose Liberty - Whose Security - The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent" (2002) 81:4 *Oregon Law Review* 1051-1132.

<sup>809</sup> Michel Foucault, *Security, Territory, Population: Lectures at the College de France, 1977-78* (1d) (Arnold I. Davidson Francois Ewald, Michel Senellart (eds.), Graham Burchell (trans.)) (Palgrave, Macmillan: 2007) at 384

<sup>810</sup> See Andrew Dilts and Bernard E. Harcourt, "Discipline, Security, and Beyond: a brief introduction" (2008) 4 *Carceral Notebooks* 1-6

<sup>811</sup> *Adalah v. The National Council for Planning and Building*, HCJ 2817/06 [June 15 2010] at para. 23.

<sup>812</sup> *Ibid.* at para. 25.

The court upholds the executive's decision to institute the plan as 'an exception that becomes the rule'. However, the court is deciding on a claim of offence to the principle of equality. Yet, to say that fundamental human rights can be overridden by the executive or the court sanctioning an 'exception' is rather worrying. This is because it is not that a fundamental human right is being trumped by another fundamental human right more deserving of being upheld than the former based on the exigencies of the case, or even that a fundamental human right is *balanced* alongside a competing basic human right. Rather, the 'exception', which is not grounded in 'right' nor derives its legitimacy in law itself unless explicitly provided for in statute,<sup>813</sup> suffices as the decision of the appropriate government body to serve as a trump of a basic freedom of or entitlement that is owed to a human being or a community.

### *Schmitt on the Exception*

Emergency law is grounded in the exception. When a state declares itself to be in an emergency, the situation is so extraordinary, that the rule of law needs to be temporarily suspended in order for the state to deal with the particular threat it faces – whether it be a man-made natural disaster or war. Israel has been in a state of emergency since its founding as a means to combat the existential threat that it deems to be facing.

I'd like to bring in Carl Schmitt's work on the exception in an attempt to understand possible implications of the exception's use for equality in liberal Israeli jurisprudence.

For Schmitt, 'politics' is defined in the dyadic terms of friend/enemy in the public, but not private, sense.<sup>814</sup> The relationship with the 'friend', then, evokes the willingness to die for other members of one's group, whereas that of the 'enemy' is defined by the willingness to go to war and kill members of another hostile group that is external to one's polity.<sup>815</sup>

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<sup>813</sup> Although the validity of the declaration of an emergency may be provided for in statute, that does not mean that the scope of the emergency response will also have legitimacy in the law. The parallel under the laws of war would be the difference between *jus ad bellum* (determining whether entering a war is permissible) and *jus in bello* (establishing limits to military conduct).

<sup>814</sup> Carl Schmitt, *The Concept of the Political* (trans. George Schwab) (Chicago: University of Chicago Press, 1976 [1932]) at 26.

<sup>815</sup> *Ibid.* at 32-33.

The exception is a decision taken outside of constitutional norms and is instituted by the sovereign,<sup>816</sup> which Schmitt defines as “some person or institution, in a given polity, capable of bringing about a total suspension of the law and then to use extra-legal force to normalize the situation.”<sup>817</sup> Therefore, the sovereign is the one with the power to declare war against an enemy that poses an existential threat to the sovereign and its polity.

*Why national security as fundamental principle is antithetical to a rule of law project*

While equality is a fundamental ethical value in Israeli jurisprudence, the move to elevate national security to fundamental principle is inherently contradictory to the project of adjudication on the basis of fundamental principles. This is because the project’s goal, as professed by Barak, is for fundamental principles to crystallize into norms that make up the rule of law and democracy.<sup>818</sup>

Dyzenhaus explores precisely this point, asking if the state of emergency would run contrary to the requirements of the rule of law.<sup>819</sup> It is because Israel declares itself to be under an ongoing state of emergency<sup>820</sup> that it does not seem out of place that national security has been accorded the status of fundamental principle. Dyzenhaus draws on Dworkin’s conception of the ‘embedded mistake’ to illustrate the danger of the emergency to the rule of law. An ‘embedded mistake’ is a prerogative in a statute or constitution that exists as a legal fact but to which the judge must not give ‘gravitational force’ so that the mistake not have a legal effect beyond that which is absolutely necessary.<sup>821</sup> The embedding of such a mistake in statute creates a legal black hole, an emptiness or suspension of law<sup>822</sup> or a space beyond the law,<sup>823</sup> because there is no telling the depths to which interpretation could lead.

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<sup>816</sup> Liberal constitutionalists would find backing for the declaration of a state of emergency not in ‘a sovereign’, but rather in the law and its norms and rules around the same, and effected through the rule of law and appropriate division of powers among the executive, judiciary and legislature. See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (trans. George Schwab) (Chicago: University of Chicago Press, 2005 [1922]) at 18-26.

<sup>817</sup> *Ibid.* at 5.

<sup>818</sup> The adjudicative method of Barak has not escaped criticism. For a biting critique on the grounds of methodology, see Stanley Fish, “Intention is All There is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law” (2008) 29:3 *Cardozo Law Review* 1109-1146

<sup>819</sup> David Dyzenhaus, “Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?” (2006) 27:5 *Cardozo Law Review* 2005-2040.

<sup>820</sup> Gad Barzilai, “The Argument of “National Security” in Politics and Jurisprudence” in Daniel Bar-Tal, Dan Jacobson and Aharon Klieman (eds.), *Security Concerns: Insights from the Israeli Experience* (Greenwich: JAI Press, 1998) 243- 265

<sup>821</sup> *Supra* note 819 at 2011, Dworkin, *Taking Rights Seriously*, *supra* note 566 at 121-2.

<sup>822</sup> Giorgio Agamben, *State of Exception* (trans. Kevin Attell) (University of Chicago Press: 2005) at 41-42, 47-48

<sup>823</sup> *Supra* note 819 at 2015

The state of emergency is essentially about sovereign will and unimpeded by law, therefore by definition it cannot be restricted by it. This is why the institution of the emergency cannot be concordant with the demands of the rule of law; being beyond the law, it does not follow legal rules nor does it hold the government or sovereign accountable to the law.

The existence of such a prerogative in Israeli law should, by Dworkin's reasoning, be limited by judges who uphold the rule of law. While Barak does not deny that such is the special calling of the judge, he fails to see how national security is an 'embedded mistake', for him it appears more an 'embedded necessity'. It is also curious to note that Barak is insistent that where there is judicial review there are no black holes, including in times of terror,<sup>824</sup> without recognizing the likelihood that the embeddedness of national security as principle in adjudication in itself creates a black hole, a space beyond the law where law is not operational. As Dyzenhaus cautions, borrowing from Carl Schmitt, "one cannot confine the exception. If it is introduced into legal order and treated as such, it will spread".<sup>825</sup>

### *The downward spiral*

What is possibly the most disquieting feature of the state of emergency is the extent, uncertain in scope, to which the polity's sense of normalcy is assured through the suppression of those outside the polity.<sup>826</sup> Accordingly, we can know little about how far fundamental freedoms and liberties could be violated in the aim of countering the existential threat and maintaining the polity's identity.

The war on terror in America has fundamentally reformulated traditional understandings and applications of the rule of law.<sup>827</sup> Looking at the American example, we see that what a national security emergency has prompted is the insertion of the exception at the demands of an

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<sup>824</sup> Barak, *Judge in a Democracy*, *supra* note 349 at 298-299.

<sup>825</sup> David Dyzenhaus, "Humpty Dumpty Rules or the Rule of Law" (2003) 28 *Australian Journal of Legal Philosophy* 1-30.

<sup>826</sup> Carl Schmitt, *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (Berlin: Duncker&Humblot, 1994 [1921]) (German) at 150-67, cited in Vinx, Lars, "Carl Schmitt", *The Stanford Encyclopedia of Philosophy* (Winter 2013 Edition) (ed. Edward N. Zalta), online: <http://plato.stanford.edu/archives/win2013/entries/schmitt/>

<sup>827</sup> See American Civil Liberties Union (ACLU), *A Call to Courage: Reclaiming our Liberties Ten Years after 9/11* (New York: ACLU, 2011), *Al-Aulaqi v. Panetta*, No. 12-1192 (D.D.C.), *El-Masri v. Tenet*, 37 F. Supp. 2d 530 (E.D. Va. 2006) (No.1:05cv1147), *ACLU v. Clapper*, No. 13cv03994 (S.D.N.Y.)

extraordinary situation, as the appropriate response to this exceptional situation, as the US administration argued, was simply not possible for international law to realize in its current form.<sup>828</sup>

With the harkening of the exception, however, is also the inability to adequately determine *what* aspects of life could be negatively impacted and *how profound* those impacts could be. As the exception suspends the rule of law, there seems to be little redress for increasing violations to the fundamental right of habeas corpus or to *jus cogen* norms, such as the right to be free from torture and the right to life.

In following the state's assertion that more security means better protection of freedoms and liberty, the US courts, not unlike Barak, seems to be following a particular reading of the Jeffersonian adage that "the tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure".<sup>829</sup>

Indeed, recent trends indicate that violations to fundamental freedoms and liberties continue apace in Israel, and particularly so since the second intifada at the turn of the century. The downward spiral has meant that even the more mundane and everyday practices of living have been affected.<sup>830</sup>

National security arguments have been used to negatively impact on the ability of Palestinians to live sustainable lives by growing food for consumption and sale<sup>831</sup> and for Palestinian children,<sup>832</sup> as

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<sup>828</sup> Alberto Gonzales, 'Memorandum for the President: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban' (25 January 2002) in Karen Greenberg and Joshua Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005) 118.

<sup>829</sup> From Thomas Jefferson's letter to William Stephens Smith, Paris, 13 Nov. 1787. Julian P. Boyd, Charles T. Cullen, John Catanzariti, Barbara B. Oberg et al (eds.), *The Papers of Thomas Jefferson* (Princeton: Princeton University Press, 1950), Volume 12, 356-7.

<sup>830</sup> As Pain and Smith write, "What is perhaps most extraordinary is the extent to which the everyday – the feelings, experiences, practices and actions of people outside the realm of formal politics – has become so invisible in the flurry of interest in the globalised geopolitics of fear". See Rachel Pain and Susan J. Smith, "Fear, critical geopolitics and everyday life" in *Fear: critical geopolitics and everyday life* (Aldershot: Ashgate, 2008) 1-24.

<sup>831</sup> As seen in the Court's non-intervention concerning the uprooting of olive groves belonging to protected persons during army operations in *El-Saka v. The State of Israel*, H CJ 9252/ 00; and in the destruction of a plantation because a Palestinian sniper had used it in *Gusin v. The Military Commander*, H CJ 4219/02, 56(4) PD 608.

<sup>832</sup> Through the closing of schools and the use of the school building for military operations, see *The Association for Civil Rights in Israel v. The Military Commander*, H CJ 8286/ 00

well as prisoners, old and young<sup>833</sup> to acquire an education. Tens of thousands of Palestinians are being denied their rights to home, to private and family life on account that they or members of their immediate family are considered security threats on national grounds alone.<sup>834</sup>

Recent developments have also brought the Praver Plan, which threatens to forcibly displace some forty thousand Palestinian Bedouin from lands in their historical possession, use or ownership.<sup>835</sup> Part of the rationale is similar to that of the Wine Path Plan's, where Bedouin are considered threats to the goal of population dispersion and the contiguity of Israeli Jewish settlements.<sup>836</sup>

Possibly the most disconcerting example of the harm to liberty in the downward spiral of security or emergency arguments is found at the site of the prison. The restriction to liberty of the prisoner grew even more acute, when in April 2014, over one hundred Palestinian prisoners launched a hunger strike to protest the illegality of their administrative detention, a procedure whereby they are held in prison without charge and for an indefinite time period. In response, the Israeli government passed legislation to force feed the hunger striking prisoners,<sup>837</sup> a law that was later upheld by the Supreme Court.<sup>838</sup>

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<sup>833</sup> As of August 2013, 179 children were in prison after being processed through the military court system. They are generally denied access to education. See Defence for Children International, 'Detention Bulletin' (August 2013), online: [http://www.dci-palestine.org/sites/default/files/august\\_2013\\_detention\\_bulletin\\_draft\\_04oct2013.pdf](http://www.dci-palestine.org/sites/default/files/august_2013_detention_bulletin_draft_04oct2013.pdf). See also Addameer, *The Right of Child Prisoners to Education* (2010), online: <http://www.addameer.org/files/Reports/addameer-report-the-right-of-child-prisoners-to-education-october-2010-en.pdf>. The *Farahat* court determined that Palestinian child prisoners did have a right to education similar to that of Israeli juvenile offenders, though conditioned on "security considerations". See *Farahat v. Israel Prison Service*, petition no. 97/400. In December 2012, the Supreme Court affirmed that there was no right to education for 'security' prisoners and upheld the District Court's decision to bar security prisoners from accessing education in *Said Salah v. Ministry of Public Security*, Prisoner Appeal 2459/12. See Adalah, "Briefing Paper on Recent Developments on Palestinian Prisoners held in Israeli Prisons" (June 23 2013).

<sup>834</sup> On account of passing the temporary order, The Citizenship and Entry into Israel Law (temporary provision) 5763 – 2003. This has been unsuccessfully challenged in the courts, see for example, *Adalah v. The Minister of the Interior*, HCJ 7052/03, *Adalah v. The Minister of the Interior*, HCJ 830/07. For more on the impact and genealogy of this blanket ban, see Adalah, 'Family Unification' (constantly updated), online: [www.adalah.org/eng/Articles/1556/Family-Unification](http://www.adalah.org/eng/Articles/1556/Family-Unification)

<sup>835</sup> Adalah: The Legal Center for Arab Minority Rights in Israel, "Adalah's Position Paper on "Praver II": The Israeli Government's New Plan to Forcibly Displace and Dispossess Palestinian Bedouin Citizens of Israel from their Land in the Naqab (Negev)" (February 23 2017), online: <https://www.adalah.org/en/content/view/9049>. Home demolitions in the Bedouin villages continue apace and this is why civil society activist and geographer, Thabet abu Ras, has been quoted as saying that, although the Praver Plan has not become law, various aspects of the Plan are already being implemented "on the ground everyday". Abu Ras, "Two years since Praver... What's next?" (September 11 2013).

<sup>836</sup> See Neve Gordon, "Uprooting 30,000 Bedouin in Israel", *Al-Jazeera* (April 3 2012), online: <http://www.aljazeera.com/indepth/opinion/2012/04/2012421020291808.html>

<sup>837</sup> BBC, "Israel passes law allowing force-feeding of prisoners" (July 30 2015), online:

<http://www.bbc.com/news/world-middle-east-33717075>, Jonathan Lis and Ido Efrati, "Prisoner force-feeding bill

What is so remarkable about this case is that liberty is restricted for the Palestinian prisoner at the most rudimentary level of physical autonomy, where the prisoner's choice of whether to intake food or not is also subject to restriction.<sup>839</sup> The exception, prompted by the professed security threat,<sup>840</sup> seems to restrict liberty not just in life, but also with the onset of death.

Dyzenhaus' caution that the state of emergency can very reasonably lead to a downward spiral is probably a major factor in him calling for the emergency to be banished.<sup>841</sup> The caution does not seem unwarranted. We have seen in the Israeli case how security reasons are cited to deny liberty in its most literal form of imprisonment or detention, in the explicit sense in denying one the right to free expression or property, to impinge on everyday, mundane liberties such as accessing education or growing food, and in this most recent case to say that even the consumption of food/not is a security concern, thereby justifying force-feeding, a form of torture according to international medical ethics standards. Dyzenhaus' caution seems warranted and following his line of thought, we could ask with justified concern, where security is raised to the level of fundamental principle in adjudication, how low can the downward spiral in fact go?

#### Section 4.5 – Conclusion - Security as right?

I had earlier posed the question that if Barak sees national security as principle, then does it follow that a decision made on national security grounds is justified by it securing some group *right*? This would follow from Dworkin's formulation that fundamental principles are intended to establish

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ready for final vote after getting fast track" *Ha'aretz* (June 18, 2014), online:

<http://www.haaretz.com/news/national/.premium-1.599503>

<sup>838</sup> In *Israel Medical Association v. Knesset*, [2016] HCJ 5304/15, Jesse Lempel, "Force-Feeding Prisoners on a Hunger Strike: Israel as a Case Study in International Law" *Harvard International Law Journal* (December 2 2016), online: <http://www.harvardilj.org/2016/12/force-feeding-prisoners-on-a-hunger-strike-israel-as-a-case-study-in-international-law/>

<sup>839</sup> This case certainly complicates the Foucauldian notion of biopolitics – whereby bodies are disciplined and lives are either encouraged to live or let to die. This is one case where bodies are certainly punished, but those same bodies are deliberately kept alive, as 'living dead', because even the threat of their deaths render them security threats. For more on the 'living dead' in what has been described as a governmentality of necropolitics in the OPT and Gaza, see Achille Mbembe, "Necropolitics" (2003) 15(1) *Public Culture* 11-40

<sup>840</sup> The state argued that if the prisoners were to die, then this would increase the security threats that Israel would face, as the state would be held culpable for their deaths.

<sup>841</sup> Dyzenhaus' concluding argument is for the emergency to be banished. He argues that the law should be used to deal with a crisis situation, and not the emergency/exception, which is an empty space *beyond* law. David Dyzenhaus, "Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?" (2006) 27:5 *Cardozo Law Review* 2005-2040 at 2030, 2036, 2038.

individual rights<sup>842</sup> or indeed are ‘rights’ that exist prior to the law.<sup>843</sup> And if so, then how would we define such a collective right? Would it be the collective right of the state’s constituents to security, or a group right to Jewish sovereignty?

The idea of security as right is brought up by Martti Koskenniemi in his study of the law of occupation. Speaking specifically to Israel’s *Mara’be*<sup>844</sup> and the UK’s *Jedda*,<sup>845</sup> he notes how in both cases, security *becomes* a human right,<sup>846</sup> with human rights and security suddenly indistinguishable so that an “action is always an act of security and human rights and whether we describe the former in the latter’s vocabulary no longer really matters”.<sup>847</sup> Koskenniemi endeavours to show why security should not be conflated to the level of rights as it undermines the protections that human rights are meant to guarantee for citizens, occupied persons and vulnerable populations.

Whatever the nature of the right that stems from the elevation of national security to the level of fundamental principle, irrespective of who the right holder is or how such a right can be defined and operationalized, to speak of rights stemming from security’s assignment as a fundamental principle is a problematic undertaking.

Therefore, the argument could be made that a security argument enables liberty in the Hohfeldian sense of not facing a restriction to do a certain act. Therefore, we saw evidence of how national security, broadly conceived as national development or population dispersion, granted Israeli Jews the right to settle in ethnically exclusive communities on both sides of the Green Line. We also saw how it underpinned the right of Israeli Jews to establish tourist endeavours along a considerable stretch of land, as materialized under the Wine Path Plan. Nevertheless, it would be incorrect to grant such an entitlement the status of right.

For one, it is not a right on par with other rights, there is no hierarchical relationship between it and other rights, and as we’ve seen where there appears a threat to Jewish sovereignty, security serves as a vertical trump over *jus cogens* norms and other fundamental freedoms or liberties, an ability

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<sup>842</sup> Ronald Dworkin, “Hard Cases” (1975) 88:6 *Harvard Law Review* 1057 at 1067.

<sup>843</sup> Ronald Dworkin, ‘Introduction’ in *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978)

<sup>844</sup> *Mara’abe v. The Prime Minister of Israel*, [2009] H CJ 7957/04

<sup>845</sup> *AI-Jedda v. Sec’y of State for Defense*, [2005] EWHC 1809 (Admin), HRLR 1355.

<sup>846</sup> Martti Koskenniemi, “Occupied Zone – ‘A Zone of Reasonableness’?” 41 *Israel Law Review* (2008) 13 at 28

<sup>847</sup> *Ibid.* at 29

that rights do not have. Second, it is hard to find a moral argument to justify such a right, even though Barak has attempted to do so.<sup>848</sup> To accord it the status of right also undermines other universal rights that the human rights corpus has enshrined in international norms and standards to protect all equally and particularly those vulnerable and oppressed persons so that they can live in dignity and with their minimum subsistence requirements met. Finally, as security is unbounded, there is no limit to when such a right could be called upon, while rights by their very nature are identifiable and bounded and tell us who the right holder is, when such a right can be claimed and the scope of the right's action. When security is cited as fundamental principle, there is no way of knowing these things.

What we can say, however, is that national security gives rise to privilege, but not in the Hohfeldian sense of liberty. Rather, it gives rise to a privilege that is specifically Jewish racial privilege, the one in a permanent headlock with democratic, liberal ideals, and one that is seemingly unbounded.<sup>849</sup> This is privilege as used in the critical race studies tradition,<sup>850</sup> which speaks primarily of privilege to describe certain categories of being that comport advantage to their bearer, so privilege as white (race), cis-male (sex/gender identification matching that assigned at birth), heterosexual and in socio-economic terms, belonging to the upper-middle class. Privilege often goes unnoticed by its bearers because it does not need to be harkened in order to have effect and therefore is reproduced in the most mundane of practices. However, for those without said privilege, the advantage of others is a regular reminder of their position of disadvantage and of the privilege they were not born into or do not possess.<sup>851</sup>

In this chapter, I set out to investigate the normative content of equality in Israeli liberal jurisprudence. I chose to focus on Aharon Barak's jurisprudence, because the liberalism with which he is identified showcases the best that Israeli jurisprudence can be with regards to fulfilling the rights and liberties of Palestinians, and in particular the fundamental right to equality. In conclusion, and after the chiasmus reading, what I am able to argue is that there is no basic

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<sup>848</sup> For example, to argue that it is a precursor to the realization of other human rights, much like the *Jedda* court argued.

<sup>849</sup> See Shira Robinson, "The Problem of Privilege" *Jadaliyya* (March 23 2012), online: <http://www.jadaliyya.com/pages/index/4797/the-problem-of-privilege>

<sup>850</sup> Stephanie M. Wildman & Adrienne D. Davis, "Language and Silence: Making Systems of Privilege Visible" in Richard Delgado (ed.), *Critical Race Theory: The Cutting Edge* (Philadelphia, Temple University Press, 1995) 573

<sup>851</sup> For the codification of white privilege in the early eighteenth century that turned African bond-labourers into slaves, see Theodore W. Allen, *The Invention of the White Race, Volume 2: The Origin of Racial Oppression in Anglo-America* (2d) (Verso, 2012).

minimum guarantee for those outside the polity, that is for Palestinians, to liberty as license, meaning to be granted freedom from legal constraint to do what one wishes. This is because both the mundane and the fundamental are constrained if the security situation calls for it. Neither is there a minimum guarantee to liberty as independence, which would mean being treated as someone that is independent and equal rather than being treated as someone subservient or in a manner insulting to one's dignity.<sup>852</sup> In failing to answer to liberty in these two essential ways, it is hard to make a convincing argument that the court is one that can be identified as an institution that upholds liberty. As liberty is the core aim of liberalism it would therefore not be fair to assign the Israeli court the label of a liberal court. For while some decisions do affirm the liberty of persons, such is not the general conclusion one reaches when carefully accounting the court's approach to the liberty of Palestinians, and it would be precisely in these moments, when upholding liberty is most difficult in the balance with other considerations, that the court would be most deserving of the label.

It would also be more deserving of the label if the court can show that its *blameworthiness* over time has reduced owing to efforts undertaken in the present that display a change towards its dealings with Palestinians when compared to its dealings with Palestinians in the past. Therefore, for a legal system that was responsible in the founding years of the state for enabling land expropriations and forcible expulsions of Naqab Bedouin, we could say its diachronic responsibility, or responsibility over time, reduces if there has been a concomitant character change whereby the court better respects and fulfills the liberty of Palestinians. However, as evidence for this is lacking, we would be hard pressed to show that the court has absolved itself of some of its responsibility in limiting the liberty of Palestinians.<sup>853</sup>

As for the value of equality, the court's record, and this is rather clear-cut in the Wine Path Plan case and the Umm al-Hieran eviction case, shows that similar to liberty, there is no basic guarantee for the right to fundamental equality for Palestinians when it is considered alongside the issue of Jewish sovereignty. Therefore, neither does the court accept that the Rawlsian notion of the abstract right to equal concern and respect should apply to an individual irrespective of social class. Nor does the court consider Agamben's notion of 'whatever-singularity' that affirms the value of a person irrespective of what it is. Indeed, we can appreciate that when the primary value

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<sup>852</sup> Dworkin, *Taking Rights Seriously*, *supra* note 566 at 262

<sup>853</sup> See Andrew C. Houry, "Synchronic and diachronic responsibility" (2013) 165:3 *Philosophical Studies* 735-52

undergirding security (Jewish sovereignty) is predicated on racial or ethnic privilege, that it will be a Sisyphean effort for the court to begin to see equality in the Agambenian sense, which emphasizes value with no consideration for status, ethnic or otherwise.

That national security gives rise to privilege means that it grants Israeli Jews, relative to the Palestinian, the privileges to travel unrestrictedly<sup>854</sup> or to stay at home<sup>855</sup>, to attend school without interruption and then be admitted to university,<sup>856</sup> to settle in a home in a location of one's choice,<sup>857</sup> to decent pay and an adequate standard of living,<sup>858</sup> to access courts<sup>859</sup>, to the rule of law<sup>860</sup>, to electricity and water,<sup>861</sup> to organic produce,<sup>862</sup> to agricultural land,<sup>863</sup> to leisure<sup>864</sup>, malls<sup>865</sup> and swimming pools<sup>866</sup>. In short, it enables greater life chances for the Israeli Jew.

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<sup>854</sup> Gideon Levy and Alex Levac, "Journalist Majd Kayyal speaks out after Shin Bet interrogation" *Ha'aretz*, (April 26, 2014), online: <http://www.haaretz.com/weekend/twilight-zone/.premium-1.587161>, Zvi Bar'el, "Israel's double standard on reporters visiting enemy states" *Ha'aretz* (April 18, 2014), online: <http://www.haaretz.com/news/diplomacy-defense/1.586189>

<sup>855</sup> Reference here to the home demolitions in the Naqab, in both unrecognized villages and development towns for unlicensed building. These demolitions will be stepped up with the institution of the Praver Plan.

<sup>856</sup> Gisha, 'Student travel between Gaza and the West Bank 101', Information Sheet (September 2012), online: <http://www.scribd.com/doc/122756105/Student-travel-between-Gaza-and-the-West-Bank-101>

<sup>857</sup> Which Palestinians are prevented from doing in roughly 80% of Israel territory, owing to the existence there of Admissions Committees.

<sup>858</sup> The incidence of poverty among Palestinian families in Israel in 2012 was 53.4%, see Lidar Gravé-lazi, Greer Fay Cashman, "Annual report shows 1.7 million Israelis living below poverty line" (December 17 2013), online: <http://www.jpost.com/National-News/Annual-report-shows-17-million-Israelis-living-below-poverty-line-335255>.

An annual UN study on the Palestinian economy concludes that Israeli policies play a direct role in exacerbating poverty in the OPT, including in East Jerusalem. See United Nations Conference on Trade and Development (UNCTAD), 'Report on UNCTAD assistance to the Palestinian people: developments in the economy of the Occupied Palestinian Territory' (July 8 2013), UN Doc. TD/B/60/3, online: [http://unctad.org/meetings/en/SessionalDocuments/tdb60d3\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/tdb60d3_en.pdf)

<sup>859</sup> There are numerous legal, procedural and practical obstacles for Palestinians seeking access to justice for death, injury or property destruction in the Israeli courts. See Ha'aretz, "Palestinians say Israel imposing steep court fees to prevent lawsuits" (November 7 2011), online: <http://www.haaretz.com/news/diplomacy-defense/palestinians-say-israel-imposing-steep-court-fees-to-prevent-lawsuits-1.394246>, Adalah, "Adalah Petitions Israeli Supreme Court against Policy Banning Gazans Entry to Israel which Prevents Access to Courts for their Compensation Claims" (October 4 2012), online: <http://adalah.org/eng/Articles/1840/Adalah-Petitions-Israeli-Supreme-Court-against-to> . Palestinian Center for Human Rights (PCHR), *Penalising the Victim* (2013), online: <http://www.pchrgaza.org/files/2013/Penalising%20the%20Victim-report.pdf>

<sup>860</sup> See Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (Berkeley, California: University of California Press, 2005), David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Albany: SUNY Press, 2002)

<sup>861</sup> Amnesty International, *Troubled waters - Palestinians denied fair access to water* (2009), Index Number: MDE 15/027/2009, online: <http://www.amnesty.org/en/library/info/MDE15/027/2009>, Physicians for Human Rights (PHR) and The Regional Council for the Unrecognized Villages (RCUV), *Sentenced to Darkness: Electricity and Chronic Patients in the Unrecognized Bedouin villages in the Negev* (December 2008), online: [http://www.phr.org.il/uploaded/articlefile\\_1235291771187.pdf](http://www.phr.org.il/uploaded/articlefile_1235291771187.pdf)

<sup>862</sup> Clémentine Cirillo-Allahsa, "Israel-Palestine – Organic farming between the battle and the field" in Philippe Baqué (ed.), *Organic Farming & Food – Between Business and a Social Project* (Agone, 2012) (French)

What are 'life chances'? Legal scholar Dean Spade furthers the Foucauldian notion of biopolitics to show how administrative governance abets enormous discrepancies in the distribution of life chances resulting in the premature death of many that are queer, racialized, non-normatively sexed and gendered populations.<sup>867</sup>

What marks these routines and practices as privileged is that they are not readily accessible or acquirable to those determined to be without said privilege, Palestinians. These actions that deny access to private and public goods, as Dean Spade points out when looking at transgender subjects, are mostly the doing of the executive branch<sup>868</sup>. Nevertheless, when the primary value of security is determined by the courts to be Jewish sovereignty, even if implicitly so, it is hard to imagine why the executive would feel compelled not to codify Jewish sovereignty in a Jewish privilege of this form. It *cannot* be said to be of great consequence that the court intervenes in certain instances whereby the exclusion of Palestinians from a particular privilege offends statute or conscience, because when this privilege is so pervasive, the court is simply unable to rectify the countless, interlocking, seemingly infinitesimal ways that Palestinians everyday are reminded of their denial of such privilege. Nor is the court free from responsibility, for at least as often as it intervenes, it also *enables*. These forms of privilege then carry with them the force of law, circulate in even more intimate spheres of one's life and only become further entrenched.

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<sup>863</sup> For Gaza, see Food and Agriculture Organization (FAO) and Office for the Coordination of Humanitarian Affairs (OCHA) "Farming without Land, Fishing without Water: Gaza Agriculture Sector Struggles to Survive" (May 25 2010), online: <http://unispal.un.org/UNISPAL.NSF/0/9A265F2A909E9A1D8525772E004FC34B>; for the Jordan Valley, see Ma'an Development Center, "The Status of Palestinian Agriculture in the Jordan Valley" (2012), online: <http://www.maan-ctr.org/pdfs/FSReport/spotlight/Spotlight10.pdf>

<sup>864</sup> Ilan Lior, "Segregation at Superland: Separate days for Arab and Jewish students at amusement park" *Ha'aretz* (May 30, 2013), online: <http://www.haaretz.com/news/national/segregation-at-superland-separate-days-for-arab-and-jewish-students-at-amusement-park.premium-1.526705>

<sup>865</sup> Oz Rosenberg, "Hundreds of Beitar Jerusalem fans beat up Arab workers in mall; no arrests" *Ha'aretz* (March 23, 2012), online: <http://www.haaretz.com/print-edition/news/hundreds-of-beitar-jerusalem-fans-beat-up-arab-workers-in-mall-no-arrests-1.420270>

<sup>866</sup> Ami Kaufman, "Arab barred entry to swimming pool in Beer Sheva country club" *972 mag* (July 4 2013), online: [http://972mag.com/nstt\\_feeditem/arab-barred-entry-to-swimming-pool-in-beer-sheva-country-club/](http://972mag.com/nstt_feeditem/arab-barred-entry-to-swimming-pool-in-beer-sheva-country-club/)

<sup>867</sup> Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Boston: South End Press, 2012).

<sup>868</sup> *Ibid.*

What these gestures of exclusion mean to Palestinians are not only that they are not in possession of said privilege, but that with every day that passes, the further they are pushed to their premature death.<sup>869</sup>

The reduced life-chances for Palestinians as a result of security being assigned the value of fundamental principle in adjudication is an appropriate segway into the principal inquiry of the next chapter, the value of life as generally apprehended by Israeli law.

We've shown how security is the legally embedded necessity born to protect the ability of the state to remain sovereign in Jewish terms and will go beyond the law as its ontological premise is to do just that. While this overrides norms of equality from being realized on land rights for Naqab Bedouin or Palestinians more generally, what does it mean for the Palestinian right to life? This is something we will take up in the final chapter on the issue of vaccinations.

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<sup>869</sup> *Ibid.* at 144.

## Chapter 5 - Vaccinations

### Introduction

#### **Sailing into Beersheba**

Highway traffic was atypically light. Sailing into the city, the oddness of the day descended like a foreboding. Yet, I certainly wasn't as scared as some of the others around me seemed. A string of cars had pulled up by the side of the road as if on cue. Some waited in their cars. Many others, however, darted towards the sand dunes artificially propped up by the roadside. I saw one man crouched with his daughters, his arms enveloping both in a tight embrace. They were all visibly scared; the dad, however, looked petrified.

I was in Beersheba and there were rockets falling from the sky. It was mid-July 2014 and we were in the midst of a carnage. Not in Beersheba, though, but only a mere thirty kilometers north west. Over there, in the tightly packed enclave of Gaza, around six thousand tonnes of bombs (by conservative estimates) were dropped over the span of seven weeks in July and August.<sup>870</sup> As the dust settled and the dead finally won the honour of being recognized as war tallies, they counted 2,131 Palestinian deaths in Gaza. On the Israeli side, seventy-one died, sixty-six of who were soldiers.<sup>871</sup> Among the Israeli civilian casualties was a Palestinian Bedouin from the recognized village of Qasr al-Sir, thirty-two year old Auda al-Wadj.<sup>872</sup>

A day before a rocket claimed the life of Auda al-Wadj and injured members of his family, the state justified its lack of provision of protection against such rockets in the (recognized and unrecognized) Bedouin villages in court. The Bedouin villages in the Naqab lack bomb shelters, safe zones, fortifications and warning sirens, which are standard protective measures in place against rocket attacks, and which are found in all Jewish Israeli communities.<sup>873</sup> For this reason, residents of the villages petitioned the High Court of Justice, demanding that the defense establishment

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<sup>870</sup> Ali Abunimah, "How many bombs has Israel dropped on Gaza?", *Electronic Intifada* (August 19, 2014), online: <http://electronicintifada.net/blogs/ali-abunimah/how-many-bombs-has-israel-dropped-gaza>

<sup>871</sup> United Nations Office for the Coordination of Humanitarian Affairs (OCHA), "Occupied Palestinian Territory: Gaza Emergency Situation Report" (September 4, 2014), online: [www.ochaopt.org/documents/ocha\\_opt\\_sitrep\\_04\\_09\\_2014.pdf](http://www.ochaopt.org/documents/ocha_opt_sitrep_04_09_2014.pdf)

<sup>872</sup> Chaim Levinson, Ido Efrati, Jack Khoury and Revital Hovel, "Man killed in rocket strike on Negev Bedouin community", *Ha'aretz* (July 19, 2014), online: <http://www.haaretz.com/news/diplomacy-defense/.premium-1.606027>

<sup>873</sup> In fact, emergency preparedness of Palestinian communities in Israel is pegged at a mere 14%. Only 9% of Arab communities have bomb shelters. Meirav Arlosoroff, "Shelter from the war? For Israel's Arabs, not so much", *Ha'aretz* (July 23, 2014), online: [www.haaretz.com/business/.premium-1.606852](http://www.haaretz.com/business/.premium-1.606852) citing The Abraham Fund Initiatives, "Arab Local Authorities' Preparedness for Emergencies" (December 2013) (Hebrew)

provide adequate shelter from rockets for some one hundred thousand residents.<sup>874</sup> As part of the state's justification for lack of adequate protection in the villages, it stated that the villages were not a priority for the defense establishment and that the best protective measure residents could take was to lie on the ground.<sup>875</sup>

The High Court of Justice subsequently issued a partial rejection of the petition, stating that while the state has a paramount obligation to protect the lives and physical integrity of citizens, they did not find cause to intervene with the defense establishment's decision not to erect portable shelters in the villages. The authorities had done their homework, making their decision reasonable, and so the court found no cause to have their discretion override that of the authorities.<sup>876</sup> Besides, as this was a 'security' matter, "judicial intervention in this area [would be] very limited".<sup>877</sup>

I was in Beersheba to meet with Huda Abu al-Obayed, a young Bedouin activist who recently assumed the position of Director of 'Yasmin al-Naqab', a grassroots NGO mandated to promote healthy living among Palestinian Bedouin and to realize their right to a standard of living adequate for the health of the community. Huda had arranged for me to meet with four women in Bir al-Mashash, an unrecognized village, not far from Dimona, and just a few kilometers north of Qasr al-Sir. Qasr al-Sir didn't know it yet, but it would mourn the loss of one of its own the following day. In retrospect, I suppose my foreboding, unlike that fateful rocket, was not misplaced.

I was in Bir al-Mashash to inquire into a rather peculiar legal case.<sup>878</sup> In 2010, an amendment was passed in the Israeli parliament to cut child allowance payments to those families that did not vaccinate their children according to government directives. The Naqab Palestinian community, in addition to having grossly inadequate access to protection from rockets are also in severe want of

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<sup>874</sup> *Abu Afash vs. Home Front Command*, [2014] HCJ5019/14. The petition was prompted by a rocket causing severe injury to two young girls from an unrecognized village bordering the Bedouin development town of Laqiya, on 14 July. See Jack Khoury, Shirly Seidler and Gili Cohen, "Bedouin in south unprotected from rocket fire", *Ha'aretz* (July 16, 2014), online: <http://www.haaretz.com/news/diplomacy-defense/1.605416>

<sup>875</sup> The Association for Civil Rights in Israel (ACRI), "State: Providing Protection for Bedouin Villages in the Negev is Not a Priority" (July 17 2014), online: <http://www.acri.org.il/en/2014/07/17/bedouin-protection-priority/>

<sup>876</sup> *Abu Afash vs. Home Front Command*, [2014] HCJ5019/14 at paras. 5-7. The court issued a 'partial' rejection of the petition, since it denied the request to provide immediate portable shelters for the villages. However, on the issue of the structural lack of permanent shelters in the villages, the state gave the authorities thirty days to respond regarding instituting a long-term shelter intervention in these communities.

<sup>877</sup> *Abu Afash vs. Home Front Command*, [2014] HCJ5019/14 at para. 6. The earlier chapter's discussion on the 'fundamental principle of security' I believe adequately explains the reasons for, and the consequences of, the exceptional weight given to the principle of security in Israeli jurisprudence.

<sup>878</sup> *Adalah v. Minister of Welfare and Social Affairs*, [2013] HCJ 7245/10

adequate health care. Although the majority in the community claim to want to vaccinate their children, the lack of well-baby clinics in the unrecognized villages makes realizing that want elusive.

Accordingly, members of the community appealed to the court on the grounds that the amendment was discriminatory in its effects as it disproportionately targeted the community, who have grossly inadequate access to well-baby clinics administering vaccinations. The court dismissed the petition and the amendment stayed on the books. The Health Ministry, which was meant to implement the amendment, announced, after the court's decision, that it would not implement it. The Health Ministry's rationale was that the amendment was 'anti-social', in part probably because a significant percentage of Israeli society would be against it as well.<sup>879</sup>

### **Recognizing the assemblage**

I believe that the case *as an object of inquiry* was what made it 'peculiar', more than the case itself. This is because the legal decision had no practical impact on the lives of the petitioners as the executive branch decided it would not implement the controversial amendment. So why study it? For one reason, being about vaccines and the promotion of the health of the child and the social body, the case is a rather unique prism through which one can explore how 'life' generally is conceived, lived, made to conform, regulated and biopolitically governed within the Palestinian Bedouin community in Israel. It also comments on how different conceptions of 'life' circulate in Israel more generally. The second reason is that by appreciating the biopolitics of this space, we come to learn how life is made recognizable<sup>880</sup> and how *different forms of recognition* manifest, which is a primary point of inquiry of this dissertation and our Polaris star around which we wish to draw conclusions.<sup>881</sup>

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<sup>879</sup> In a recent sample, it was found that 7.4% of Israeli babies are not vaccinated, the biggest reason being refusal on 'ideological' grounds. Dan Even, "More Israeli parents refusing to vaccinate their babies according to state regulations", *Ha'aretz* (June 4, 2013), online: [www.haaretz.com/news/national/.premium-1.527622](http://www.haaretz.com/news/national/.premium-1.527622)

<sup>880</sup> Butler, *Frames of War*, *supra* note 93

<sup>881</sup> Therefore, while I look at recognition using the model of the Hegelian dialectic, my vantage point is Gilles Deleuze's critique of Hegel, which is that the dialectic by itself is too identitarian and tends to see difference primarily as being dualistic. In Deleuze's own words, "All these signs may be attributed to a generalized anti-Hegelianism: difference and repetition have taken the place of the identical and the negative, of identity and contradiction. For difference implies the negative, and allows itself to lead to contradiction, only to the extent that its subordination to the identical is maintained. The primacy of identity, however conceived, defines the world of representation. But modern thought is born of the failure of representation, of the loss of identities, and of the discovery of all the forces that act under the representation of the identical". See Gilles Deleuze, *Difference and Repetition* (trans. Paul Patton) (New York: Columbia University Press, 1994) at ix.

Finally, the case is a rather telling example of ‘assemblage’, which is a coming together of disparate elements into a unity. In an assemblage, the relations between these heterogeneous elements are always changing, moving and becoming, so that through the affects and energies produced, connections and networks are both made and undone. Assemblage is a central element in Deleuze’s complexity theory. Complexity theory holds that in order to understand reality, we should not work on general abstraction and attempt to fit that to explain complex social situations or individuals. Rather, we ought to look at the complexity of relations at the level of the individual and understand the relational networks that make individuals to have a fuller understanding of what is the subject.<sup>882,883</sup>

As this chapter will look at *agency* and *recognition* of the Naqab Bedouin subject as its principal objects of inquiry, so assemblage theory, one that draws in multiple, heterogeneous elements into a unified system to study the relations between the disparate elements, is particularly useful. By studying the issues of agency and recognition through the lens of the assemblage, we learn to appreciate how phenomena manifest in both the coming together of certain elements, affects and forces, and in the concurrent possibility of their undoing with affects and forces that deterritorialize. This is to say that if medicine can generally be thought of as a ‘good’ thing, as it helps us realize good ends, such as longevity and the reducing of human suffering and economic burdens, then how do the forces from that particular assemblage influence how actors in our assemblage, which is the legal case, react? Are they fully sovereign in making the choice of whether or not to vaccinate? Further, if medicine is seen as a good, from which we can assume that the community in general have *trust* in the medical establishment, then how are existing associations undermined in this ‘trust cluster’ (which is part of the larger Israeli health system-Palestinian Bedouin community network) when the decision is made not to vaccinate?

Similarly, when looking at the state’s immunization practice among the Naqab Bedouin, it is crucial to contemplate the manner in which the state’s policies concerning demographic advantage of Israeli Jews in Israel/Palestine and nationalizing land square with the national health policy to promote health and well-being generally within its jurisdiction. Certainly, the state’s policy does not

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<sup>882</sup> For a helpful account of assemblage and complexity theory, see Srnicek, *Assemblage Theory*, *supra* note 20

<sup>883</sup> Following a description of my visit to the field in Bir al-Mashash, I will outline the theoretical frameworks that will guide this chapter’s inquiries – assemblage theory and feminist theory. These will harness discussion of the concepts of affect, Foucauldian biopolitics and performativity as taken up, in particular, by Judith Butler. With these theoretical frames and concepts as signposts I will attempt to bring greater understanding to the issues of agency and recognition as they pertain to Naqab Bedouin.

follow the single trajectory of less Arabs, more Jews but rather is an outcome of affects, forces and energies from relational assemblage networks, be they concerned principally with health or security or land. In teasing out how Bedouin life is recognized, then, it is crucial to bear these influences in mind. Assemblage theory is also always vigilant to the manner in which existing associations are broken and undone to form reconfigured networks or completely novel ones. In doing so, it offers us hints of when agency, of fluctuating sovereignty, can have *transformative potential*.<sup>884</sup>

### **Arriving in Beersheba**

Before expanding on assemblage theory and laying out the theoretical framework for the case study, I would like to elaborate on my meetings with a Bedouin woman activist, Huda and with four women from Bir al-Mashash, Umm 'Ayed, Umm Faris, Umm Osama and Umm Mohammed from the Abu Skeik family.

Huda and I agreed to meet on David Ben-Gurion street, named after Israel's founder and first prime minister who had made state-centered development of the Naqab something of a personal credo.<sup>885</sup> The street stitched together the academic and medical centers of Beersheba, Ben-Gurion University and Soroka Medical Center. In somewhat uncustomary fashion, I arrived ten minutes before our appointment. After twenty minutes of thumb-twiddling and rearview-mirror-glancing, I receive a text message from Huda apologizing for the delay. She's held up in a meeting with representatives from the Health Ministry with whom she is discussing how the government can support the work of the NGO. She asks if I could meet her outside that other Beersheba landmark, the District Court.

Soon we were off to the health NGO she had assumed charge of only recently, Yasmin al-Naqab.<sup>886</sup> Located in the old city of Beersheba, Yasmin al-Naqab was given space within the offices of Itach-Ma'aki – Women Lawyers for Social Justice. Itach-Ma'aki works under the general rubric of assisting socio-economically disadvantaged women, while in the Naqab it focuses mainly on the issues of assisting women attaining income support benefits, and dealing with polygamy and domestic

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<sup>884</sup> I will expound on assemblage theory in the theoretical discussion section that will follow.

<sup>885</sup> Ben-Gurion lived on and off in the Naqab, in Kibbutz Sde Boker, for twenty years until his death in 1973. He saw settlement and development of the Naqab as strategic objectives of the Zionist project and in that vein was personally invested in the same by setting up his permanent home there. See David Ben-Gurion, *The Negev is Still Waiting* (Tel Aviv: The Labour Party Archive, 1954) (Hebrew). It was his house Nuri and I came across whilst swirling and spitting on the wine route. See the previous chapter.

<sup>886</sup> See <http://yasminnegev.org/en/>

violence.<sup>887</sup> We walked down the thin, gray-walled corridor to Huda's office. It was quiet. Besides the two of us, there didn't appear to be anyone working there that day.

Huda and I spoke for about an hour and a half about the case and her impressions of the community's approach to vaccinations and health more generally.<sup>888</sup> Huda was in her twenties and incredibly astute. I've heard her been referred to as a poster child for women's agency in the Naqab, often in reference to 'women leaders in the Bedouin community'. While Huda may certainly be a leader, then again, there isn't just a poster child of women's agency or even a few, as everyone wields power in their own specific language and form. Yet, they do so in ways not entirely of their own making, but rather intimately and inextricably bound to their surroundings. I flag this point because of the tendency to identify social change as being located in specific, larger than life personalities,<sup>889</sup> thereby rendering invisible the contributions of the everyday and everyone as being subject-effects of 'change'.<sup>890</sup> This framing also tends to render women in the community as overwhelmingly passive and awaiting emancipation through women leaders, who become the female equivalents to the sheikhs and mukhtars who were generally seen to be the go-betweens in relations between the colonial rulers and the native Palestinian community. I will pick up on this issue of agency in the Naqab later in the chapter when I discuss the meeting with the four residents of Bir al-Mashash.

Huda met with the Health Ministry officials at their offices, located adjacent to the District Court, to explore governmental support for the NGO. She remarked to me how she "was very pleased" with the meeting. They discussed the possibility of the Ministry paying the salary of the health counselors that Yasmin al-Naqab had stationed in clinics in the community to promote greater health awareness among visitors. The Health Ministry also spoke of setting up an additional clinic in one of the villages.

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<sup>887</sup> See <http://itach.org.il/?cat=11>

<sup>888</sup> All references to our conversation refer to our interview on that day. Interview with Huda Abu al-Obayed, Director of Yasmin al-Naqab, Beersheba (July 17 2014). Interview on file with author.

<sup>889</sup> See, for example, discussion and public recognition of Amal Al-Sane', who like Huda is also from the Bedouin development town of Laqiya and who is indeed a very prominent activist in the community and has contributed greatly to women's issues among the Bedouin community at large. See The Arab-Jewish Center for Equality, Empowerment and Cooperation – Negev Institute for Strategies of Peace and Development (AJEEC-NISPED), "Amal Elsana Alh'jooj" (undated), online: <http://en.ajeec-nisped.org.il/our-staff-amal-elsana-alhjooj/>

<sup>890</sup> I use 'change' in single-inverted commas because of the tendency to see these social transformations as distinct, temporally bound events as opposed to a process that is always becoming.

However, as soon as we had settled in the air-conditioned office, the very first issue she brought up with me was that of the vaccine against the human papilloma virus (the HPV vaccine). The HPV vaccine is intended to prevent cervical cancer and anogenital warts and was introduced in the 2013-2014 academic year for some 52,000 eighth grade girls.<sup>891</sup> The Health Ministry officials drove home to Huda that there were certain Bedouin families opposed to the vaccine. Huda explained to me that this was because cervical cancer was caused in part by sexual relations with multiple partners. “Because the Bedouin community is a very conservative community” she said, “there are families that think if the girl took the vaccine, she would allow herself to have sexual relations with many persons as there wouldn’t be any risks involved”. She clarified, “This is how the Health Ministry explained it and I think their reasoning is correct”.<sup>892</sup> Huda gave the example of the ninety percent turnout rate in the Bedouin community for the polio vaccine as evidence that the community was *not* averse to vaccines; hence, low support in the community for the HPV vaccine was attributable to their conservative mores around sex. This conservatism placed sexual propriety as having more value than the health of girls in the community. By framing the issue in this manner, Health Ministry officials, and Huda, were emphasizing how the Bedouin community’s conservatism and desire to control adolescent sexuality, in contrast to the standard-setting majority Israeli Jewish society against whom Bedouin were being measured, put their children’s lives in danger. What was not addressed was how conservatism around young women’s sexuality was not a ‘Bedouin’ phenomenon, but also seen in the Orthodox community in Israel<sup>893</sup>, in Canada<sup>894</sup> and the

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<sup>891</sup> Ministry of Health, “Vaccine against the Papilloma Virus” (October 9 2013), online: [http://www.health.gov.il/English/News\\_and\\_Events/Spokespersons\\_Messages/Pages/09102013\\_1.aspx](http://www.health.gov.il/English/News_and_Events/Spokespersons_Messages/Pages/09102013_1.aspx), Dan Even, “Health risks push ministry to reconsider HPV vaccine for teen girls”, *Ha’aretz* (September 3 2013), online: [www.haaretz.com/news/national/.premium-1.545014](http://www.haaretz.com/news/national/.premium-1.545014)

<sup>892</sup> I should clarify that sex with many partners does not *cause* the cancer. Rather, sexual contact allows for the human papilloma virus to be sexually transmitted from one person to another. Only a dozen or so strains of the virus, of which there are some one hundred in total, can trigger abnormal cell growth which can eventually lead to the development of the cancer. Also, it would be incorrect to assume that there wouldn’t be health risks involved if somebody took the HPV vaccine since taking the vaccine does not protect against unwanted pregnancies and the transmission of other sexually transmitted infections/diseases. See World Health Organization (WHO), “Human papillomavirus (HPV) and cervical cancer”, Fact Sheet No. 380 (November 2014), online: <http://www.who.int/mediacentre/factsheets/fs380/en/>, National Health Service (NHS) Choices, “Cervical Cancer – causes” (June 17 2013), online: <http://www.nhs.uk/Conditions/Cancer-of-the-cervix/Pages/Causes.aspx>

<sup>893</sup> Ronny Linder-Ganz and Ido Efrati, “Cervical cancer vaccine for Israeli schoolgirls meets religious opposition”, *Ha’aretz* (October 30 2013), online: [www.haaretz.com/news/national/.premium-1.555190](http://www.haaretz.com/news/national/.premium-1.555190)

<sup>894</sup> Gina S. Ogilvie, Valencia P. Remple, Fawziah Marra, Shelly A. McNeil, Monika Naus, Karen L. Pielak, Thomas G. Ehlen, Simon R. Dobson, Deborah M. Money, David M. Patrick, “Parental intention to have daughters receive the human papillomavirus vaccine” (2007) 177 *Canadian Medical Association Journal* 1506–1512.

UK<sup>895</sup>. Huda's take-home message, and that which she wanted me to leave with as well, was that the Bedouin community could be accused of being both regressive and irresponsible.

Curiously, when discussing the polio vaccine, Huda mentioned how many (Israeli Jews) in Tel Aviv refused to take the polio vaccine because of doubts about its safety. The fact that the vast majority of the Bedouin community did take the vaccine was evidence to Huda that the community had not reached "the same level of awareness" as those in Tel Aviv. This reasoning seemed to me amiss. When the Bedouin community chooses overwhelmingly to take a vaccine, as happened with the polio vaccine in the summer of 2013, this is not evidence that they care for the health of their children, but rather that they were lacking in knowledge to refuse the vaccine. Once more, in relation to the Israeli Jewish population, Bedouin were positioned behind the curve.<sup>896</sup>

I'm flagging the discussion on the HPV vaccine not to say that there are not reservations in the community regarding premarital sex, there may very well be.<sup>897</sup> Rather, Huda's interpretation of how the community approaches the issue of vaccination is indicative of an antecedent medical discourse around the Naqab Bedouin, and in particular around women in the community, which she herself performs.<sup>898</sup> I will sketch a genealogy around vaccination and the medical establishment's dealings with the Naqab Bedouin to illustrate this antecedent discourse, after I discuss the legal case.

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<sup>895</sup> Alice Forster, Jane Wardle, Judith Stephenson & Jo Waller, "Passport to promiscuity or lifesaver: press coverage of HPV vaccination and risky sexual behavior" (2010) 15 *Journal of Health Communication: International Perspectives* 205-17 at 206.

<sup>896</sup> It should be noted that the ninety percent turnout in the Bedouin community owed to the fact that the virus was detected in the population on a few occasions, including in the development towns of Rahat and Tel Sheva (Tel al-Sab'a) and a massive government-initiated public relations campaign. See Asher Zeiger, "Health Ministry to immunize children against polio" *The Times of Israel* (June 18, 2013), online: <http://www.timesofisrael.com/health-ministry-to-immunize-all-children-against-polio/>. There is a complex interplay of factors that influence the decision to immunize one's child, see for example, Astrid Austvoll-Dahlgren & Sølvi Helseth, "What informs parents' decision-making about childhood vaccinations?" (2010) 66 (11) *Journal of Advanced Nursing* 2421-2430.

<sup>897</sup> See for example Lila Abu-Lughod on Bedouin in Egypt, Lila Abu-Lughod, "A Community of Secrets: The Separate World of Bedouin Women" (1985) 10(4) *Signs* 637-657

<sup>898</sup> On Huda's interpretation, Hanna Herzog has referred to this as the tendency of some Palestinian women to implicitly adopt racist Israeli discourse (of Bedouin as regressive and always in need of catching up to Israelis), even though the one reproducing the language is the one being racialized. See Hanna Herzog, "'Both an Arab and a woman': Gendered, racialised experiences of female Palestinian citizens of Israel" (2004) 10(1) *Social Identities* 53-82 at 61. Of course, I wouldn't pigeonhole Huda, for although she reiterates certain aspects of the officials' claims, she does so for multifarious reasons and not simply owing to naiveté. She assumes the positions of the officials as they negotiate support for the Yasmin al-Naqab NGO and it is in the interest of good business to find common ground. Also, as she has can attest to the marginalization of women in the family, it makes sense for her to establish common ground on that issue.

We then spoke of other health challenges in the community. Huda remarked how anaemia was a particular challenge for women. Nearly half of all adult women in the community suffered from anaemia.<sup>899</sup> This placed it on par with anaemia morbidity rates of pregnant women in South East Asia, where anaemia is considered a severe public health problem.<sup>900</sup> Huda attributed a poor diet, specifically one with inadequate consumption of meat (which provides an iron source that is more easily absorbed), to the exceptionally high prevalence of anaemia among women in the community.<sup>901</sup>

As she stated, “It is always the case, always, that the meat goes to the men. Women eat less meat. This is usually why there is a lack of iron in women’s bodies... and this affects children when one is pregnant. If I have anaemia, the child would likely be born with it. But nobody speaks about the issue”. Exasperated, she resolved that she would need to “run a social media campaign” in response. Huda had both the statistical and empirical evidence to show that the majority of women in the community suffer from anaemia. But more than that, she was also able to scrutinize *why* that was the case, and she does so by interlocking health and gender issues. Therefore, it wasn’t just the scarcity of meat in the community that caused iron deficiency, but also the fact that when meat is available, unwritten (and unspoken, as she affirms) patriarchal codes presume that it goes to the men because “they work outside the home... and because *they’re men*”.

And yet Huda saw further. She pointed out intersections with race as well, and how racism contributes to poor health. One reason why the community does not vaccinate, even though they are largely pro-immunization, is the issue of access. She pointed out that the lack of mother-child health clinics in the Bedouin communities in the Naqab, and a public transport system that grossly underserves the community, has meant that for a community largely living in poverty, hiring a private taxi to take them to the clinic is simply unfeasible. Although Huda did not take a position of pro/anti-immunization, she did wish that the community were more knowledgeable about the drawbacks of vaccinations like Tel Avivians were. However, she understood that one of the reasons

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<sup>899</sup> Nora Gottlieb, Ilana Belmaker, Natalya Bilenko and Nadav Davidovitch, “Bedouin-Arab women’s access to antenatal care at the interface of physical and structural barriers: A pilot study” (2011) 6(6) *Global Public Health* 643-656 at 644 [Gottlieb *et. al.*, “Bedouin antenatal access”]

<sup>900</sup> Bruno de Benoist, Erin McLean, Ines Egli, Mary Cogswell (eds.), “Worldwide prevalence of anaemia 1993-2005” WHO Global Database on Anaemia (Geneva, World Health Organization: 2008), online: [http://whqlibdoc.who.int/publications/2008/9789241596657\\_eng.pdf?ua=1](http://whqlibdoc.who.int/publications/2008/9789241596657_eng.pdf?ua=1)

<sup>901</sup> A poor diet is one cause for the condition, where there is insufficient intake of iron or Vitamin B12 or folic acid. Other reasons include malabsorption, inherited or autoimmune disorders and pregnancy.

they did not have that knowledge was owing to the lack of a stable electricity supply that would allow for unfettered television and internet access, and that this was a result of a government policy to deliberately refuse to connect those in the unrecognized villages to the national electricity network.

In our brief, but revealing, two-hour tête-à-tête, Huda very eloquently described to me how poor health in the community and irregular participation in the national immunization programme were not simply due to conservative mores, irresponsibility or just not caring enough.<sup>902</sup> Rather, these were outcomes precipitated by a plethora of effects, racial, gendered, economic and other. Of course, considering solely the immunization programme, without the issue of community participation in it, we can appreciate how the programme is similarly influenced by these and other factors, including that linked to nation building, and the biopolitical and eugenic ideas embedded in the medical profession as I will describe later in this chapter.

### **On to Bir al-Mashash**

Our parking meter was still running when we jumped into the car. We were eager to get to the field. Bir al-Mashash was one of the more southern-lying unrecognized villages, off Road 25 and just east of moshav Nevatim.<sup>903</sup> Umm Faris, one of the interviewees, would later explain how ‘near Nevatim’ was one of the twenty-odd answers she had for the ambulance when they asked for directions to her unrecognized village.

We headed south on Road 25, in the direction of Dimona, the city that is home to Israel’s nuclear reactor.<sup>904</sup> Huda signals for me to get off the highway and onto the snaky sand-path that leads to the village. In the shadow of dust clouds, we exit the vehicle and as the air clears, barefoot, wide-eyed kids appear to us, scuttling across the brown sand and in our direction. It is slightly cooler than the

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<sup>902</sup> As has been argued by the Bedouin Development Authority, for example. See Bedouin Development Authority, ‘Project of Regulating the Settlement of Bedouin in the Negev’, Promotional Video (undated), video on file with author. The Israel Lands Authority (ILA) established the Bedouin Development Authority (BDA) to reach agreements regarding land ownership claims, though since that time the BDA’s authority has extended to the provision of services to the Bedouin in the unrecognized villages and in encouraging their relocation from the unrecognized villages into the development towns. State of Israel, *State Comptroller’s Report 52B* (2002) at 102-103, cited in Physicians for Human Rights (PHR), *No Man’s Land: Health in the Unrecognized Villages of the Negev* (2003) at 12-13.

<sup>903</sup> Nevatim was setup by the Jewish Agency in 1946 as part of the ‘eleven spots’ settlement plan meant to prompt the allocation of the Naqab to the future Israeli state. See Ruth Kark, “Jewish Frontier Settlement in The Negev, 1880-1948: Perception and Realization” (1981) 17:3 *Middle Eastern Studies* 334-356 at 350-353.

<sup>904</sup> Frank Barnaby, “The Nuclear Arsenal in the Middle East” (1987) 17:1 *Journal of Palestine Studies* 97-106

past few days, but still warm and dry. And characteristic to the vast open spaces of the Naqab, sandwashed winds snap us to attention.

### Stranger in these parts

A boy, about eight, is the first to greet us. His face is wind-beaten and his eyes penetrating. What did we want? they seemed to ask. I exchange pleasantries in the most unthreatening body gestures I know.

We begin talking about what is on most people's lips these days, the attack on Gaza. He tells us how he frequently sees rockets in the sky and how the earth shudders when they drop out of view. He smiles. With delight he boasts how he and the other kids climb on top of their tin shack roofs to cheer the underdogs who blast their home-made bottle rockets<sup>905</sup> into space. In his mind's eye, the fireworks in the sky are part of a rather neatly laid out game of good guys versus bad guys.<sup>906</sup>

Huda and I then approach the common meeting space of the family we are here to visit. It is spacious, tiled and is being made to sparkle by Umm Faris who vigorously splashes and scrubs. It is unfurnished except for the odd dark-brown plastic chair. Umm Faris gestures for me to sit on one as she goes about her work. She seems pleased to have a guest in Bir al-Mashash but there is unrest in her mop's sweep and swirl. We eventually move to the roofed portion of the meeting room, Huda, the four women and me, together with about half a dozen kids. We occupy the lower quarter of the room with a plastic table and some more plastic chairs. The kids are quite happy to rest on the floor or across their mothers' laps. In the background, the whistling wind slams the wooden windows open and shut to a tune. I'm happy to be here because I feel something serene in our midst. This must seem absurd, given that the ground under my feet intermittently shudders from fallen rockets and the stories we hear are overwhelmingly those of struggle. Yet, the stories of struggle are also stories of victories *over* struggle told in a communal setting of exchange, deliberation and support, so that they are also stories of the modalities of outdoing and overcoming, narrative assurances of community agency in the face of war's leftovers or those of discriminatory health care policy.

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<sup>905</sup> For more on the characterization of Palestinian rockets as 'bottle rockets', see Mark Perry, "Gaza's Bottle Rockets", *Foreign Affairs* (August 3, 2014), online: <http://www.foreignaffairs.com/articles/141698/mark-perry/gazas-bottle-rockets>

<sup>906</sup> In this sense, I suppose the line he takes is not that different from that of the Israeli government's. See Gideon Levy, "Opinion: Why Israel is its own worst enemy" *CNN* (August 8, 2014), online: <http://edition.cnn.com/2014/08/08/opinion/israel-own-worst-enemy-levy/>, Chris Hedges, "Why Israel Lies" *Truthdig* (August 3, 2014), online: [http://www.truthdig.com/report/item/why\\_israel\\_lies\\_20140803](http://www.truthdig.com/report/item/why_israel_lies_20140803)

### Inadequate Infrastructure

We begin our conversation by addressing those things that most interviews in the Naqab address first, the inadequate infrastructure in the villages. Thereafter, the women draw links with the forces of patriarchy and their experiences with education, medicine and vaccination. Picking up on where the conversation with the children left off, we broached the war, its economics, the possible alienation of its fighter pilots and how anxiety tags itself to the skin of those who pore over its images on the telly.

“Our life here is like those in the third world... it is hard, they don’t even recognize our presence, we don’t have rights, for example to build like regular people, most of us don’t have water or electricity” began Umm Mohammed. Umm Osama interrupted, “*We ourselves make ourselves*; it’s not that the government helps us, except very recently on the issue of water provision”.

All the women chipped in to explain that their homes are everyday threatened with demolition. “We lay stone on stone, month after month, for two to three months and in a moment they destroy it all”. Moreover, they explained that the youth are getting fed up; the demolitions and the threat of them imbue their wishes for the future, including their marriage plans, with a permanent uncertainty.

The women reveal that it isn’t easy to sleep in Bir al-Mashash. The fact that there is no garbage collection means that oftentimes neighbours burn their trash so that the intoxicating fumes of burning plastic make it hard to breathe. However, they tell me that a particular health hazard is that when they need medical attention it is hard to come by. There are no paved roads leading to the community, the ambulances cannot locate them because they’re not on official maps and none of them have access to private cars. So, the route they are often forced to take is the fifteen-minute walk to the highway.

As there are few work opportunities for the women, they receive insurance benefits from the government’s National Insurance Institute, both for being unemployed and as support for their children, which are their only sources of income.<sup>907</sup> Despite this governmental support, they sit

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<sup>907</sup> Welfare payments for mother and child are most often the only sources of income for women in the unrecognized villages, see Physicians for Human Rights, “I am Here: Gender and the Right to Health in the Unrecognized Villages of the Negev” (April 2008) at 17-18.

firmly in poverty. Because of slim work opportunities and patterns of historical labour movement, their husbands, along with a hundred or so others from the village, live and work in Kfar Qasim, a village in the 'southern triangle region' of Israel, east of Tel Aviv, where a significant Palestinian population is concentrated.

### Discrimination in healthcare?

Huda then attempted to steer the conversation to health care and vaccinations. So, I asked a pinpointed question, did they feel discriminated against when they accessed medical services?<sup>908</sup> The women told me that they did not experience explicit discrimination when accessing health care. However, Umm Osama did flag that around fifteen years ago, while receiving medical attention at one of the four health service providers in Israel, Maccabi, she felt that a doctor she was seeing was explicitly racist against her; she promptly replaced the doctor with another. Umm Osama made clear, however, that experiencing racism in health care was a rare phenomenon.

She elaborated on the quality of service she received at the Maccabi clinic located in the city center, "When I used to go to Maccabi it was very comfortable, much more comfortable than the 'Abu Rube'ia clinic'. For one thing, we used to start on time". The Abu Rube'ia clinic is a private clinic run by a Bedouin doctor of the same name. She would visit either the Abu Rube'ia clinic or the Maccabi clinic located in Beersheba. However, she had recently been redirected from the Beersheba Maccabi clinic to the new Maccabi clinic in Neve Ze'ev, a middle class Jewish neighbourhood in southwest Beersheba. Reflecting on her experience at the three clinics, she remarked how the Neve Ze'ev Maccabi clinic was harder to get to because she had to switch buses to get there and the trip ended up costing her more. She also described the discomfort she felt in being marked as an outsider as a Palestinian Bedouin woman in a middle class Jewish neighbourhood.<sup>909</sup>

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<sup>908</sup> Na'amah Razon has shown how racism is routinely experienced by Bedouin families accessing health care, though this has been vehemently denied by health services providers. See "Learned Blindness: Transforming Bedouins into standardized patients. Examining health and politics in southern Israel" (2015) 45(2) *Ethnologie Française* 269-280.

<sup>909</sup> I would like to footnote the phenomenology of this discomfort Umm Osama feels. Fanon has referred to a historico-racial schema to describe the phenomenological process by which the body and the world are in constant conversation of making/unmaking one another. In a colonial context, where race is a dominant signifier, the self-image of the black/brown body becomes deficient owing to myths and anecdotes that circulate in colonial society and prompt negrophobia. This deficient self-image also contributes to the coloured body not being fully sovereign in shaping the world according to this dialectical schema. See Jeremy Weate, "Fanon, Merleau-Ponty and the Difference of Phenomenology" in Robert Bernasconi (ed.), *Race* (Oxford: Blackwell, 2001), Frantz Fanon, *Black Skin, White Masks* (New York: Grove Press, 1967) 89-119.

Unlike Maccabi's Neve Ze'ev branch, the Abu Rube'ia clinic was located close to the Bedouin community market in Beersheba, making it very accessible and familiar. However, Umm Osama recalled that the service was rather awful as the appointments never ran on time, forcing her to wait hours for hers. This clinic was also always overcrowded. These aspects of the clinic were in stark contrast to those at Maccabi. In her mind, it was the clientele to blame, "Abu Rube'ia tries to be organized. But Bedouin women are non-committal. They don't commit to appointments, it's hard, that's how it is. They say they have work, they just lack commitment... that's why the situation doesn't change".<sup>910</sup>

### On vaccinations

We then move on to the subject of vaccinations. When I asked if they vaccinated their children, the women tell me that they regularly vaccinate their children. However, during the discussion, it became apparent that on a few occasions vaccinations were either not given or were not given as per the vaccination schedule because of access difficulties.

In line with the arguments raised by the petitioners in the case, taking vaccinations was fraught with complications. It was not that the women were opposed to taking vaccinations. Rather, although they wished to be able to take the stipulated vaccinations, they simply did not have adequate access to them.

Umm Osama characterized the process of taking vaccinations as requiring "effort, fatigue and time". Bir al-Mashash, like the majority of unrecognized villages, does not have mother child clinics where the vaccines are administered. Therefore, the women travel to a mother-child clinic in the city of Beersheba, which costs them 30 shekels (approximately US\$ 8) a trip. Umm Osama admits that this is no small change for the family and that the same amount would be well spent equipping the family home with necessary provisions. To further drive home her point, she then pointed to Umm Faris and asked me to imagine her son needing to visit a clinic. If Umm Faris took her son to a clinic,

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<sup>910</sup> As Shiloh Whitney explains, the affective implications of internalizing racist hatred are that the racialized person redeploys it towards other objects of the racialized community which makes her less able of genuine communication with them. Shiloh Whitney, "The Affective Forces Of Racialization: Affects And Body Schemas In Fanon And Lorde" (2015) 3:1 *Knowledge Cultures* 45-64. Instances of the same may not be explicit but can be sensed, for example, when Umm Osama performs the order/disorder divide when discussing Bedouin in an Israeli context. She refers to Bedouin women as unassailably non-committal while the Israeli medical establishment, in this case health service provider, Maccabi, is naturally organized. 'Atwa's son in the Umm al-Hiran chapter also similarly ascribed negative qualities as being a mark of 'the Arab'.

what would she do with her other children? She has thirteen children in total<sup>911</sup> and there would simply be no place to put the others. There are no day-care centers or kindergartens and Umm Faris cannot imagine leaving the care of her kids to chance. She still reels from when, two decades ago, her crawling eleven-month-old spilt boiling water on himself as she cooked on the living room floor.<sup>912</sup>

In order to prompt the women's feedback for the amendment, I mentioned how it threatened to cut child allowance payments, without parenthesizing that the Health Ministry had decided not to implement it at present (though I clarified this later). I almost immediately regretted phrasing my question the way I did. The women were exasperated. Umm Mohammed interjected, "This government seeks, by any price, to cut child allowance. It wants to cut allowances for those who do not vaccinate? This is completely unfair. This is a big injustice, it is completely illegitimate. They seek any way to make our lives harder, what do they want from us? People seek to make a living, to have a future, they fall sick when they don't vaccinate and on top of it all, they want to cut insurance payments... this is criminal! What more do they want from us? Aren't they ashamed to act this way when they say that [vaccinations] are important and so should be made accessible?"

Umm Osama added, "All the women here vaccinate, even the extremely poor ones. If they want us to vaccinate, then they should come and administer the vaccinations. Do they want to kill a woman from hunger because of vaccinations?" "They want us off this land at any price... and they are [teaching our children] violence, hate and enmity... these aren't good things", concluded Umm Mohammed.

### On education

And yet, it seemed that the state was not teaching their children enough. There was a substandard kindergarten and primary school and no secondary school. Some of the younger children and most high schoolers traveled to the neighbouring recognized development township of 'Ara 'Ara to study. As 'Ara 'Ara was twelve kilometers away, or a two and a half hour walk, the children required vehicular access to get there. In the past they were transported by bus for free as the bill was footed

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<sup>911</sup> Though three of the thirteen were mature and did not require parental supervision.

<sup>912</sup> For Umm Faris, the event was traumatic not only because her baby son was scalded and left with first to third degree burns. Owing to the transportation difficulties mentioned earlier, it seemed to her like forever carrying her baby to the main road in order to secure a ride to the hospital. Moreover, after the ordeal, she was brought in for an investigation by the authorities on suspicion of neglect and child abuse.

by a non-governmental organization. However, this wasn't the case any longer. These days, they were being asked to pay 150 shekels per child for private transport, which was no small change. As Umm Osama asked rhetorically, "If somebody has three kids, what is she to do?"

Moreover, the buses that transported the children were significantly substandard. The women told me that only a month earlier a bus' rear caught fire while transporting the children. Luckily, motorists stopped to save the children. The women told me that it was not the first time this happened.

The nearest kindergarten, besides the village's, was one recently setup in the recognized village of Abu Tlul, some six kilometers from the village. However, transport to the kindergarten had not been organized and registration costs 34 shekels per child. As Umm Faris told me, "This year we hope that somebody brings us a teacher for the children for the local kindergarten. A representative from the Education Ministry saw it, liked it, but they haven't brought us a teacher. Bring us a teacher or bring us a few educational materials and let the local women teach the kids".

In fact, an earlier version of the amendment stipulated that the child allowance would be cut if a child did not regularly attend an educational institution, though this condition was later dropped in later versions of the bill.<sup>913</sup>

#### Vaccination refusal in Tel Aviv

I then asked what they thought about parents in Tel Aviv who had access to vaccinations but refused to give them to their children. They didn't seem to have heard about the phenomenon before. I explained that some parents had concerns about the aluminum content in vaccinations and had raised other health related concerns. Umm Osama replied, "The Israelis aren't aware of what they're doing. I had to deal with chickenpox for one of my kids. It's highly contagious and it's bad because it can lead to permanent scars. This vaccination is very good, and if the Israelis don't know this [it's strange] because they know more than us". She wasn't opposed to vaccinations even though two of her sons had severely negative reactions to one; one of her sons was rushed to the hospital for treatment. She rationalized continuing with the vaccination schedule for her children by emphasizing the trust she nevertheless had in the medical establishment, "They run tons of tests before they (vaccinations) are approved, so I trust them".

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<sup>913</sup> *Adalah v. Minister of Welfare and Social Affairs*, [2013] HCJ 7245/10 at para. 18-19.

### The falling rocket

As the earth intermittently recoiled from the impact of falling rockets, the war was never far away during our conversation. Every now and then we drifted towards it but somehow steered ourselves back on course. Eventually, we could no longer stick to the interview's schedule, but were drawn in to speaking just about the war.

“Tell me what the meaning is that they destroy our homes, us Arabs, but Jews no. Look now, for example, in Gaza, look at how they destroy their homes... why is it that when a home or two of an Israeli Jew is destroyed, they turn the world upside down? Look at how many homes they've destroyed [in Gaza]. Honestly, we are going crazy over it. Aren't our daughters like theirs? The Israelis are killing children and women, I've become depressed over it... and I don't [just] imagine them, I imagine our kids, our lives”, admitted Umm Faris. She was referring to the palpable fear she had for the lives of her loved ones' lives following the injury of the two girls from the nearby unrecognized village of Mkeiman and the death of 'Auda al-Wadj from Qasr al-Sir.

“They are like us. Gazans and us, we're the same”, clarified Umm Mohammed.

Umm Faris continued, “If a couple or so rockets hit now, won't we need to be buried? This is what I've been feeling the past two, three weeks, by God, I'm depressed, all of the women here are depressed”. Umm Osama echoed Umm Faris' concern that depression in the community was pervasive, “If you were to do research on the women, you'd see that most of them are depressed. What are they to do? They feel they're at a dead-end”. Some of the children among us nodded vigorously in agreement.

Umm Faris continued, “There's nothing to do except eat and trust in God.... Don't they tell us to take cover in shelters when the bombs fall, where do we take cover? There are no shelters”.

It also seemed absurd to the women that so many millions of dollars were being spent daily on the war, which clearly brought considerable pain and suffering, when the same money could have been used to ease the already present suffering of the poor.<sup>914</sup>

Before I move on to a discussion of the case itself, I'd like to lay out the theoretical frameworks applicable to this chapter, namely assemblage theory and feminist theory.

## II THEORY

### **Assemblage Theory**

Assemblage, as mentioned briefly above, is a coming together of disparate elements into a unity.

One may think of the phenomenon of identity in the space of our study as being either Palestinian or Israeli, the attitude towards vaccinations as being either for or against, or in the case of the Hegelian dialectic, as there being a duel between the consciousness of the slave versus that of the master; that is, one may assume that such phenomena are essentially dualistic.

Yet, assemblage theory stresses *anti-dualism* as explained by Deleuze himself, as it attempts to “find between the terms. . .whether they are two or more, a narrow gorge like a border or a frontier which will turn the set into a multiplicity, independently of the number of parts”.<sup>915</sup>

We can consider identity as being an assemblage when we appreciate how the women in Bir al-Mashash assume an identity that is at times Bedouin, at times Palestinian, and at times Israeli, the latter particularly when thinking about access to certain privileges of citizenship. Yet, concurrently, the women understand identity and perform it even as identity is *not connected* to an ethno-national characteristic.

On numerous occasions during our conversation, they stressed an identity as women, as working-class poor, as mothers, as Muslims and so forth.

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<sup>914</sup> The estimates for the cost of the war were around US\$60 million per day. Some officials shared the concerns of the women, saying that the inflated defense budget would mean “deep, painful cuts in education, health care, welfare and infrastructure” in 2015. Moti Bassok, “The cost of Israel’s Gaza op: \$60 million a day” *Ha’aretz* (August 22 2014), online: <http://www.haaretz.com/news/diplomacy-defense/.premium-1.611930>

<sup>915</sup> Gilles Deleuze, *Dialogues with Clare Parnet* (trans. Hugh Tomlinson and Barbara Habberjam) (London: Athlone Press, 1987) at 132, cited in Adrian Parr (ed.), *The Deleuze Dictionary: Revised Edition* (Edinburgh: Edinburgh University Press, 2010) at 20.

Similarly, on the issue of vaccinations, mothers are generally pro-vaccination, though they often do not take vaccinations for themselves or their children because they lack adequate access to them. So, while they insist that they've all followed the vaccination schedule for their children, they also admit that access issues have made it difficult to fully satisfy the requirements of the schedule. They've had negative reactions among some children to vaccinations, yet they remain adamant about continuing to give them. However, most of the women I interviewed did not administer the influenza vaccine "because no one insisted on it", unlike when the Health Ministry was urging families to administer the polio vaccine to their children.

As shown, it can hardly be said that somebody in Bir al-Mashash is pro- or anti-vaccination, and even if we do, that does not tell us much, such as if they've actually followed the schedule for their children or if we can predict with absolute certainty future behaviour relating to vaccinations. This is the "narrow gorge" between a binary that Deleuze speaks about that opens itself to a multiplicity of actions, effects and potentialities. Anti-dualism, then, is one of the starting points to understanding assemblage theory and is quite essential as we interpret phenomena, subjects and effects both in this vaccination case, and as we take stock of this study's findings as a whole.

As mentioned earlier, assemblage theory stresses ontology, the metaphysics of being, over anthropocentric, subjective experience. That is to say, phenomena under study should not be made to fit abstract generalizations of reality as we know them through experience, rather the complexity of relational networks should be studied in order to understand phenomena.

Deleuze's philosophical approach is known as 'transcendental empiricism',<sup>916</sup> which is to say that real conscious awareness is the starting point to philosophy, without assuming pre-existing categories or axioms. At the same time, this empiricism is transcendental because it attempts to "deduce the conditions of possibility of conscious experience".<sup>917</sup> It acknowledges that the

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<sup>916</sup> Transcendental empiricism goes beyond both empiricism, as espoused by Hume and transcendentalism, for example as argued for by Kant and Emerson. Empiricism holds that 'experience' is restricted to one's sensory perception. Transcendentalism holds that our forms of sensibility exist prior to knowledge itself and it is these transcendental forms that make experience possible. Adrian Parr (ed.), *The Deleuze Dictionary: Revised Edition* (Edinburgh: Edinburgh University Press, 2010) at 288-9.

<sup>917</sup> Adrian Parr (ed.), *The Deleuze Dictionary: Revised Edition* (Edinburgh: Edinburgh University Press, 2010) at 289.

preconditions of experience cannot be known by the senses but need to be deduced transcendently.<sup>918</sup>

In such an accounting, there isn't really a Kantian subject as a precondition for all human experience; rather, 'I', as with any individuated phenomenon, is a product of the contingent effects of interactions among events, social forces, chance, memory and affect.

Such a philosophy also moves us away from finding likeness among human beings, to celebrating diversity, contingency and difference in each person.<sup>919</sup>

In Deleuze's model of reality, there are three realms, the actual, the virtual and the intensive process of individuation that are necessary to construct an ontology. The actual is a stable, identifiable system, such as power, desire, a state of affair, an individual, a community and is the point at which representation becomes possible. The actual is an open-ended system, meaning various materials flow through it, though equilibrium points, or 'attractors', keep the system in a state of equilibrium.<sup>920</sup>

The virtual refers to events and singularities on a plane of consistency that are immanent to a situation, that have the potential to bring about actualization, though are not the actual itself.<sup>921</sup> The intensive process of individuation consist of 'far from equilibrium' processes that embody the virtual structure and make the passage from virtual to actual possible.<sup>922</sup>

Deleuze argues that there is no hierarchy among the realms, that they are all in a concrete mixture with one another and that they are all *real*.<sup>923</sup> In the process of individuation, when the actual is

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<sup>918</sup> Transcendental here means immanent conditions that make a thing possible.

<sup>919</sup> *Supra* note 917

<sup>920</sup> Srnicek, *Assemblage Theory*, *supra* note 20 at 38-9.

<sup>921</sup> *Supra* note 917 at 300, *Ibid.* at 47.

<sup>922</sup> Srnicek, *Assemblage Theory*, *supra* note 20 at 38.

<sup>923</sup> *Ibid.* For Deleuze, the 'real' could be characterized as all of the actual and all of the virtual, thereby to be distinguished from a Lacanian definition of the real, which posits the real as distinct from the symbolic and the imaginary, and also elusive to representation. For Deleuze, the 'real' is the essence of being, including its virtual, imagined and emotive expressions. For more on Lacan's tripartite register theory of the imaginary, the symbolic and the real, see, for example, Philippe Julien, *Jacques Lacan's Return to Freud: The Real, the Symbolic, and the Imaginary* (trans. Devra Beck Simiu) (New York: New York University Press, 1994)

realized, continuous multiplicities become discrete.<sup>924</sup> Yet, by utilizing the process of individuation, we come to appreciate how individuals or individuated identities are not solely their representations but a product of processes that produce, sustain and undo them.<sup>925</sup>

Why is assemblage theory useful for this case study and the dissertation as a whole? This is because as we approach a conclusion of sorts, attempting to aggregate our conclusions in Nuri's land ownership case, the crop-spraying case, the Umm al-Hieran evictions, the discriminatory allocation of land in the Wine Path Plan case and this vaccinations case, assemblage theory allows us to draw in heterogeneous elements into a unity.

How? Take this case study on vaccinations. We study the issue of 'vaccinations in the Naqab' as an assemblage by drawing in its various identifiable components, health policy in Israel, state-community relations in the Naqab, scepticism towards vaccinations, poverty, racialization and the like. Yet, what is interesting about the assemblage is not just the appreciation of how these discrete states of affairs come together to constitute the assemblage of 'vaccinations in the Naqab', but how these discrete multiplicities themselves come to be more or less stable systems through the processes of individuation described above.

Similarly, what sort of actual, stable system can we identify for 'recognition' and 'agency' as we reflect on the dissertation as a whole?

Assemblage theory attunes us to the processes by which 'things' come to be labelled as relatively stable things, so that in understanding phenomena we do not study the end result, but deduce the conditions of possibility that get us there. While an assemblage comes about through homogenization and the stability of its boundaries, also known as territorialization, it is the immanent possibility of being undone that is particularly interesting.

Deterritorialization is how homogenous states of affairs unravel into more heterogeneous elements and the materiality of a particular phenomenon is undone. The process by which it occurs is referred to as a line of flight, which is a "fleeing... flowing, leaking, disappearing into the

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<sup>924</sup> Adrian Parr (ed.), *The Deleuze Dictionary: Revised Edition* (Edinburgh: Edinburgh University Press, 2010) at 132.

<sup>925</sup> Srnicek, *Assemblage Theory*, *supra* note 20 at 28.

distance".<sup>926</sup> It is the creative potential of the assemblage and can result in either the transition to a new stable state in the actual or a return to the virtual to create new patterns of organization.<sup>927</sup>

Assemblage theory allows us to identify the lines of flight that fracture the 'vaccinations in the Naqab' assemblage by looking at the ways in which the women's agency, as selectively sovereign as it may be, is one particular modality by which the assemblage threatens to be reconstituted or absolutely undone.

It is the manner in which the women perceive, enunciate, decide and perform that contains the revolutionary potential to rewrite social organization by undermining the existing associations in this particular assemblage.

As this chapter looks closely at the women's agency, it allows us to appreciate not only the tangible, material ways in which agency manifests but also the more subtle, immanent potentials for the same to come about.

Assemblage theory also allows us to appreciate the expressive elements, including language, that make individuals and institutions.

Therefore, part of how territorialization comes about is by the process of 'coding', whereby there are regimes of existing found in talking, working and relating to one another that are more or less fixed. These can be found in bureaucracy, the family and popular culture. Processes of decoding, such as "informal conversations between friends"<sup>928</sup> is how the language specific to a particular institution may be destabilized when they undermine traditional social categorization, precipitating the deterritorialization spoken about above.<sup>929</sup>

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<sup>926</sup> Brian Massumi, 'Notes on the Translation and Acknowledgements' in Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (trans. Brian Massumi) (Minneapolis, London: University of Minnesota Press, 1987) at xvi

<sup>927</sup> Adrian Parr (ed.), *The Deleuze Dictionary: Revised Edition* (Edinburgh: Edinburgh University Press, 2010) at 69-72.

<sup>928</sup> Manuel DeLanda, *A New Philosophy of Society: Assemblage Theory and Social Complexity* (New York: Continuum Books, 2006) at 16, cited in Srnicek, *Assemblage Theory*, *supra* note 20 at 65.

<sup>929</sup> Adrian Parr (ed.), *The Deleuze Dictionary: Revised Edition* (Edinburgh: Edinburgh University Press, 2010) at 40-1, Srnicek, *Assemblage Theory*, *supra* note 20 at 64-5.

How did the conversations that we held on that warring summer morn undermine the traditional social categorizations in the assemblage? How did such decoding open up creative potentials to fracture the assemblage and bring about new ways of being?

There are two particular interventions that fall under the rubric of assemblage theory that are relevant to mention as they bear on our case; the first is Jasbir Puar's exploration of homonationalism in Israel/Palestine as assemblage<sup>930</sup> and the second is Elizabeth Povinelli on 'social projects' and the liminality<sup>931</sup> intrinsic to them.<sup>932</sup>

Puar identifies homonationalism as a form of modern nation-state building as it attempts to evaluate the legitimacy of a state's sovereignty based on how it treats its gay and lesbian subjects.<sup>933</sup> There are at least three particular elements of her analysis of homonationalism that are of import to our own study.

First, homonationalism as assemblage acknowledges the phenomenon as one that is of process, of becoming as opposed to a phenomenon that is fixed and unchanging. In Puar's words, homonationalism, which names a historical shift in the making of nation-states that increasingly insist on homonormativity from earlier heteronormative stances is "an assemblage of de- and re-territorialising forces, affects, energies, and movements... a field of power rather than an activity or property of any one nation-state, organisation, or individual".<sup>934</sup> It is the coming together of, among a plethora of factors, political economy, the history of settler-colonial violence and the LGBT tourism and human rights industries.<sup>935</sup> In this way, it is an assemblage in much the same way that vaccinations in the Naqab are linked to the medicalization of society, the state's township-transfer

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<sup>930</sup> Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, 2007), Jasbir K. Puar, "Homonationalism as Assemblage" (2013) 4:2 *Jindal Global Law Review* 23-43

<sup>931</sup> Liminality here refers to the condition located at the threshold between two actual states that is the disruptive potential intrinsic to social transformation. It is "the noise that a social formation produces" that escapes identification. Jin Haritaworn, Adi Kuntsman, Silvia Posocco & Elizabeth Povinelli, "Obligation, Social Projects and Queer Politics" (2013) 15:4 *International Feminist Journal of Politics* at 556. Povinelli draws on earlier work on the liminal by Victor Turner, *The Ritual Process: Structure and Anti-Structure* (Ithaca: Cornell University Press, 1969).

<sup>932</sup> Elizabeth A. Povinelli, *Economies of Abandonment: Social Belonging and Endurance in Late Liberalism* (Durham, NC: Duke University Press, 2011), Jin Haritaworn, Adi Kuntsman, Silvia Posocco & Elizabeth Povinelli, "Obligation, Social Projects and Queer Politics" (2013) 15:4 *International Feminist Journal of Politics*, 554-564.

<sup>933</sup> The concept is taken up at length in Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, 2007).

<sup>934</sup> Jasbir K. Puar, "Homonationalism as Assemblage" (2013) 4:2 *Jindal Global Law Review* at 25.

<sup>935</sup> *Ibid.* at 34.

policy, settler-colonial genealogy, the anti-vaccination movement and a host of other factors that we can come to know by transcendental empiricism. Neither phenomenon is authored solely by the Israeli state.

Second, homonationalism makes the nation-state by defining those subjects who are permitted envelopment in its fold and those left outside. Puar discusses this aspect in relation to Israel/Palestine whereby liberal gay rights<sup>936</sup> activists and their supporters are afforded the privilege of being included in the Israeli nation state.<sup>937</sup> These activists, and by their enfolding,<sup>938</sup> also the state, are juxtaposed to the naturally homophobic Palestinian population (except for those Palestinian individuals who subscribe to the liberal gay rights formula) and the gay-rights-violating Palestinian state. This particular construct allows for Israel to present itself as a bastion of democracy and tolerance in the midst of virulently homophobic neighbours.<sup>939</sup> Moreover, it ‘pinkwashes’, which is to say that it justifies the Israeli occupation of Palestine according to the logic that progressive, democratic configurations vis-à-vis gay rights have the right to rule over regressive, less democratic ones. Homonationalism not only makes the modern Israeli nation state, it also defines ‘subjects’ and ‘outsiders’ and justifies state practices, irrespective of whether those practices have been critiqued for being undemocratic.<sup>940</sup>

In a similar vein, on the issue of vaccinations among the Bedouin in the Naqab, the court and government representatives consistently muster the issue of non-administration of vaccinations among the Bedouin community to designate those who belong to the nation-state and those who don’t with regards to their sense of duty to the nation’s subjects. In doing so, the Bedouin find

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<sup>936</sup> Jasbir Puar identifies the liberal gay rights movement as one that “produce narratives of progress and modernity that continue to accord some populations access to cultural and legal forms of citizenship at the expense of the partial and full expulsion from those rights of other populations.” It is one that tends “to privilege identity politics, ‘coming out’...and a flat invocation of ‘homophobia’ as an automatic, unifying, experiential frame”. *Ibid.* at 25, 37.

<sup>937</sup> Subscribing to the liberal gay rights formula would be just one condition, among others, to be satisfied in order to belong to the Israeli nation-state; a principal condition, and one that we are most familiar with, is being Jewish.

<sup>938</sup> I use ‘enfolding’ here in the sense of Deleuze and Foucault, which is to say that subjectivity comes about when outside forces are enveloped within a particular interior, which we then identify as ‘subject’. For more on the fold in Deleuze, see Adrian Parr (ed.), *The Deleuze Dictionary: Revised Edition* (Edinburgh: Edinburgh University Press, 2010) at 107-8.

<sup>939</sup> Among the institutions that make this explicit claim is the US-based pro-Israel outfit, Stand With Us; see for example the following booklet, “LGBT Rights: In Israel and the Middle East”, <https://www.standwithus.com/booklets/LGBT/files/lgbt%20booklet-final.pdf>. An Israeli LGBT organization that operates on this premise is HaAguda, in particular its “Palestinian Rescue Project”, see Jason Ritchie, “How Do You Say ‘Come Out of the Closet’ in Arabic? Queer Activism and the Politics of Visibility in Israel-Palestine”(2010) 16:4 *GLQ: A Journal of Lesbian and Gay Studies* 557-575.

<sup>940</sup> Jasbir K. Puar, “Homonationalism as Assemblage” (2013) 4:2 *Jindal Global Law Review* at 33-4.

themselves on the wrong side of modernity and are rendered irresponsible actors towards both their families (when they don't vaccinate their children) and the wider community (when they risk infecting others as a result of their children not being immunized).

Where in Israel/Palestine Puar shows how homonationalism serves to justify occupation, I will focus in on how Israeli state discourse around Bedouin vaccinations supports the state's dismembered<sup>941</sup> forms of recognition of the community and justifies its policy of the community's forced relocation into development townships.

The third element of import, and one that is fundamental to assemblage theory, is the possibility of deterritorialization or undoing. Puar argues for sexuality to be understood as the multiplicity of 'affirmative becomings', which is the multiplication and proliferation of difference which overwhelms binaries such as man/woman, gay/straight and the status quo.<sup>942</sup> It is the creative potential of the assemblage in our case as well that clues us in to how the signifiers such as 'Bedouin mother' or 'Bedouin woman' come to be, how they circulate within an assemblage, and how they contain the possibilities of their own undoing.

In *Economies of Abandonment*,<sup>943</sup> Elizabeth Povinelli looks at alternative ways of being in the age of what she terms 'late liberalism', which refers to the shape liberal governmentality takes as it responds to crises of legitimacy prompted by anticolonial, new social and new Islamic movements.<sup>944</sup> In constructing a sociology of potentiality<sup>945</sup>, Povinelli looks at 'projects', "the thick subjective background effects of a life as it has been lived... (and which refer to) any given social

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<sup>941</sup> One way to characterize the state's recognition of the community is dismembered, for two reasons. For one, it is partial, and being partial, it is incomplete to the point that it handicaps the person from reaching her true potential. Therefore, the state grants partial recognition for the community when it constructs a gravel exit from the highway to your village, yet your village remains unrecognized and lacks other paved roads within it. Being dismembered is also to disavow the subject's historicity, its genealogy, autology, diversity, creative potential and all those other wonderful (and not so wonderful) things that make us who we are. See Elizabeth Povinelli, *The Empire of Love: Toward a Theory of Intimacy, Genealogy and Carnality* (Durham and London: Duke University Press, 2006).

<sup>942</sup> *Supra* note 940 at 41-3.

<sup>943</sup> Elizabeth A. Povinelli, *Economies of Abandonment: Social Belonging and Endurance in Late Liberalism* (Durham, NC: Duke University Press, 2011) [Povinelli, *Economies of Abandonment*]

<sup>944</sup> *Ibid.* at 25

<sup>945</sup> As opposed to an 'ontology of potentiality', which could be how some would characterize Deleuze's work. Povinelli, however, thinks that Deleuze too would subscribe to the idea that potentiality cannot be constructed in a general way, but embedded in particular arrangements. In her own words, then, "Rather than the question of the variation of being and not being or affects and ideas in general, I want to understand this variation in specific historical contexts. But I am making a general claim; namely, that potentiality and its perpetual variations never occur in a general way, but always, as Deleuze himself noted, in specific *agencements*- arrangements of connecting concepts, materials, and forces that make a common compositional unity". *Ibid.* at 16

world, (where) multiple moral and political calculations proliferate because no one ever lives the exact same project".<sup>946</sup> When projects start being in relation to one another is when they become 'social projects'. 'Alternative social projects', on the other hand, are digressions and deviations from the "explicitly given categories of life and world".<sup>947</sup>

Povinelli conceives of social projects as assemblage. This is because social projects break up the multiple forms of sociality and meaning present in social worlds and aggregate them into individual social projects that can be treated as a unity. Social projects are not static, but are always aggregating practices and activities.<sup>948</sup> Yet, there are many activities and practices that are not aggregated into a social project so that they escape apprehension and enunciation. Some such practices, which may be considered quasi-events before their enunciation, may catch and may aggregate into alternative social projects.

Povinelli looks at how such quasi-events come to be apprehended and named and how they aggregate to an identifiable, more-or-less whole 'alternative social project', for example, the mundane, ordinary forms of suffering as opposed to the catastrophic ones that prompt civic and political ethical engagement in liberal markets and states.<sup>949</sup>

'Liminality' describes this space of the quasi-event.<sup>950</sup> It is the 'potentiality' intrinsic to the assemblage that is bursting with possibility to move the assemblage to a new stable state or to undo the assemblage altogether.

Just as the 'why' of how liminal spaces come to be grasped and enunciated in alternative social projects intrigues Povinelli, so too this dissertation is similarly motivated to identify these temporally and spatially specific liminal spaces in all five case studies that are bursting with potential in our Naqab-Bedouin assemblage and how it is they come to be and when it is they fizzle and fail.

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<sup>946</sup> *Ibid.* at 6.

<sup>947</sup> Jin Haritaworn, Adi Kuntsman, Silvia Posocco & Elizabeth Povinelli, "Obligation, Social Projects and Queer Politics" (2013) 15:4 *International Feminist Journal of Politics* at 556. Such alternative social projects and their emergence in a normative world interested Foucault as well, see Michel Foucault, "Des espaces autres" (1984) 5 *Architecture, Mouvement, Continuité* 46-49.

<sup>948</sup> Povinelli, *Economies of Abandonment*, *supra* note 943 at 8.

<sup>949</sup> *Ibid.* at 13-14.

<sup>950</sup> Jin Haritaworn, Adi Kuntsman, Silvia Posocco & Elizabeth Povinelli, "Obligation, Social Projects and Queer Politics" (2013) 15:4 *International Feminist Journal of Politics* at 555-6.

## Feminist Theory

*"...I write this as a woman, towards women. When I say 'woman,' I'm speaking of woman in her inevitable struggle against conventional man; and of a universal woman subject who must bring women to their senses and to their meaning in history. But first it must be said that in spite of the enormity of the repression that has kept them in the "dark" --that dark which people have been trying to make them accept as their attribute-- there is, at this time, no general woman, no one typical woman" – Hélène Cixous<sup>951</sup>*

Feminist theory inquires into the role of gender in shaping social relations and draws out paths in the pursuit of a more just world.<sup>952</sup> In discussing the theory's relevance to this case study, I would like to address four main points. First, I would like to make a clarification on the theory's genealogy, which will be followed by outlining the theory's principal tenets. Next, I will address the contested concepts of 'woman' and 'gender' within feminist theory itself. Finally, how might we take from feminist theory to imagine a more just world for the women of Bir al-Mashash as well as for all others caught up in this particular assemblage? How might feminist theory clue us into constructing alternative social projects for the Naqab Bedouin as a community?

It is commonly assumed in feminist theory that feminism can be studied at specific temporal moments, those that have progressively unraveled in three waves. The first wave is identified as the women's liberal rights movement at the turn of the 20<sup>th</sup> century in Europe and the US and the second wave is determined as occurring in the postwar period of the 1960s and 1970s. This genealogy identifies the current wave as emerging since the mid-1990s and as underscoring diversity and ambiguity as a postcolonial response to neoliberal politics.<sup>953</sup>

However, the proposed genealogy is a truncated one, because it ignores the plethora of ways that women of colour, those enslaved and native women have been doing feminist work in locales

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<sup>951</sup> Hélène Cixous, "The Laugh of the Medusa" (1976) (trans. Keith Cohen, Paula Cohen) 1:4 *Signs* 875-893 at 875-876.

<sup>952</sup> Mari J. Matsuda, "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice" (1986) 16 *New Mexico Law Review* 613 at footnote 1

<sup>953</sup> See, for example, this claim made by Charlotte Kroløkke and Anne Scott Sørensen, *From Silence to Performance: Gender Communication Theories and Analyses* (Thousand Oaks, CA: SAGE Publications, 2006).

outside of Europe and the US (and within them as well) and for a time much longer than the last century and a half.

In 'Decolonizing Feminisms', the authors argue that modern feminist theory is a "Eurocentric, Global North-hegemonic notion"<sup>954</sup> of feminism that discounts the feminist groundwork that was laid down for it by Native feminists over the past 500 years of settler colonialism. In a similar vein, Nikeeta Slade and Akunna Eneh argue that black women and other women of colour began organizing in the US as early as white women, during which they formed a multitude of organizations to address their particular predicaments of economic exploitation, racism and sexism and other forms of oppression.<sup>955</sup> As has been documented, black women mobilized with black men and white progressives to lead the sharecroppers strike of the 1930s and were active in workers struggles in the automobile, packing and steel industries.<sup>956</sup>

Why have I attempted to clarify feminism's genealogy in the study of this assemblage? There are two principal reasons, both stemming from the form that the debate around vaccinations in the Naqab assumes.

What we notice is that the omissions of mainstream feminism mirror the omissions when discussing the issue of vaccinations in the community. When the principal actors in this assemblage are identified, it is common practice to identify Bedouin women as being *victims* at the hands of patriarchy in the home and in their larger environs and not as agents who, while being marginalized in very tangible and visible ways, everyday confront and challenge their marginalization.<sup>957</sup>

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<sup>954</sup> Maile Arvin, Eve Tuck, and Angie Morrill, "Decolonizing Feminism: Challenging Connections between Settler Colonialism and Heteropatriarchy" (2013) 25(1) *Feminist Formations* 8-34 at 14.

<sup>955</sup> Nikeeta Slade and Akunna Eneh, "A History of Black Feminism" (June 26, 2014), Paper presented at the annual conference of the International Socialist Organization, 'Socialism 2014' (Chicago, Illinois), online: <http://wearemany.org/a/2014/06/women-race-and-class>

<sup>956</sup> Claudia Jones, "An End to the Neglect of the Problems of the Negro Woman!" in Beverly Guy-Sheftall (ed.), *Words of Fire: An Anthology of African-American Feminist Thought* (New York: The New Press, 1995) 107-123 at 114-115

<sup>957</sup> For example, although commendable for its scope and empirical case studies, Physicians for Human Rights, "I am Here: Gender and the Right to Health in the Unrecognized Villages of the Negev" (April 2008) nevertheless fails to tell how Bedouin women actively oppose their marginalization and subordination. By failing to tell the whole story, we take home a very incomplete picture of this assemblage, one in which Bedouin women are little more than the impetus for human rights actors to intervene.

The second reason is that because Bedouin women are not characterized as agents, so a betterment of their situation comes about through the efforts of ‘saviours’, others who proffer aid through advocacy or financial support and are typically progressive Israeli Jews, human rights organizations or Bedouin men, who in fact similarly diagnose Bedouin women as being in essence without agency.<sup>958</sup>

By this logic, Bedouin women do not initiate challenges to their oppression but follow the lead of other women/men, who are not Bedouin *and* women, with the exception of a handful of Bedouin ‘women leaders’.<sup>959</sup> It is important to identify the omissions of mainstream feminism in order to be able to identify similar patterns of omission when looking at the feminist work of Bedouin women, and the manner in which the modalities of settler colonialism can quite casually minimize the feminist labour that Bedouin women do, every day.

#### *Some central tenets*

Feminist theory works to undermine how the structures and affects of heteropatriarchy and heteropaternalism circulate, by undermining the strict male/female binary upon which they are based.

Arvin, Tuck and Morrill argue that heteropatriarchy is a social system that assumes the naturalness of heterosexuality and patriarchy, thereby rendering alternative ways of being aberrant. Second, it enables the positioning of the father, or father-like figure at the centre of social groupings and organizations of family, church and state, and this is what is meant by heteropaternalism.

Feminist theory works to undermine these forces and structures of heteropatriarchy and heteropaternalism that are essentially founded on the idea that the male gender is both strong and capable while the female gender is its opposite, frail and confused.<sup>960</sup> The feminist legal scholar, Mari Matsuda argues that the binaries constructed by heteropatriarchy also place men on the side of science and rationality and women on that of intuition and emotion, the latter seen as inferior to

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<sup>958</sup> For more on ‘liar saviours’ in the Bedouin women context, those who claim to be helping the community but whose ulterior motives are not lost on the women in the community, see Nadera Shalhoub-Kevorkian, “The Grammar of Rights in Colonial Contexts: The Case of Palestinian Women in Israel” (2012) *Middle East Law and Governance* 4: 106–151

<sup>959</sup> See the short commentary on Bedouin ‘women leaders’ in the Introduction section of this chapter.

<sup>960</sup> Maile Arvin, Eve Tuck, and Angie Morrill, “Decolonizing Feminism: Challenging Connections between Settler Colonialism and Heteropatriarchy” (2013) 25(1) *Feminist Formations* 8-34 at 13.

the former. The privileging of rationality over real-life experience, she maintains, is a form of androcentric scholarship and therefore something that feminist theory seeks to overcome by making the personal political and telling stories of the daily, mundane ways in which power and agency operate.<sup>961,962</sup>

*Woman as a contested concept*<sup>963</sup>

Matsuda's critique of Rawls' abstraction in developing his social contract theory of justice is spurred by it being a theory of 'anti-experience'. She accuses Rawls' abstraction of being devoided of feeling and specificity when it asks individuals to apply a veil of ignorance, to ignore their particular conditions, context and the historical materiality of their being as they are called to choose from various conceptions of justice.<sup>964</sup>

Abstraction is of use because it allows us to form concepts or ideas by finding common features to particular entities while ignoring other elements possessed by those entities. For Rawls, abstraction was useful when it came to the issue of moral judgements. Rawls saw the utility of identifying the rational, self-interested individual as a common starting point for human beings who were being asked to make a moral judgement about how they would like to see society organized.

Yet, what if we attempted to be abstract about women? Could we identify a particular common feature to women that would allow us to generalize about them? Would that common feature be the common experience of oppression and heteropatriarchy?

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<sup>961</sup> Mari J. Matsuda, "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice" (1986) 16 *New Mexico Law Review* 613 at 617-618.

<sup>962</sup> This dissertation is acutely aware of the pitfalls of androcentric scholarship and for this reason each chapter is grounded in on-the-ground vignettes and narrations of real-life experiences before it engages with a legal analysis of the case.

<sup>963</sup> For Butler, both 'sex' and 'gender' are equally socially constructed, so that 'sex is gender'. For Stone, sex is not gender, and claims about sex (for example, men are physically stronger than women) imply claims about gender norms, that is make claims about how a 'man' or 'woman' ought to behave (men, more than women, ought to take up physically demanding jobs). See Judith Butler, *Bodies that Matter* (London: Routledge, 1993), Alison Stone, *An Introduction to Feminist Philosophy* (Cambridge: Polity Press, 2007).

<sup>964</sup> Mari J. Matsuda, "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice" (1986) 16 *New Mexico Law Review* 613, John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972)

This is precisely where the essentialist/anti-essentialist divide stands, in wilful disagreement about whether there are essential properties common to women, and that all women share<sup>965</sup> as their 'essence'.<sup>966</sup>

The debate hinges very much on the political expediency of either conception of 'what is woman', anti-essentialism being criticized for undercutting both feminist political activism and feminist social criticism by arguing that women are fully diverse.<sup>967</sup>

Scholars have proposed different explanations for navigating the contested terrain.<sup>968</sup> So, for example, strategic essentialism acknowledges that any descriptive essentialism is false. However, because states and institutions determine women in descriptively essentialist ways, so we should act as if essentialism were true for political/collective action and expediency.<sup>969</sup>

Iris Marion Young has proposed that we think of women as a series. Women are not a homogenous group, but are "multifaceted, layered, complex and overlapping", though are nevertheless united passively by the same or similar constraints in society.<sup>970</sup>

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<sup>965</sup> Alison Stone, "Essentialism and Anti-Essentialism in Feminist Philosophy" (2004) 1:2 *Journal of Moral Philosophy* 135-153 at 138 [Stone, "Essentialism, Anti-Essentialism"]

<sup>966</sup> Yet, would not the attribution of certain qualities to *all* women performed in a turn of abstraction be at the same time essentializing of women by arguing that they possessed an 'essence' even if on the most minute of attributes? It seems, then, that abstraction by this Rawlsian formula is not 'anti-essentialist' by being abstract, but in fact essentializing. This is what Matsuda argues in her article, "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice" (1986) 16 *New Mexico Law Review* 613, John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972).

<sup>967</sup> Stone, "Essentialism, Anti-Essentialism", *supra* note 965 at 141

<sup>968</sup> One of the main concerns of the essentialist/anti-essentialist debate is the concern for the implications of activism. Would an anti-essentialist stance undermine political and social advocacy for those who identify as 'women'? The debate, then, is not necessarily structured on what is a more honest accounting of what is woman, if indeed we can even attempt at a definition, but how do anti-essentialist assumptions undermine the emancipation of 'women' sidelined in society? Considering this, we can appreciate how the 'race' debate, fictional as 'race' is, being a construct, similarly functions in critical race theory for the reasons of political expediency and social justice. The debate on race and women, then, seem to be at their core, the search for social justice for those on the wrong side of each identifier, while at the same time trying very consciously not to perpetuate the essentializing myths associated with them.

<sup>969</sup> Stone has critiqued strategic essentialists for placing all women in an equally situated disadvantage vis-à-vis the state. Doing so, they indirectly affirm descriptive essentialism, even as they critique it and describe it as a 'fiction' of the state. Therefore, the contradiction is that strategic essentialists claim that women's experience is diverse, yet nevertheless structured by descriptive essentialist assumptions that thereby prompt uniform models of behaviour, undermine their own claim that women's experience is fully diverse. Stone, "Essentialism, Anti-Essentialism", *supra* note 965 at 142-44.

<sup>970</sup> Iris Marion Young, "Gender as Seriality: Thinking about Women as a Social Collective" (1994) 19:3 *Signs* 713 at 728. Alison Stone has taken issue with the 'women as a series' argument since the extraneous realities it indicts as

Critical of both strategic essentialism and “women as a series”, Alison Stone proposes the concept of ‘women as genealogy’, drawing from Judith Butler’s performative theory of gender.<sup>971</sup>

According to Stone, “women always acquire femininity by appropriating and reworking existing cultural interpretations of femininity”,<sup>972</sup> and thereby become situated in a historical chain of ‘women’, all of whom have practically reinterpreted the meaning of femininity specific to their context and the power constellations in which they reside. As all women are embedded in this complex history, they can be said to belong to a determinate social group, even if they don’t hold a common understanding or experience of what it means to be ‘woman’.<sup>973</sup>

Catharine Malabou attempts at a concept of woman that is neither exclusively essentialist nor anti-essentialist, but located in the interstices between the two.

Malabou argues against the anti-essentialist claim that women’s identity is completely without essence because she claims that such a position risks robbing women of agency and is also apolitical.<sup>974</sup> Malabou borrows from Sartre to argue for a ‘minimum concept of woman’ or ‘a minimal essence’ based on essence not existing as something substantial but essence as “being *in a situation*”.<sup>975</sup> Malabou argues by analogy that the essence of woman is being in a situation of ‘woman’.

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constraining women have certain unifying characteristics, which Stone claims is descriptively essentialist. *Ibid.* at 144-146.

<sup>971</sup> Judith Butler’s performative theory of gender maintains that gender is an act continuously actualized and reproduced by its interlocutor subjects based on a script already composed. Gender being ‘performativity’ and not ‘performance’ means that the subject isn’t an independent doer and “there is no gender identity behind the expressions of gender; that identity is performatively constituted by the very ‘expressions’ that are said to be its results”. Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990; Anniversary edition 1999) at 25. That said, with each appropriation of ‘woman’, the term is modified a little, so that gender norms are continuously organized anew. Judith Butler, “Variations on Sex and Gender: Beauvoir, Wittig and Foucault”, in Seyla Benhabib and Drucilla Cornell (eds.), *Feminism as Critique* (Minneapolis: University of Minnesota Press, 1987) at 131.

<sup>972</sup> Stone, “Essentialism, Anti-Essentialism”, *supra* note 965 at 135

<sup>973</sup> *Ibid.* at 149-150

<sup>974</sup> Catharine Malabou, “On Sexual Difference”, Lecture at The London School of Economics and Political Science (LSE) (June 2 2014), online: <http://www.lse.ac.uk/publicEvents/events/2014/06/20140602t1830vNT.aspx>. See also Catherine Malabou, *Changing Difference* (trans. Carolyn Shread) (Cambridge: Polity Press, 2011) for Malabou’s more in-depth exploration of sexual difference within the essentialism/anti-essentialism debate.

<sup>975</sup> Jean-Paul Sartre, *Anti-Semite and Jew: An Exploration of the Etiology of Hate* (trans. George J. Becker) (New York: Schocken Books, 1995 [1944]) at 43

If Malabou were to insist on the specificity of women, then she would argue it in the context of violence, all instances of which are also specific. It is the particularity of violence directed against women – domestic abuse, sexual abuse, forced prostitution, exploitation and fascism – that makes the woman.<sup>976</sup>

Judith Butler's critique of linguistic essentialism hinges on how language as a signifying practice erases difference. As categories (including gender identities of masculine and feminine) are features of language, so all categories eradicate cross-cutting differences and undermine other ways of describing those within a particular category.<sup>977</sup> Accordingly, Butler calls for a recognition of the contingency of categories and the need to parody and destabilize terms like "women" even as we call upon them.<sup>978</sup>

Considering all of the above, how would feminist theory inform our discussion of agency and recognition not just for the women in Bir al-Mashash but for the Naqab Bedouin community more generally? How is the call to parody and to destabilize linguistic categorization, as suggested by Butler, already fracturing this particular assemblage? We will address these questions in the concluding discussion.

### **The Case: Adalah v. Ministry of Social Affairs, HCJ 7245/10**

I will now move on to the discussion of the vaccinations case. The petition called for the revocation of Section 61(2)(d) of the Arrangements Law (Legislative Amendments for Implementation of the Economic Plan for 2009 and 2010), 5769-2009. The petitioners were 'Yasmin al-Naqab', the

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<sup>976</sup> Feminist scholar, Alison Stone, differs with Malabou on this. Stone counters, "How do women concretely derive resistant powers from their very violation? Moreover, we might wonder whether the definition of women's being in terms of their being violated is unduly negative. Has patriarchy really violated women's being so totally that nothing more positive than violation is left to define them? After all, if violation enables resistance, then surely women having always been violated must have always resisted their violation and created more positive modes of being for themselves. In that case their essence would be less wholly negative than Malabou suggests". Alison Stone, "Book Review: Changing Difference by Catherine Malabou" LSE Review of Books (May 15 2015), online: <http://blogs.lse.ac.uk/lseviewofbooks/2012/05/15/book-review-changing-difference-catherine-malabou/>

<sup>977</sup> Judith Butler, "Contingent Foundations: Feminism and the Question of 'Postmodernism'," in Seyla Benhabib, Judith Butler, Drucilla Cornell and Nancy Fraser, *Feminist Contentions: A Philosophical Exchange* (New York: Routledge, 1995), cited in Cressida J. Heyes, *'Back to the Rough Ground!' Wittgenstein, Essentialism, and Feminist Methods*, Doctoral Dissertation (Montreal: McGill University, 1997) at 40-1

<sup>978</sup> Cressida J. Heyes, *'Back to the Rough Ground!' Wittgenstein, Essentialism, and Feminist Methods*, Doctoral Dissertation (Montreal: McGill University, 1997) at 43-4, see Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990) at 34

organization that Huda now represents as Director, together with other civil society organizations and individuals from the Naqab. Adalah: The Legal Center for Arab Minority Rights in Israel represented the petitioners. In issuing its decision, the court combined petition HCJ 7245/10 of the Naqab Bedouin community with two other petitions also calling for the revocation of Section 61(2)(d), though for other reasons than those raised by the petitioners in HCJ 7245/10.<sup>979</sup>

Section 61(2)(d) allowed for the reduction of state-funded child allowance payments if the child had failed to receive vaccinations identified as mandatory on the Health Ministry's vaccination schedule. The petitioners had called for the revocation of Section 61(2)(d) as it would disproportionately affect Bedouin children of the Naqab who suffer from inadequate access to health services.

As a result of the amendment, Bedouin children (and their families) from the unrecognized villages would see a reduction in their child allowance payments because they lacked adequate access to well-baby (also known as 'mother-child') clinics where said vaccinations were administered. Therefore, even if the families wanted their children to receive the vaccinations, that is, even if they were not opposed to vaccinations because they had no reservations about their safety nor did they have any ideological opposition to them, they would nevertheless not be able to access vaccinations without significant difficulty. This meant that they, as Bedouin from the unrecognized villages, would be more likely to see a reduction to their child allowance payments than the general population.

The vaccines determined by The Ministry of Health to be mandatory are listed in the 'Vaccination Program'. At the time of the decision, and at the time of writing, they include four vaccines, measles,

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<sup>979</sup> *The Israel National Council for the Child v. Government of Israel*, [2013] HCJ 8357/10, *The Association for Information on Vaccines v. The National Insurance Institute*, [2013] HCJ 908/11. The argument put forth by the Israel National Council for the Child was that the amendment violates the right to equality of those who do not vaccinate their children. This is because the amendment creates a distinction (between those who vaccinate and those who do not) that is not relevant to the purpose of the child allowance. The purpose of the child allowance is to allow for redistribution of income among the population, between citizens without children to those with children and with more mouths to feed. Therefore, whether or not one's child is vaccinated should not bear on whether that parent receives the allowance payment for that child. The Association for Information on Vaccines argued that both the effectiveness and safety of vaccines are contested issues in the medical community and among the general population. Accordingly, by cutting child allowance payments to those who do not vaccinate, the amendment violates the right to equality, the individual's right to autonomy and the right to autonomy of parents in the upbringing of their children.

mumps, rubella and varicella. The four are administered as a quadrivalent vaccine, in a single jab, when the child is one year old.<sup>980</sup>

The amount reduced from the child allowance payment would be 100 shekels per month for the second, third and fourth child in a family unit that had not received the mandatory vaccines, which would amount to a reduction of just over 60%.<sup>981</sup> The reduction would apply for the entire length of time that it was suitable to receive the vaccine, following which the allowance would return to its original amount.<sup>982</sup>

The judge who wrote the majority opinion was Justice Arbel, who also sat on the bench in the crop-spraying case discussed earlier in this dissertation, *Abu Mdeghem*.<sup>983</sup> Although there were no dissenting opinions, in the concurring opinions of Justice Barak-Erez and Justice Hayut, both judges laid out different reasons for reaching their decision. In the court's judgement, even though the constitutional right to equality enshrined in *Basic Law: Human Dignity and Liberty* (1992) was violated, the violation satisfied the cumulative conditions of the limitation clause in the *Basic Law*. Accordingly, the court ruled to deny the petition.

The issues considered by the court were whether the Amendment to the National Insurance Law<sup>984</sup> violated the rights enshrined in *Basic Law: Human Dignity and Freedom* (1992), in particular the right to a dignified life or the right to social security, the right to autonomy, and the right to equality.<sup>985</sup>

Justice Arbel found that there was comprehensive groundwork done by the authorities ahead of the formulation of the amendment, denying the petitioners' claim to the contrary.<sup>986</sup> Accordingly, Justice Arbel found that there was no room for judicial intervention in the legislative proceedings

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<sup>980</sup> *Adalah v. Ministry of Social Affairs*, HCJ 7245/10 at para. 30-31. MMRV is also given in the first grade but this second dosage is not included in the 'Vaccination Program' and therefore is not subject to the Amendment.

<sup>981</sup> Arrangements Law (Legislative Amendments for Implementation of the Economic Plan for 2009 and 2010), 5769-2009 at Section 68(d)

<sup>982</sup> *Adalah v. Ministry of Social Affairs*, HCJ 7245/10 at para. 50

<sup>983</sup> *Abu Mdeghem v. Israel Lands Administration*, [2007] HCJ 2887/04, IsrLR 62.

<sup>984</sup> *National Insurance Law, 1995*, S.H. 5755, No. 1522

<sup>985</sup> *Adalah v. Ministry of Social Affairs*, HCJ 7245/10 at para. 38

<sup>986</sup> *Ibid.* at para. 18-19

because they were not an instance of a process that “causes deep harm to material values of the constitutional regime[.]”<sup>987</sup>

Arbel determined that the purpose of the child allowance was to help families with children bear the costs associated with raising them. Following this premise, Arbel emphasized how the allowance helped families with children maintain a certain standard of living and reduced their risk of falling below the poverty line.<sup>988</sup>

While not deciding conclusively on whether the allowance belonged to the child or the parent, Arbel held that when determining child allowances, the legislator had in mind the welfare and best interests of the children.<sup>989</sup>

On the issue of vaccines, Arbel determined, drawing on the findings of the Ministry of Health, that their purpose was twofold. First, vaccines ensured the protection of children from the risk that “any immigrant or tourist will bring with him diseases that are not currently found in Israel”.<sup>990</sup> Second, that the high coverage rate of vaccines helps ensure ‘herd immunity’, which helps protect those who are very young, very old, and those with weakened immune systems for whom the administration of a vaccine is not effective or possible, to nevertheless be protected from the disease.<sup>991</sup>

Arbel laid out the dangers of the four diseases that the MMRV vaccine is meant to protect against – measles, mumps, rubella and varicella (chicken pox) and concluded that “the prevalent and recognized position worldwide is that the benefit derived from the vaccines immeasurably exceeds the risk inherent therein”.<sup>992</sup>

After Arbel determined the facts of the case, she moved on to undertake a constitutional review of the Amendment, looking specifically at whether there was a violation to the *Basic Law: Human Dignity and Freedom* (1992).

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<sup>987</sup> *Ibid.* at para. 20-21, citing *Shlitner v. The Pensions Commissioner*, [2011] HCJ 6784/06 at para. 36 of the opinion of Justice Procaccia.

<sup>988</sup> *Ibid.* at para. 24

<sup>989</sup> *Ibid.* at para. 25

<sup>990</sup> *Ibid.* at para. 27

<sup>991</sup> *Ibid.*

<sup>992</sup> *Ibid.* at para. 29

Arbel first considered if there was a violation to the right to a dignified life. She determined that a reduction in the child allowance payment did not automatically result in a violation of the right. Rather, the petitioners bore the burden of proving the violation by showing that after examination of the range of services provided to the family by the state in terms of income support payments and the like, that the reduction of the child allowance would cause a decline to the material living conditions of the families, thereby harming their dignity. At a minimum, Arbel opined that the petitioners ought to have presented individual cases that illustrated the alleged harm to facilitate a shifting of the burden of proof to the State. As they failed to provide this minimum proof, Arbel found no harm to the right to a dignified life.<sup>993</sup>

Arbel then considered if there was a violation to the right to autonomy. Arbel explained that the right to autonomy derived from the right to human dignity and was “a central component of the life of every individual in society”.<sup>994</sup> The right enables an individual to shape her life and is essential for the individual’s self-determination.

Arbel clarified that at the case at hand it was the right to *parental* autonomy that was being considered. The right to parental autonomy encompasses both the obligation and the right to care for the needs of the child, including the child’s health. This right is vested in the parents since there is a natural connection between these two parties and because it is assumed that parents will make the best decisions for their children because they know them and the family unit in which they are raised most intimately.

Moreover, there is no unequivocal social consensus on the issues that parents are called to decide upon. Finally, parents will have to live with the consequences of their decisions, and so it is assumed that their decisions vis-à-vis their children will have generally favourable consequences in the long-term. All the same, Arbel conditions the above on the fact that the right to parental autonomy is not absolute and that it is limited by the principles of the child’s best interests and her rights.<sup>995</sup>

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<sup>993</sup> *Ibid.* at para. 41-42

<sup>994</sup> Arbel here is citing the *Daaka* case, *Ali Daka v. Haifa ‘Carmel’ Hospital*, [1999] CA 2781/93 *IsrSC* 53(4) 526 at 570

<sup>995</sup> *Supra* note 993 at para 45

In order for the right to autonomy to be a constitutional violation in the case at bar, two parameters would need to be examined. The first parameter would be the 'essence of the choice denied', which is to say that the more harm caused to the personal expression and self-realization of the person, the more likely it would be deemed a constitutional violation. The second parameter is the extent of coercion and denial of will.<sup>996</sup>

Arbel determined that the denial of the child allowance for non-compliance with the government-mandated vaccination schedule was not a violation of the first parameter in the way that a citizen denied the right "to marry the love of his life"<sup>997</sup> would be. Second, she held that the extent of coercion was limited to the denial of a financial benefit, which is not the same as the imposition of a criminal sanction. Finding that neither of these two parameters were fulfilled, Arbel determined that there was no violation to the constitutional right to autonomy.<sup>998</sup>

Finally, Arbel considered if there had been a violation to the right to equality. Arbel concluded that the conditioning of the child allowance payment on receipt of the vaccination was a condition that was foreign to the purpose of the allowance. The purpose of the allowance, she held, was to assist in financing the expenses of raising children and to prevent the family from falling into poverty. Accordingly, denial of an allowance for non-receipt of the vaccination was a violation of the right to equality for all those parents insured by the National Insurance Law.

However, for the violation to be a constitutional violation and justify judicial intervention, the four-pronged limitation clause test would need to be applied, only failing which, would the amendment be deemed a constitutional violation.

Arbel found that the first two conditions of the clause were satisfied, as the amendment was made by law and befit the values of the State of Israel. As for if whether the amendment had a proper purpose, she found that its objective to increase vaccination rates was proper, since it "promotes an important social objective of caring for public health in general and children's health in particular".<sup>999</sup> The amendment is also intended to maintain 'herd immunity'<sup>1000</sup>. Accordingly, the

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<sup>996</sup> *Ibid.* at para 46

<sup>997</sup> *Ibid.*

<sup>998</sup> *Ibid.* at para 47

<sup>999</sup> *Ibid.* at para. 57

<sup>1000</sup> For more on 'herd immunity', see above and *ibid.* at para. 27

amendment has a close connection to the right to health and the right to life, and so even if considered a violation to the right to equality, it has a sufficiently strong purpose to justify the violation.

Finally, Arbel considered if the violation was proportional. This was the fourth and final prong of the limitations clause test (also known as the ‘proportionality test’) that examined if there was a rational connection between the means chosen and the end result and whether there was a less harmful means that could have been chosen in the amendment’s stead. The last of the three subtests looked at whether there was a proper balance struck between the benefit derived from the achievement of the amendment’s purpose and the scope of the violation of the constitutional right.

Arbel found that there was a rational connection between the means and the ends, since there was a “reasonable probability” the means chosen would at least result in “partial achievement”<sup>1001</sup> of the end sought.

As for the less harmful means subtest, Arbel cited those instances, in foreign jurisdictions, where non-compliance with state vaccination schedules resulted in criminal sanctions for the offending adult party and the denial of enrollment into an educational institution for non-compliant children. The reduction in child allowances provided for by the amendment, relative to these other means, is less harmful.

Further, Arbel stressed, as she did on numerous occasions in her decision, that the reduction in child allowance payments happened concurrently with the increase in child allowance payments, so that it “should be deemed as not granting a benefit [and] not as a deduction from a person’s income”.<sup>1002</sup> Because the amendment resulted in the *withholding* of a benefit, this was less harmful than if it was an economic sanction or penalty.<sup>1003</sup>

Finally, Arbel found that the state had done the necessary work – including establishing well-baby clinics in the Bedouin recognized towns and unrecognized villages, setting up a mobile health clinic, equipping these centers to be culturally appropriate and incentivizing staff who worked in these

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<sup>1001</sup> *Supra* note 999 at para. 60

<sup>1002</sup> *Ibid.* at para. 42

<sup>1003</sup> *Ibid.* at para. 61

clinics - to make receiving vaccinations accessible for the Naqab Bedouin population.<sup>1004</sup> These considerations led Arbel to conclude that the amendment passed the second subtest of the proportionality test.

In evaluating if the amendment passed the third subtest, Arbel grounded her argument in one that this dissertation has explored being made by former Chief Justice Aharon Barak, namely that of the law striking a balance between the needs of society and the rights of the individual.<sup>1005</sup>

Arbel states, “The effect of each and every individual on the public justifies a balance which harms the individual to a limited and restricted extent for the benefit of the public. It is impossible to ignore that the individual lives within society and sometimes his acts or omissions impact the society around him”.<sup>1006</sup> The benefit in this case was public health. When vaccination rates crossed a particular threshold it would create ‘herd immunity’ for vulnerable members of society.

This reasoning allowed Arbel to conclude that the third subtest was also satisfied, thereby satisfying all elements of the limitation clause test, and finding the violation to equality to be proportional.

Justice Barak-Erez concurred in her decision. Like Arbel, Barak-Erez denied the petition, though qualified by a different rationale. Barak-Erez concluded that the right to equality was offended but that the violation to the right was proportionate.

Barak-Erez offered a different rationale for why the amendments were issued, that is, it was not primarily about the financing of families raising children and staving off poverty as Arbel had argued. Rather, the purposes of the child allowances were multifold, they varied over time, and they included the goals of assisting in the absorption of immigrants and encouraging births.<sup>1007</sup>

Accordingly, the purpose of the child allowance, besides promoting the child’s welfare, was also “to promote the social policy of the government at a given time”.<sup>1008</sup>

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<sup>1004</sup> *Ibid.* at para. 62

<sup>1005</sup> In the ‘Wine Path Plan’ case, I discussed in detail the use of fundamental principles in adjudication, and specifically how Barak’s argument about balancing between an individual’s rights and the individual’s duties to society in order to be responsive to society’s needs, factors in such adjudication.

<sup>1006</sup> *Supra* note 1004 at para. 63

<sup>1007</sup> *Adalah v. Ministry of Social Affairs*, HCJ 7245/10 at para 18-19 (Barak-Erez, D., concurring)

<sup>1008</sup> *Ibid.* at para 20 (Barak-Erez, D., concurring)

Barak-Erez also emphasized that the amendment should not apply to those families who wish to vaccinate their children but are unable to do so because of access issues, as was argued by the Naqab Bedouin petitioners. Nevertheless, based on the evidence before her, she did not find that the amendment wrongfully discriminated against Bedouin children compared to Jewish children.<sup>1009</sup>

Justice Hayut, unlike Justices Arbel and Barak-Erez, did not find that the amendment violated the constitutional right to equality and voted with the majority to deny the petition.

## **Analysis of the Case**

### Genealogy of the Israeli Medical Establishment's dealings with the Naqab community

Prior to analyzing the legal decision, I would like to sketch a brief genealogy of the Israeli medical establishment's dealings with the Naqab Bedouin. Therefore, the purpose of this sketch is not to draw out a historical record that is linear, progressive or official. Rather, true to the method of genealogy, we appreciate how this relationship between the Israeli medical establishment and the Naqab Bedouin is informed by meanings that fluctuate based on constellations of power that mold, erase, and obscure its elements.

Based on this premise, when we attempt a historical accounting of this relationship, we attempt to identify the silences in the official record and the ruptures in the assemblage within which this relationship is found.<sup>1010</sup>

So, for example, while the official record may state that the vaccination rate among the Naqab Bedouin from the unrecognized villages for the MMRV vaccine is over 90%<sup>1011</sup> and that they enjoy

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<sup>1009</sup> *Ibid.* at para. 59 (Barak-Erez, D., concurring)

<sup>1010</sup> For more on the Foucauldian insistence on genealogy over historiography in medicine, see Colin Jones and Roy Porter (eds.), "Introduction" in *Reassessing Foucault: Power, medicine and the body* (Routledge: London and New York, 1994)

<sup>1011</sup> *Adalah v. Ministry of Social Affairs*, HCJ 7245/10 at para 62

access to eight well-baby clinics within these villages,<sup>1012</sup> when we attend to the silences, we learn much more.

For one, how were Bedouin from the three dozen unrecognized villages able to achieve a 90% vaccination rate for MMRV given that public transport does not service these villages? What measures were they forced to take and what hurdles overcome to outperform Jewish families? What were the affective investments of Bedouin mothers, the primary caregivers of their children in most cases, in meeting this vaccination rate? By identifying these omissions and ruptures, we are able to undertake a more accurate accounting of the claims put forward by the official record.

As Israeli scholars<sup>1013</sup> have shown, Israel had a medical selection policy, instituted in 1951, specifically directed towards new immigrants, and not unlike that which was implemented in the United States and Canada.<sup>1014</sup> Shvarts *et. al.* claim that the policy was informed by considerations both Zionist and eugenic.<sup>1015</sup>

This is to say that immigrants to the newly formed state were screened both for how they contributed to the national identity and for how much disease they carried. Often, and without due cause, there was a an indiscriminate association of disease-producing germs with immigrants.<sup>1016</sup>

Medical anthropologist Na'amah Razon, who undertook extensive fieldwork on the Bedouin and their historical and current interactions with the Israeli public health system, has shown that as

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<sup>1012</sup> *Ibid.*

<sup>1013</sup> Shifra Shvarts, Nadav Davidovitch, Rhona Seidelman And Avishay Goldberg, "Medical Selection and the Debate over Mass Immigration in the New State of Israel (1948-1951)" (2005) 22:1 Canadian Bulletin of Medical History 5-34

<sup>1014</sup> *Ibid.* at 7-8

<sup>1015</sup> Here the authors are referring to the relations between Zionism and eugenics before the establishment of the state, and cite Raphael Falk, "Zionism and the Biology of the Jews" in *Science in Context* (1998) 11:587-607, Mitchell B. Hart, *Social Science and the Politics of Modern Jewish Identity* (Stanford, California: Stanford University Press, 2000) and John Efron, *Defenders of the Race: Jewish Doctors and Race Science in Fin-de-Siècle Europe* (New Haven: Yale University Press, 1993). Of course, the authors' use of 'eugenics' is not to be equated with that which was practiced by the Nazis, though Nazi practices under this label are often construed as representing the science as a whole.

<sup>1016</sup> *Supra* note 1013 at 8

with immigrants, the state was preoccupied with hygiene and sanitation of Bedouin in the early years following the state's foundation, when Bedouin lived under military rule.<sup>1017</sup>

Razon's archival research shows that the provision of health care to Bedouin in the early years of the state was sporadic and by 1955 there were only two clinics that served a population of 12,000 Naqab Bedouin. As Bedouin lived under military rule until the mid-sixties, the provision of medical care was limited to within the confines of the closed military zone, making treatment of Bedouin and Israeli Jews within the same geographic space essentially separate. Further, the military government's rationale regarding health care also mirrored the rationale of Bedouin as a security threat, so that, according to officials, health care provision to the Bedouin became necessary to stop the spread of disease that would threaten the majority Jewish Israeli population.<sup>1018</sup>

In Razon's interactions with medical personnel, she was made aware of how the health system identified Bedouin culture as a source of pathology.<sup>1019</sup> While medical personnel often identified Bedouin as those that received 'equal' treatment, medical staff concurrently identified them as those who were inherently prone to disease because of their nomadic culture.

Therefore, by this reasoning, it was inherent to Bedouin culture for families to bear many children. This contributed to a high disease burden on the medical system. As the culture was essentially nomadic prior to the state's founding, it was forced to undergo a rapid transition from ancient to modern living, which resulted in poor eating habits and an unhealthy lifestyle, which contributed to poor health.<sup>1020</sup>

As Razon critiques, curiously missing from the analysis of health officials are the structural forces of the 1948 war, military rule, forced settlement of the community, underfunding and institutional

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<sup>1017</sup> Na'amah Razon, 'Chapter 2: Military and Medicine, Archives and Notes, Writing and History' in *Producing Equality: Citizenship, Science, and Medicine in the Negev/Naqab*, PhD Dissertation (Department of History, Anthropology, and Social Medicine, University of California San Francisco, 2013) at 62.

<sup>1018</sup> For example, the Military Governor of the southern division, commenting on the poor health condition of the Bedouin population, wrote to the Ministry of Defence, "I am yet to receive help from the State's Ministry of Health. I refuse to accept the situation - is this not a state that cares for its citizens? Especially **if the subject endangers the well being of the entire population**" (emphasis added). See *ibid.* at 67

<sup>1019</sup> Na'amah Razon, "Seeing and Unseeing Like a State: House Demolitions, Healthcare, and the Politics of Invisibility in Southern Israel" (2017) 90:1 *Anthropological Quarterly* 55-82 at 71-74

<sup>1020</sup> *Ibid.* at 72

discrimination as contributing factors to poor health. Rather, as Razon concludes, “it is ‘culture’—as nomadic and ‘Bedouin’— and the loss of culture that becomes the culprit of disease”.<sup>1021</sup>

Razon asserts that it should not strike one as surprising that the political and historical forces that shape a Bedouin’s health are absent from consideration. Rather, to ignore non-medical, structural forces is key to biomedical interventions such as diagnoses, protocols, and clinical trials. In a medical protocol for leukemia that Razon became acquainted with through the course of her research, for example, there is very little personal information or background about a patient; rather they are categorized by risk level upon their arrival, risk itself determined by discrete criteria such as age, blood count and genetics. Accordingly, patients are rendered equivalent units, diagnosed with the same disease, receive the same treatment and become the same units within protocol data.<sup>1022</sup>

The rendering of patients as equivalent units extends also to how health personnel refer to patients’ treatment. Therefore, health officials repeatedly claimed to Razon that Bedouin were treated the same as Israeli Jews or other minority groups. Nevertheless, when Bedouin missed certain aspects of the leukemia protocol because they lacked adequate transport to the treatment center, health professionals refused to see how these transportation and socioeconomic barriers did in fact make treatment unequal.<sup>1023</sup>

Until 2000, there was not a single mother-child health clinic servicing the unrecognized Bedouin villages.<sup>1024</sup> Currently, there are eight clinics operating in the villages, and the first of these were only established following a petition filed by Adalah, the petitioner in this case.<sup>1025</sup> This lack of well-

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<sup>1021</sup> *Ibid.*

<sup>1022</sup> Na’amah Razon, “Learned Blindness: Transforming Bedouins into standardized patients. Examining health and politics in southern Israel” (2015) 45(2) *Ethnologie Française* 269-280 at 272. For more on the how patients are objectified in the bureaucratic space of medical diagnosis see Charles E. Rosenberg, “The Tyranny of Diagnosis: Specific Entities and Individual Experience” (2002) 80:2 *The Milbank Quarterly* 237–260

<sup>1023</sup> Na’amah Razon, “Learned Blindness: Transforming Bedouins into standardized patients. Examining health and politics in southern Israel” (2015) 45(2) *Ethnologie Française* 269-280 at 273

<sup>1024</sup> Gottlieb *et. al.*, “Bedouin antenatal access”, *supra* note 899 at 644

<sup>1025</sup> In 1997, Adalah filed a petition on behalf of 121 Arab Bedouin citizens of Israel and 3 NGOs against the Ministry of Health (MOH) demanding the establishment of 12 mother-child health clinics to serve the unrecognized villages in the Negev. In March 1999, the Supreme Court ruled that the MOH construct six such clinics by May 2000, and provide public transportation to neighboring recognized towns with clinic services. *Adalah v. Ministry of Health*, [1999] HCJ 7115/97, see Adalah - The Legal Center for Arab Minority Rights in Israel, *Interim Report on Israel Submitted to the UN Committee on Economic, Social and Cultural Rights*, 24<sup>th</sup> Session (November 2000), online: <https://www.adalah.org/uploads/oldfiles/eng/intladvocacy/uncesr24.htm>

baby clinics servicing the Bedouin population in the unrecognized villages is although their need is most pronounced there than probably anywhere else in the country.<sup>1026</sup>

Although these mother-child clinics service the community, the services they offer have been substandard. So, for example, it has been documented how the clinics are understaffed, have short operation hours, are overcrowded and have extended waiting periods.<sup>1027</sup> A common complaint of patients is the lack of service in Arabic.<sup>1028</sup> In fact, the service is regarded by some women as so poor, that they use the well-baby clinics in the unrecognized villages as 'a last resort', when it is too hard to reach the well-baby clinic in the Jewish town of Dimona.<sup>1029</sup>

Bedouin women also have high morbidity rates for urinary tract infection and anemia.<sup>1030</sup> They live on average five years less than Israeli Jewish women.<sup>1031</sup>

#### Bedouin vaccination rates are higher than the average population, however...

Given the poor health of Naqab Bedouin women and the historical and contemporary disadvantage at which they're placed vis-à-vis the general population in terms of health care provision and accessibility, it may strike as surprising that the rate of vaccination of Bedouin children in the unrecognized villages is roughly the same as that of Israeli Jewish children.<sup>1032</sup> Probably more

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<sup>1026</sup> The importance of well-baby clinics in the Naqab owes in part to the high infant mortality among the Bedouin there compared to other populations in Israel, 11.5 compared to 4.5 in 2006. See Gottlieb *et. al.*, "Bedouin antenatal access", *supra* note 899 at 644. This, together with premature births and low birthweights, owe to the underutilization of antenatal care. See Irit Twizer, Eyal Sheiner, Mordechai Hallak, Moshe Mazor, Miriam Katz, and Ilana Shoham-Vardi, "Lack of prenatal care in a traditional society. Is it an obstetric hazard?" (2001) 46:7 *Journal of Reproductive Medicine* 662-668.

<sup>1027</sup> Physicians for Human Rights (PHR), *The Bare Minimum - Health Services in the Unrecognized Villages in the Negev* (2009) at 24-27, Gottlieb *et. al.*, "Bedouin antenatal access", *supra* note 899 at 652. The substandard health services in the unrecognized villages are not limited to just the well-baby clinics, but also to the regular health clinics located there. See Physicians for Human Rights (PHR), *The Bare Minimum - Health Services in the Unrecognized Villages in the Negev* (2009) at 8-23.

<sup>1028</sup> Lack of service in Arabic makes treatment ineffective and renders the consultations as sources of frustration and shame for the women, and indirectly sometimes results in the violation of their right to confidentiality, see Physicians for Human Rights, *I am Here: Gender and the Right to Health in the Unrecognized Villages of the Negev* (April 2008) at 26-32 for more.

<sup>1029</sup> Gottlieb *et. al.*, "Bedouin antenatal access", *supra* note 899 at 652.

<sup>1030</sup> Based on a sample size of 202 Naqab Bedouin women, from both the unrecognized villages and the development towns, it was found that more than 50% suffered from urinary tract infection and close to 50% suffered from anaemia. Julie Cwikel, Rachel Lev-Wiesel, and Alean Al-Krenawi, "The physical and psychosocial health of Bedouin Arab women of the Negev area of Israel: The impact of high fertility and pervasive domestic violence" (2003) 9:2 *Violence against Women*, 240-257 at 248.

<sup>1031</sup> Ramsees Gharrah (ed.), *Arab Society in Israel (5): Population, Society, Economy* (Van Leer Jerusalem Institute, 2012) at 23, 29, Summary Table 2

<sup>1032</sup> *Adalah v. Minister of Welfare and Social Affairs*, [2013] HCJ 7245/10 at para. 59 (Barak-Erez, D., concurring)

striking is the fact that the rate of vaccination for the MMRV vaccine is in fact *higher* among Bedouin than among Israeli Jews.<sup>1033</sup>

One would expect that if a particular service was inadequately provided, or that if there was some other reason that made it more difficult to access a particular service, that there would be lower rates of service procurement. This was indeed the argument being made by the petitioners.

The only reasonable explanation for a *higher* rate of procurement would be if those acquiring the service would have had to work with significantly *more effort* than the average person (without the same provision and access challenges) so that their acquisition rates were similar or higher than the average person.

In a revelatory 2009 essay, DeNeen L. Brown walks her readers through the rather obvious, yet often overlooked, fact how it is the poor pay more, “more in money, time, hassle, exhaustion, menace”.<sup>1034</sup> This fact is no different from the experience of the women, who are from the poorest households in Israel.<sup>1035</sup>

So, for example, in Bir al-Mashash, because the women I interviewed did not own a private car or have ready access to one, and since public transport does not service their village, they were forced to hire a private taxi for the return journey to the nearest well-baby clinic. This cost them more time and money than it would if a well-baby clinic was located within their community or if they had a private car at their disposal. Umm Osama characterized the process of taking vaccinations similarly to Brown’s characterization of doing routine tasks when poor, saying taking vaccinations required considerable “effort, fatigue and time”.

There was also the issue of lack of childcare. As mentioned earlier, when Umm Faris, a mother of thirteen children, wants to take her son to a clinic, she has to make a number of calculations and arrangements. For one, where would she put her other children if there were no childcare options in the community? Could she leave some of them behind to take care of themselves? She still recalls

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<sup>1033</sup> *Adalah v. Minister of Welfare and Social Affairs*, [2013] HCJ 7245/10 at para. 62

<sup>1034</sup> DeNeen L. Brown, "The High Cost of Poverty: Why the Poor Pay More" *Washington Post* (May 18, 2009), online: <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/17/AR2009051702053.html>

<sup>1035</sup> The incidence of poverty among Naqab households is nearly 70% Ramsees Gharrah (ed.), *Arab Society in Israel (5): Population, Society, Economy* (Van Leer Jerusalem Institute, 2012) at 91, Table C1

with horror that occasion when her eleven-month old was scalded by boiling water because she was not able to give him her full attention while she was preparing food for the family.

What the courts omit and the official record does not register are those affective investments of Bedouin mothers in meeting and surpassing vaccination rates for their children, the feelings of uncertainty, inadequacy and in Umm Faris' case, those of fear, guilt and remorse that invariably accompany the routine procedure of vaccination.

Was the law able to accommodate hearing and registering those investments, the court would less readily consider the high vaccination rates of Bedouin children in spite of inadequate access issues, as a phenomenon not deserving a remedy of sorts, in line with the request of the petitioners. That is, just because Bedouin received the combination MMRV vaccine at rates slightly higher than Israeli Jews, they did so *in spite of* access issues, meaning they were *forced to undertake efforts over and above the majority population* to realize this particular aspect of the right to health for their children.

The right to health has been determined to have constitutional standing in Israeli case law.<sup>1036</sup> Further, access is a core element of the right to health in international human rights law as explicated by the UN Committee on Economic Social and Cultural Rights in their General Comment No. 14.<sup>1037</sup>

Not only do high vaccination rates mean that Bedouin have to work harder to receive the full child allowance payments that are ordinarily paid to families with children. Because they are poor, Naqab Bedouin also have less *freedom to choose* whether they would like to take vaccinations in the first place.

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<sup>1036</sup> See *Louzon v. Government of Israel*, [2008] HCJ 3071/05 at para. 10, where Chief Justice Beinisch concludes, "Thus, it emerges from the case-law of this Court that the constitutional rights enumerated in Basic Law: Human Dignity and Liberty are likely to include various aspects from the areas of welfare and social security, including health care". In *Gamzo v. Isaiah*, [2001] LCA 4905/08 IsrSC 58(3) 360 at para. 20, Chief Justice Barak states, "a person without access to elementary medical treatment is a person whose human dignity has been violated" and in *Physicians for Human Rights v. Minister of Finance*, [2004] HCJ 494/03 IsrSC 59(3) 322 at paras. 16, 18, Barak determined that, "the social right to the provision of basic health services can be anchored in the right to bodily integrity under s. 4 of the Basic Law".

<sup>1037</sup> United Nations, Committee on Economic, Social and Cultural Rights, "The Right to the Highest Attainable Standard of Health", General Comment No. 14, UN Doc. E/C.12/2000/4

That is, they are unlike Israeli Jews who, in numbers greater than Arab citizens, opt out of administering vaccines for their children<sup>1038</sup> because they would generally like more autonomy in making health choices for their children.<sup>1039</sup> The Bedouin do not enjoy the same freedom to make similar considerations, because the price they would pay (forfeiting the child allowance payment) would be beyond what they could afford. Although I discussed earlier how the mothers themselves did not see the closing down of such ethical considerations as a major concern,<sup>1040</sup> the amendment nevertheless *does close down* the possibilities for Bedouin to choose differently. In doing so, the punitive element of the amendment, as we saw in the Wine Path Plan case, also offends liberty as license (to do as one pleases) and indirectly offends liberty as independence (to make decisions for one's self and one's family), for example to live on their historical lands without being forced to forfeit adequate standards of health care.

Finally, the decision did not give adequate weight to the fact that the amendment is damaging because Bedouin children would be doubly harmed, for not receiving the vaccination and having to forego their allowance, even though Justice Arbel acknowledged that the children would be harmed on both those accounts.<sup>1041</sup>

### Premises for the Decision

The judges relied on a number of premises in reaching their decision, which included:

1. Vaccinations were in the best interest of the child since vaccines are essentially good
2. The amendment resulted in a 'denial of a benefit' and was 'not to be considered a deduction'
3. Bedouin access to mother-child well-baby clinics was 'good enough'

The court's central premise in reaching its decision was that vaccines were essentially good.<sup>1042</sup> It was because vaccines were essentially good that Section 61(2)(d) of the Arrangements Law was enacted.

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<sup>1038</sup> Dan Even, "More Israeli parents refusing to vaccinate their babies according to state regulations", *Ha'aretz* (June 4, 2013), online: [www.haaretz.com/news/national/.premium-1.527622](http://www.haaretz.com/news/national/.premium-1.527622)

<sup>1039</sup> Stemming from the health critique of vaccinations, such as concerns about the aluminum content in vaccines, or the detrimental health effects of a combination vaccine, where as many as four or five vaccines are combined in a single shot. I will briefly address the critiques of vaccinations below and the implications of their inadequate consideration by the judges in the case.

<sup>1040</sup> See section, 'Blindspots: the Knesset's and mine'

<sup>1041</sup> *Adalah v. Ministry of Social Affairs*, H CJ 7245/10 at para. 49.

<sup>1042</sup> *Ibid.* at para. 28.

First, to ensure that those of vaccine-appropriate age did receive those vaccines designated by the state to be especially important for their health. Second, because vaccines made a significant contribution to maintaining public health by preventing the outbreak of disease.<sup>1043</sup>

Indeed, the petitioners Adalah, Yasmin al-Naqab and The Israel National Council for the Child did not contest this point, though The Association for Information on Vaccines did. The latter argued that both the effectiveness and safety of vaccines are contested issues in the medical community and among the general population.

Vaccines have been proven to result in brain encephalopathy, or brain damage, and victims have been compensated in US courts.<sup>1044</sup> In fact, Israel itself has legislated a Vaccine Victims' Insurance Law<sup>1045</sup> 5750-1989 allowing those determined to be harmed as a result of receiving a vaccine to claim damages.

The administration of two concomitant vaccines, DTaP-Hib-IPV and MMR have also been shown to have more side effects on babies in Israel than when those vaccines were administered separately.<sup>1046</sup> There have also been questions raised in the medical community about the effectiveness of vaccines, particularly pertussis vaccine, as a result of pathogen resistance.<sup>1047</sup>

Although the court is right to state that there is general agreement in the medical community that vaccines are a general 'good', that statement is not unqualified. That is, there are several points of contestation around vaccines, both in the medical profession<sup>1048</sup> and among members of the public.

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<sup>1043</sup> *Ibid.* at para. 28, 63.

<sup>1044</sup> Sharyl Attkisson, "Vaccines, Autism and Brain Damage: What's in a Name?" *CBS News* (September 14, 2010), online: <http://www.cbsnews.com/news/vaccines-autism-and-brain-damage-whats-in-a-name/>

<sup>1045</sup> Vaccine Victims' Insurance Law, 5750-1989

<sup>1046</sup> The full form of those vaccines are MMR: measles-mumps-rubella, and DTaP-Hib-IPV: diphtheria tetanus acellular pertussis-Haemophilus influenzae type b-poliomyelitis. Elena Shneyer, Avshalom Strulov and Yaakov Rosenfeld, "Reduced Rate of Side Effects Associated with Separate Administration of MMR and DTaP-Hib-IPV Vaccinations" (2009) 11 *IMAJ* 735-738

<sup>1047</sup> F. E. Mooi, N. A. T. Van Der Maas and H. E. De Melker, "Pertussis resurgence: waning immunity and pathogen adaptation – two sides of the same coin" (2014) 142:4 *Epidemiology and Infection* 685-694

<sup>1048</sup> Eve Dubé, Caroline Laberge, Maryse Guay, Paul Bramadat, Réal Roy and Julie Bettinger, "Vaccine hesitancy: An overview" (2013) 9:8 *Human Vaccines & Immunotherapeutics* 1763-1773 at 1767. See also J Leask, HE Quinn, K Macartney, M Trent, P Massey, C Carr et al. "Immunisation attitudes, knowledge and practices of health professionals in regional NSW" (2008) 32 *Australian and New Zealand Journal of Public Health* 224-9, PMID:18578819; online: <http://dx.doi.org/10.1111/j.1753-6405.2008.00220.x>, T. Jelleyman, A. Ure, "Attitudes to immunisation: a survey of health professionals in the Rotorua District" (2004) 117 *The New Zealand Medical Journal* U769.

What The Association for Information on Vaccines argued in their petition is that because the taking of vaccines is a *contested* issue, there should be freedom of choice whether one takes it or not. Indeed, this has so far been the case, where taking vaccines has been a choice. However, that freedom to choose is impaired with a law like the one in contention. Owing to the fact that the efficacy and safety of vaccines are actively deliberated in the public agenda, the court would do well to reconsider whether penalizations attached to the non-administration of a *contested* practice (irrespective of whether the benefits outweigh the risks) is fair to all parties involved.

Second, the court stressed that the amendment called for an increase of NIS 100 in the child allowance for the second, third and fourth child at the same time as it called for a decrease of NIS 100 from those who did not receive the vaccine.<sup>1049</sup> Therefore, the court determined that the amendment was not a 'deduction' but 'a denial of a benefit',<sup>1050</sup> which meant that it was less likely to be considered a violation of the constitutional right to human dignity.

However, there are two problems with the court's statement.

First, child allowance increases are prompted, since 2006, as a matter of course by the rising consumer price index (CPI),<sup>1051</sup> which is a measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services.<sup>1052</sup> The CPI measures inflation, and the child allowance increases are a response to rising inflation and a higher cost of living.

The fact that child insurance allowances are being paid to enable families to keep up with the rising cost of living so that they stay out of poverty makes it difficult to regard such payments as a 'benefit' as opposed to an essential cash injection.

Second, and most significantly, the child allowance increases were implemented until July 2013. Thereafter, and in the framework of the same Arrangements Law that enabled their increase, the child allowances were drastically cut.

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<sup>1049</sup> *Adalah v. Ministry of Social Affairs*, HCJ 7245/10 at para. 42

<sup>1050</sup> *Ibid.*

<sup>1051</sup> National Insurance Institute of Israel, *Annual Survey 2010*, "Chapter 3: Benefits: Activities and Trends – Children Insurance" at 4, 7

<sup>1052</sup> United States Department of Labor, Bureau of Labor Statistics, "Consumer Price Index" (undated), online: [http://www.bls.gov/cpi/cpifaq.htm#Question\\_1](http://www.bls.gov/cpi/cpifaq.htm#Question_1)

Today, the level of child allowances are the lowest they've been in the past twenty years.<sup>1053</sup> Nevertheless, the reduction of child allowances owing to non-receipt of the mandatory vaccinations is still on the books.

The court's third premise in reaching their decision was that the access Bedouin enjoyed to the well-baby clinics was 'good enough'. Justice Arbel fully adopted the government's submission regarding clinic accessibility, while it did not adequately consider the accessibility concerns raised by the petitioners.<sup>1054</sup> Further, the court almost completely ignored reports from leading human rights organizations who conducted in-depth studies on services provided by these clinics, and which found them to be grossly substandard.<sup>1055</sup>

So, for example, Israeli Jews from Omer receive 5.18 physician hours per 100 patients compared to 1.86 in the neighboring unrecognized Bedouin village of Algrain.<sup>1056</sup> There are 4 pediatricians who receive patients in Omer for 81.5 hours per week, while there were no pediatric services in Algrain in spite of the fact that there are more children in Algrain than there are in Omer.<sup>1057</sup> Both these glaring disparities did not strike the court as problematic or indicative of accessibility issues

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<sup>1053</sup> National Insurance Institute of Israel, *Annual Survey 2013*, "Chapter 3: Children Insurance" at 6-9. So, for example, as of May 2015, the second, third and fourth child (born in June 2003 and after) in an eligible family is paid NIS 188 per month, whereas after the said increase by April 2012 they were paid NIS 259 per month. See National Insurance Institute (NII), "Child allowance rates" (undated), online: [https://www.btl.gov.il/English%20Homepage/Publications/AnnualSurvey/2013/Documents/Chapter%203\\_Children.pdf](https://www.btl.gov.il/English%20Homepage/Publications/AnnualSurvey/2013/Documents/Chapter%203_Children.pdf), National Insurance Institute of Israel, *Annual Survey 2010*, "Chapter 3: Benefits: Activities and Trends – Children Insurance" at 1

<sup>1054</sup> See Adalah, Summary Petition for an Order Nisi, *Adalah v. Ministry of Social Affairs*, HCJ 7245/10 (December 6, 2010) at paras. 66-69.

<sup>1055</sup> See, for example, the reports of Physicians for Human Rights, *Discrimination in Access to Health*, Position Paper (November 23 2011), *Israel's Step Children: About the lack of pediatrics in the Unrecognized Villages in the Negev and its Ramifications Step Kids*, Position Paper (November 2008), *I am Here: Gender and the Right to Health in the Unrecognized Villages of the Negev* (April 2008), *The Bare Minimum - Health Services in the Unrecognized Villages in the Negev* (2009)

<sup>1056</sup> Physicians for Human Rights, *Israel's Step Children: About the lack of pediatrics in the Unrecognized Villages in the Negev and its Ramifications Step Kids*, Position Paper (November 2008) at 2, 21

<sup>1057</sup> *Ibid.* at 21

requiring remedy.<sup>1058</sup> Somehow, in the court's view, these substandard services were 'good enough for Bedouin'.<sup>1059</sup>

### Performing Biopolitics

The Foucauldian notion of biopolitics is a particularly helpful lens through which to understand the motivations and implications of the court's decision.

The court's decision is directed towards modifying the biological destiny of the population via vaccinations, and exerts disciplinary power (the amendment's provision to penalize non-administration, the court's decision that gave the amendment the additional force of law, the more nuanced coaxing by health professionals) towards that end.<sup>1060</sup>

As Foucault argues about medicalization, of which the administration and discipline around vaccinations are only a small part, disease was seen as an economic problem for social collectives to be resolved as a matter of policy.<sup>1061</sup> The rationale, Marxist in essence, was that the less healthy an individual was, the less able he would be to partake as labour in capitalist production.

In particular, Foucault saw vaccinations of children as intrinsic to the project of creating the economic and physical conditions to ensure the child's survival and development to adulthood towards the telos of 'being useful' within that production schema.<sup>1062</sup>

What made the issue of vaccinations *successful* as a social policy, however, was that it was policed, which is to say that an ensemble of apparatuses, regulations, institutions, and indeed *vaccination's*

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<sup>1058</sup> So, for example, Justice Barak-Erez states that should vaccination services to the Bedouin not be reasonably adequate, then the court would be ready to hear the case challenging the implantation of the law on these grounds, see *Adalah v. Ministry of Social Affairs*, HCJ 7245/10 at para 59 (Barak-Erez, D., concurring). See Justice Hayut concurring, *Adalah v. Ministry of Social Affairs*, HCJ 7245/10 at para 8 (Hayut, E., concurring).

<sup>1059</sup> The fact that health services for the Bedouin are so sparse, yet that this is nevertheless acceptable to the court, echoes with the Abu Musa'ed decision, when it ruled that the Bedouin have a right to 'minimum access to water' on the basis of having a 'human right to minimal existence in dignity'. *Abu Musa'ed v. Water Commissioner*, CA 9535/06.

<sup>1060</sup> Michel Foucault, *Security, Territory, Population: Lectures at the College de France, 1977-78* (1d) (Arnold I. Davidson Francois Ewald, Michel Senellart (eds.), Graham Burchell (trans.)) (Palgrave, Macmillan: 2007) at 10. For more on biopolitics, see the chapters on Atir and Umm al-Hiran and the Wine Path Plan.

<sup>1061</sup> Michel Foucault, "The Politics of Health in the Eighteenth Century" in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (ed. Colin Gordon, trans. Colin Gordon, Leo Marshall, John Mepham, Kate Soper) (New York: Pantheon Books, 1980) at 166

<sup>1062</sup> *Ibid.* at 172

*subjects themselves*, contributed to order, enrichment and health, making the social milieu one of physical well-being.<sup>1063</sup> The force of the moral responsibility to vaccinate, inculcated in parents, helped the family from the eighteenth century to “become the most constant agent of medicalization”.<sup>1064</sup>

Seen in this way, the court’s decision is one that aligns neatly with medicalization’s own goal, which is to build the nation as a healthy social body, and to have the nation’s subjects perform within the bounds of the law that accommodate for that goal. That the nation’s subjects do perform to that standard is evident in how the women from Bir al-Mashash were convinced of vaccination’s intrinsic good, and how the petitioner Adalah argued for the same.<sup>1065</sup>

A second motivation for the decision, and one that Judge Arbel admits, is that the case is one concerning nation-building at its core,<sup>1066</sup> and cites the state’s intervention towards women delivering babies in the hospital and not at home as another instance of the same.<sup>1067</sup>

Barak-Erez opines that the goal of the amendment is to build a healthy social body. This goal is indicative of the state promoting human dignity<sup>1068</sup> and looking out for the children in Israel.<sup>1069</sup> Yet, the fact that Bedouin children suffer from poor health<sup>1070</sup> and are deliberately denied basic living amenities by the state, does not strike Justice Barak-Erez as contradictory to her claim that the case is “evidence of the state’s commitment to the welfare of the children in Israel”.<sup>1071</sup>

The policy goal of moving the Bedouin out from their historical lands in the unrecognized villages and into the development townships, while concurrently having them secede land claims, is a biopolitical goal central to the building of the Israeli nation-state. This policy goal is a recurring theme in all the land-centered cases we’ve studied so far, and as we see, resurfaces in a case not explicitly about land, but about vaccinations and health care.

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<sup>1063</sup> *Ibid.* at 170

<sup>1064</sup> *Ibid.* at 173

<sup>1065</sup> *Adalah v. Ministry of Social Affairs*, HCJ 7245/10 at para. 28

<sup>1066</sup> *Ibid.* at para. 26-27

<sup>1067</sup> *Ibid.* at para. 60

<sup>1068</sup> *Adalah v. Ministry of Social Affairs*, HCJ 7245/10 at para. 36 (Barak-Erez, D., concurring).

<sup>1069</sup> *Ibid.* at para. 69 (Barak-Erez, D., concurring).

<sup>1070</sup> Physicians for Human Rights, *Israel’s Step Children: About the lack of pediatrics in the Unrecognized Villages in the Negev and its Ramifications Step Kids*, Position Paper (November 2008)

<sup>1071</sup> *Supra* note 1068 at para. 69 (Barak-Erez, D., concurring).

The reason that grossly substandard health services in the unrecognized villages is not a source of concern for the court is because these spaces of residence, as we saw clearly in the Umm al-Hieran evictions case, are not seen as legitimate spaces. Rather, they are spaces of colonial governmentality where systems of modernization and correction can be acted upon Bedouin bodies. And if those Bedouin bodies are non-conformant, either in their insistence not to move to development townships, or receive vaccinations, they are either forcibly evicted (as is immanent to Umm al-Hieran) or immediately designated as irresponsible and acting contrary to the best interests of their family or larger society.<sup>1072</sup>

It therefore becomes acceptable to condition the quality of health service delivery, and consequently the payment of child allowance, on whether the Bedouin are conformant to the state's goal of determining where is acceptable for them to live, in forms that do not pose a threat to the state's exercise of absolute sovereignty over the land within its borders.

I would like us to take notice of how vaccinations' subjects' performativity is what makes the biopolitical project such a successful one. Performativity, according to Judith Butler, should be understood more as a 'doing', rather than a 'being', one where "gender is the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being".<sup>1073</sup>

The women's convictions around vaccination appears to me to be a gendered expression of a health choice. The belief in vaccinations is not a characteristic essential to the nature of the women of Bir al-Mashash, but rather an outcome of the particular assemblage that they are embedded within, the regulatory frameworks of medicalization, state policy towards Naqab Bedouin, and what it means 'to be a good mother'.

These forces (in relational networks of constant realignment and fluctuation) dictate ways of doing gender through already-scripted acts, from the explicit acts of walking several kilometres and

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<sup>1072</sup> *Adalah v. Ministry of Social Affairs*, HCJ 7245/10 at para 63. This latter phenomenon whereby certain bodies are marked outside the respectable, healthy community is another marker of nation-building, allowing a consolidation of meaning around who makes the nation and who threatens it.

<sup>1073</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990; Anniversary edition 1999) at 33

utilizing multiple means of transport in order to vaccinate their child, to the more affect-based performativity of guilt, when they fail to live up to the ideal of what a mother should be.

Here I think also of Umm Faris and her recalling of the guilt and remorse she felt as a result of her child being burned while she was cooking for the family, something that was no doubt reinforced when social workers soon thereafter appeared at her doorstep to question whether she satisfied the responsibility standard that mothers ought to live up to (irrespective of life circumstances).

At the risk of sounding overly deterministic, one could say that one reason mothers want to vaccinate is because that's the responsible thing to do; mothers in Bir al-Mashash are pro-vaccination because that's what makes them 'good mothers'.

The case is performativity exemplified, and as discussed above, the women are exercising a 'choiceless choice'. That is, although they appear to be making a choice to vaccinate, the law, poverty and pervasive gender norms are the forces that constrain their choices. They are forced to choose vaccinations without being able to determine freely if that is indeed what they would like to do.

However, Butler identified the possibilities implicit to the situation. That is, because gender is a construct, implicit to that construction is the possibility of its undoing. As Butler writes, "Construction is not opposed to agency; it is the necessary scene of agency."<sup>1074</sup> I will discuss more on the subversive possibilities in the Naqab below, in the concluding chapter on agency and recognition.<sup>1075</sup>

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<sup>1074</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990; Anniversary edition 1999) at 147

<sup>1075</sup> It is worth noting that Elizabeth Povinelli, who I referenced above in relation to 'alternative social projects' as being the deviations from constructed, performative norms of being, proposes a refreshing take on how we can understand performativity through the lens of 'obligation'. Obligation is, in one sense, a liminal space, not always enunciated or known. Obligation is that space that could be considered "a no man's land between choice and determination". Povinelli, *Economies of Abandonment*, *supra* note 943 at 33. To say that one is obliged by something does not imply that one is also determined by it. Rather, it "is a much richer form of relationality, a continual nurturing, or caring for, bindings that are often initially very delicate spaces of connectivity". So, while one may be able to enunciate why one is drawn to a particular space to attend to a particular obligation or to sever it, there is very little that can be described as 'choice' in this orientation. Kim Turcot DiFruscia, "Shapes of Freedom: An Interview with Elizabeth A. Povinelli" (2010) 7:1 *Altérités* 88-98 at 93-94. This would be a worthwhile inquiry, to ask how much can we attribute obligation as contributing to performativity around vaccinations for mothers in Bir al-Mashash?

### Social Goals for Land and Life

As Justice Barak-Erez herself writes, the goal of child allowance payments has always been *social*.

In the early years of the state, when the state was keen to increase the birth rate in Israel, Ben-Gurion introduced a monetary prize for those families with ten children or more.<sup>1076</sup> Later, child allowances were legislated in part as a response to poverty (and social unrest) among recent Mizrahim (Jews of Middle Eastern origin) immigrants. There were also special child allowances made to those families where a member had served in the Israeli army, to ultra-orthodox families and new Jewish Israeli immigrants.<sup>1077</sup>

Therefore, the social goals whose realization was sought through child allowance payments were concerned with two factors primarily, demography and immigrant absorption. Yet, demography and immigrant absorption are precisely the goals that inform the state's *land and housing policy*.<sup>1078</sup>

You will recall how in the Wine Path Plan chapter we identified the objective of Jewish settlement as an element of 'national development', an objective enforced by raising the principle of 'national security' to the level of fundamental principle. Further, as discussed in the crop-spraying case, the motivation behind the spraying of herbicide on several thousand dunams of Bedouin agricultural land was to facilitate the state-building goals to secure land and assist in the settlement of new Israeli Jewish immigrants in the Naqab.

The social goals, in this case and in the Wine Path Plan and *Abu Mdeghem* cases, therefore are specifically *Zionist* social goals. They are goals that are drawn up with the purpose of benefiting the majority Jewish Israeli population alone, they are informed by the phenomenon of nation-building, and they secure the ability of the state to remain sovereign in Jewish terms.

The rather troubling implication of this case, however, is the slippery slope it sets us on. If access to health care for Bedouin is not set at a minimum standard concordant with international human

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<sup>1076</sup> *Adalah v. Ministry of Social Affairs*, HCJ 7245/10 at para. 7 (Barak-Erez, D., concurring).

<sup>1077</sup> *Ibid.* at para. 7-10 (Barak-Erez, D., concurring).

<sup>1078</sup> Yifat Holzman-Gazit, *Land Expropriation in Israel: Law, Culture, and Society* (Hampshire, England: Ashgate Publishing Limited, 2007) at 82-83. I've discussed this at length in *The Efficacy of the Israeli Legal System in Protecting and Fulfilling Naqab Bedouin Land Rights*, LLM Thesis (Toronto: Osgoode Hall Law School, York University, 2009).

rights law standards, then what are the implications for conditioning other rights on social goals? What other aspects of social health would seem threatening to the state that it would warrant an intervention harmful to the dignity or autonomy of vulnerable population groups, such as the Naqab Bedouin? Indeed, in the initial formulation of the amendment, later excised, Bedouin children would not have been allowed to enroll in school if they did not receive the mandatory vaccinations.

As discussed in the Wine Path Plan case, with national security raised to the level of fundamental principle in adjudication, there is no basic minimum guarantee for Palestinians to liberty as license (freedom from legal constraint to do what one wishes) nor to liberty as independence (being treated as someone that is independent and equal rather than being treated as someone subservient or in a manner insulting to one's dignity). Consequently, the threat of the downward spiral becomes a very real one.

## **Chapter 6 – Conclusion: Recognition**

After the inter-stellar journey over the past five chapters, we've arrived at our North Star, Polaris. I would like to conclude this dissertation with a reflection on recognition, specifically iterations of the Hegelian dialectic, to imagine ways forward and trajectories out of the impasse for Naqab Bedouin in their interaction with the Israeli legal system, but more generally as political person 'others' in a settler colonial state.

I suppose you could say that this dissertation was born during my volunteer work for Palestinian human rights NGOs in Israel, well over a decade ago. It was born in my personal recognition for what was suffering at possibly its most acute among Palestinians in Israel. Recognition was for contours of human suffering that I apprehended as running deeper and along edges more jagged, specifically for a *particular identity* of people, non-Jewish, Arab, Palestinian citizens of Israel from the Naqab region in southern Israel.

In truth, I gravitated towards 'Naqab Bedouin' as a subject of study as I saw reflections of myself in the community and in the desert-environment they lived, analogous to the environment of my birth and childhood. Over time, I came to appreciate how recognition happens on a few registers. Palestinians from the Naqab sought recognition for their particular identity and lifeways. They sought legal recognition for their living spaces. And they sought these things from the Israeli state, the sovereign.

Why did they seek recognition at this address? This is because they were seeking rights primarily as 'citizen subjects'. In order to be bestowed such rights, those with the power to accord it (the sovereign over these citizen subjects), ought to recognize them in particular ways – as citizen-subject/minority persons/moral persons and so forth. But the struggle for recognition from the sovereign is fraught, particularly in settler colonial situations like this one. Phenomenology tells us that we come into being by how we are recognized (at the same time that we make the world in dialectic relation). Fanon has shown us how in colonial situations, phenomenology operates through a historico-racial schema so that in the encounter with whiteness, the black body

constructs a self-image that is deficient. As a result, she is unable to make the world as a full sovereign.<sup>1079</sup>

Recognition for the wretched of the earth, those seeking social justice, those seen as and seeing themselves as minority, black, subaltern, Arab, LGBTI, Muslim or any other formula of non-normative pivots around a *particular identity* for which *autonomy* or *freedom* is sought.

I called upon Hegel and his treatment of the dialectic of recognition because it spoke of all these things. Hegel's dialectic speaks to identity, to conflict between competing identities and the resolution thereof, to self-recognition, to the possibilities of mutual recognition, and crucially, that which is often overlooked, the realization of Absolute Spirit. I find Hegel useful because it is the general abstraction that assists in interpreting the complex social relations that undergird this project.

That said, there is no one way to read Hegel.<sup>1080</sup> As Butler has shown in *Subjects of Desire*,<sup>1081</sup> readings of Hegel are contingent, as is the process of reading itself.<sup>1082</sup> As Theodor Adorno has admitted, "[i]n the realm of great philosophy Hegel is no doubt the only one with whom at times one literally does not know, and cannot conclusively determine, what is being talked about."<sup>1083</sup>

Andrew Cole puts forth a particular reading of Hegel's dialectic, underscoring the temporal sensitivity required to better determine the original intent of the author. Cole's main thesis is that Hegel's writings were composed in the medieval ages, and it was the feudalistic relations of that time that informed his writings.<sup>1084</sup> Cole contends that what is missing from other scholars who've been influential in elaborating on the dialectic, such as Kojève, is that they ignored the issue of

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<sup>1079</sup> Nasser Rego, "Reading Fanon in Palestine/Israel" *Jadaliyya* (April 9 2012), online: <http://www.jadaliyya.com/pages/index/4972/reading-fanon-in-palestine-israel>, Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1963)

<sup>1080</sup> Paul Redding, "Georg Wilhelm Friedrich Hegel", *The Stanford Encyclopedia of Philosophy* (Summer 2017 Edition), Edward N. Zalta (ed.), forthcoming URL = <https://plato.stanford.edu/archives/sum2017/entries/hegel/>.

<sup>1081</sup> Where Butler looks at how Hegel was appropriated by Hyppolite, Kojève, Foucault, Sartre, Lacan and Deleuze. Judith Butler, *Subjects of Desire: Hegelian Reflections in Twentieth-Century France* (New York: Columbia University Press, 1987)

<sup>1082</sup> Sara Salih (ed.), *Judith Butler* (London and New York: Routledge, 2002) at 33

<sup>1083</sup> Theodor W. Adorno, "Skoteinos, or How to Read Hegel" in *Hegel: Three Studies* (trans. Shierry Weber Nicholsen) (Cambridge, Mass.: MIT Press, 1993) at 89, cited in Andrew Cole, "What Hegel's Master/Slave Dialectic Really Means" (2004) 34:3 *Journal of Medieval and Early Modern Studies* 577-610 at 577 [Cole, "What Hegel's Dialectic Means"]

<sup>1084</sup> Cole, "What Hegel's Dialectic Means", *ibid.* at 577

possession, and probably focused too much on the fight to the death instead. Accordingly, they mistranslated 'lord' and 'bondsman' as 'master' and 'slave', thereby eliding this focus on possession.<sup>1085</sup> The struggle for recognition under this formula therefore becomes a struggle between 'ownership' of land by the lord and its 'effective possession' by the serf or bondsman. The bondsman's self-consciousness therefore comes about through labour and in the late Middle Ages allowed him to break his servile bonds and himself become a landholder.<sup>1086</sup> Alienation comes about because the product of the bondsman's labour is not directed towards life-affirming ends, rather it is absorbed by the protocapitalist forces.<sup>1087</sup> The dialectic's resolution or its *aufheben* moment happens when we see how 'possession', which gave rise to feudal society was also that which led to its undoing as it gave rise to a revolutionary self-consciousness in the serf.<sup>1088</sup>

It is hard to ignore the parallel between this reading of the dialectic and the Naqab Bedouin community's own dialectic with the Israeli state over the issue of land. The state claims to be owner of the land that Bedouin 'effectively possess' and have lived on for centuries and it is this battle that is staged between the state and the Bedouin. It is the battle for recognition of the propertied self. This specifically Marxist reading, that stresses that Hegel was talking more about 'land' than he was talking about 'life' as usually understood,<sup>1089</sup> finds echoes in the work of legal scholar, Brenna Bhandar.

According to Bhandar, the subject of recognition is "thoroughly imbricated with relations of appropriation and ownership".<sup>1090</sup> Drawing on Fanon, she stresses that in the colonial context, there was no possibility for mutual recognition as the native was dispossessed and alienated.<sup>1091</sup> In order to be recognized as a proper political subject in a settler colonial situation, one had to be in possession of property. Accordingly, recognition was about recognition of the propertied self, a

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<sup>1085</sup> *Ibid.* at 580-581

<sup>1086</sup> *Ibid.* at 584

<sup>1087</sup> *Ibid.* at 585

<sup>1088</sup> *Ibid.* at 590-591

<sup>1089</sup> *Ibid.* at 593

<sup>1090</sup> Brenna Bhandar, "Plasticity and Post-Colonial Recognition: 'Owning, Knowing and Being'" (2011) 22 *Law Critique* 227-249 at 228. See also Brenna Bhandar, "Re-covering the limits of recognition: The politics of difference and decolonisation in John Borrows' *Recovering Canada: The resurgence of Indigenous Law*" (2007) 27:1 *The Australian Feminist Law Journal* 125-151

<sup>1091</sup> Brenna Bhandar, *ibid.* at 227-228

privilege restricted to those who were white and male since those were the qualities, when possessed in the requisite degrees, that determined whether one could own property or not.<sup>1092</sup>

Bhandar incorporates the concept of plasticity, as espoused by philosopher Catherine Malabou, to show the deconstructive potential immanent to a situation, such as the potentiality of the body to destabilize typical forms of recognition in a settler-colonial situation.<sup>1093</sup> Bhandar illustrates how Palestinians from the refugee camp of Dheisheh are undermining recognition of the propertied self through the construction of a bridge, illegal under the Oslo Accords between the PLO and Israel, between their camp and the newer, built up area of 'Doha City' in the West Bank. By engaging in such building practices, Dheishens are imaging and creating something extraterritorial, escaping the control of the old logic of state sovereignty.<sup>1094</sup>

While I subscribe to both Cole's and Bhandar's reading of recognition as recognition of the propertied self, I subsume such a reading within a 'revised metaphysical' reading of Hegel. It is 'revised metaphysical' because it is not exclusively material and it incorporates an idealist sensitivity. At the same time, my reading is not idealist in that it subscribes to classical teleological spirit monism central to Taylor's interpretation<sup>1095</sup> (which would say that 'immaterial minds', whether God's or human's were the real entities to which material things could be reduced to)<sup>1096</sup> or that of English idealist, FH Bradley.<sup>1097</sup>

By 'revised metaphysical' it is opposed to traditional metaphysical in that it attempts at an understanding of reality and subjects through the mind/reasoning, at the same time that it acknowledges the limits of the mind. It is idealist in the Aristotilean, neo-Platonic sense, in that thoughts of a divine mind are immanent to matter, where matter and mind are attributes of the one substance.<sup>1098</sup>

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<sup>1092</sup> *Ibid.* at 228-229

<sup>1093</sup> *Ibid.* at 231, 233, drawing on Catherine Malabou, *Plasticity at the Dusk of Writing: Dialectic, Destruction, Deconstruction*, (trans. Carolyn Shread) (New York: Columbia University Press, 2010)

<sup>1094</sup> Brenna Bhandar, *ibid.* at 247-248

<sup>1095</sup> Charles Taylor, *Hegel* (Cambridge: Cambridge University Press, 1975)

<sup>1096</sup> Paul Redding, "Georg Wilhelm Friedrich Hegel", *The Stanford Encyclopedia of Philosophy* (Summer 2017 Edition), Edward N. Zalta (ed.), forthcoming URL = <https://plato.stanford.edu/archives/sum2017/entries/hegel/>

<sup>1097</sup> Who defines the Absolute as follows, "the Absolute is one system, and ... its contents are nothing but sentient experience. It will hence be a single and all-inclusive experience, which embraces every partial diversity in concord. For it cannot be less than appearance, and hence no feeling or thought, of any kind, can fall outside its limits". See Francis Herbert Bradley, *Appearance and Reality* (London: George Allen and Unwin Ltd., 1893).

<sup>1098</sup> *Supra* note 1096

*The forms and modalities of recognition in this study*

In the five case studies we explored, we looked at how Israel, as a collection of individuated interests given expression in the form a state, is in a dialectic of recognition with the Naqab Bedouin community.

In all the legal cases, Bedouin places of residence in the unrecognized villages were concluded to be 'illegal', thereby rendering the residents of such villages as lawbreakers. Bedouin remain lawbreakers according to place of residence unless explicitly exculpated from such illegality, as happened in the Umm al-Hieran case when the judges chastised the executive for referring to them as 'illegal' when they were in fact 'permitted residents'. However, even though they were recognized as being 'permitted residents' by the courts, this did not preclude the courts' eviction of the community from their place of residence to make way for an Israeli Jewish community.

We also saw how Bedouin were apprehended by the courts and the executive as threatening to Jewish sovereignty, particularly on the issue of their claims to land and their current places of residence, most notably in the Wine Path Plan, but also in *Abu Mdeghem*.

Because of the particular modality by which the Israeli state apprehends Bedouin, which we can say is 'dismembered' as it disavows the Bedouin subject's historicity, genealogy, affect, diversity, and the fact that such a being is always a becoming, Bedouin are not recognized as full moral persons or political subjects. It could be said that they therefore come to be recognized in the interstices between bare life and politically significant life.<sup>1099</sup> Bedouin life, then, "may be apprehended as 'living' but not as 'life'".<sup>1100</sup>

Bedouin recognition, as partial as it may be, is also conditional. Therefore, the courts relay to Bedouin how they ought to behave in order to be bestowed 'official recognition'. However, 'official recognition' does not necessarily mean that the courts will then begin to see their lives as politically significant life. Rather, Bedouin lives somehow become more intelligible and the basic elements that sustain life become more available, be they water, shelter or electricity. Therefore, the courts condition a higher grade of 'recognition' upon Bedouin moving to development towns, to their

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<sup>1099</sup> Agamben, *Homo Sacer*, *supra* note 493

<sup>1100</sup> Butler, *Frames of War*, *supra* note 93 at 7-8

‘integration’ into Israeli society, to their forfeiting of historical land claims, and possibly towards a greater identity affiliation as ‘Israeli’ rather than ‘Palestinian’.

In the struggle for recognition, it is not uncommon to see Bedouin appeal to these conditions. We see evidence for this in court proceedings where Bedouin petitioners and their legal representatives appeal to the Goldberg Commission’s recommendations for the resettlement of the community or in the way individual Bedouin such as Nuri are significantly invested in relationships with Israeli individuals, institutions and even solidarity struggles that are specifically ‘Israeli’.<sup>1101</sup> In this way, Bedouin hold on to the hope that if they speak a particular language that it may be caught by the right ears and resonate loudly enough that it will result in some truncated form of recognition.<sup>1102</sup>

In seeking such a form of recognition, the community risks not seeing the full extent of what Israel is asking. The state is not only saying do such and such so *we can recognize you* in a particular way, but recently has been calling for Palestinians generally *to recognize Israel* in a particular way. The insistence of Israel seeking recognition from Palestinian citizens as ‘a Jewish state’ is a very strange ask.<sup>1103</sup> In essence, it is telling Palestinian citizens, ‘do not see yourself in the state that is meant to represent your interests and accord you rights’. The state, then, is asking for the Palestinian’s self-negation through this form of recognition.

And yet, what was inspiring about my encounter with the women of Bir al-Mashash was how they exhibited the bondsman’s consciousness in Hegel’s dialectic. On numerous occasions, they spoke of a shared humanity with Israelis, reflecting a self-consciousness becoming aware of another self-consciousness and through the process becoming certain of its pure being-for-self.

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<sup>1101</sup> As evidenced in Nuri’s considerable investment in the Israeli social justice protests of 2011, also dubbed as the “cottage cheese protests”. Nuri’s investment involved camping overnight with Israelis on Ben-Gurion street in Beersheba to handing out protest flyers at supermarkets, among many other solidarity acts. For more on the 2011 social justice protests, and why these were particularly ‘Israeli’ and also steered by state-loyalist discourses, see Uri Gordon, “Israel’s ‘Tent Protests’: The Chilling Effect of Nationalism” (2012) 11:3-4 *Social Movement Studies* 349-355

<sup>1102</sup> As Butler cautions, while the subject may talk back to the socially constructed authorities, she cannot escape her situation of fundamental subjection. Judith Butler, *Excitable speech: A politics of the performative* (New York: Routledge, 1997) at 15

<sup>1103</sup> See the discussion on ‘the pervasiveness of national security’ in the Wine Path Plan chapter for further elaboration on this point. Raef Zreik, “Why the Jewish State Now?” (2011) 40:3 *Journal of Palestine Studies* 23

### *Recognition is the Struggle*

In the struggle for recognition, numerous authors warn of the shortcomings of state-minority recognition. So, for example, Dean Spade has shown that following state recognition of racialized and queer identities, how administrative governance nevertheless results in the reduced life-chances of those recognized as non-normative.<sup>1104</sup> In *Frames of War*, Butler cautions how in war situations, certain lives come to be seen as grievable when lost, while others not as much. This is because states render certain lives recognizable as 'life' and others as 'living'. Thus recognized, when 'living' subjects (as opposed to subjects of life) are wronged, their precarity cannot be sensed, allowing these lives to wither without them being grieved.

In *The Cunning of Recognition*,<sup>1105</sup> Elizabeth Povinelli critiques liberal forms of recognition in multicultural societies as a category of rule. She stresses how the law provides for fixed and formal standards in recognizing cultures and 'indigeneity'. Therefore, not only is indigenous culture compelled to show continuity in its expression to the court and public, and to constantly prove the same, there are also certain indigenous practices prohibited by law and by the public's sense of moral decency, being culturally repugnant.<sup>1106</sup> Povinelli cautions about such forms of recognition as they force subjects to both be and not be themselves in the contradictory discursive and moral mandates that they inhabit.

Glen Sean Coulthard tells a personal tale to drive home the lie of recognition (and reconciliation) in the Canadian context. In the 1980s and 1990s, the Dene Nation negotiated away rights to their indigenous lands in exchange for limited self-government and land claims deals proffered under the rubric of 'recognition'. The land claims process became a form of primitive accumulation, something the Dene Nation vociferously opposed only a decade earlier. As a result, although the indigenous community were not physically evicted from their lands, they run the very real risk of

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<sup>1104</sup> See a short discussion of the same in the Wine Path Plan chapter. Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Boston: South End Press, 2012).

<sup>1105</sup> Povinelli, *Cunning of Recognition*, *supra* note 14

<sup>1106</sup> *Ibid.* at 3. This fact underscored the hypocritical nature of such liberal governance. While liberal governance claims to adjudicate difference i.e. answer to the needs of minorities on account of public reason, when they come to find certain 'different' practices by said minorities as repugnant, exceptionalism kicks in, and the different no longer has dignity deserving of being adjudicated by reason. See Kim Turcot DiFruscia, "Shapes of Freedom: An Interview with Elizabeth A. Povinelli" (2010) 7:1 *Altérités* 88-98 at 91-92

being dispossessed, as those same lands “remain open for exploitation and capitalist development”.<sup>1107</sup>

### *Alternative Engagements with the Dialectic*

I'd now like to look at more philosophical engagements with the Hegelian dialectic. And thereafter to address what the recommended shapes that recognition, and its promise of freedom or autonomy for the individual, ought to take.

I particularly appreciate the direction in which Indian philosopher, Sri Aurobindo has taken up the Hegelian dialectic<sup>1108</sup> in the reconstruction of Vedantic thought.<sup>1109</sup> So, while Sri Aurobindo applies the Hegelian concept of the Absolute as Being and Consciousness (the latter regarded as an intuitive and supramental awareness), he develops the concept further by adding a third axis, which is that of *ānanda*, or 'Supreme Bliss'. Ultimate reality by this formulation is *saccidānanda* or the Absolute as Existence-Knowledge-Bliss.<sup>1110</sup>

While Sri Aurobindo subscribes to the Hegelian view that the Absolute is a self-positing universal consciousness, he pushes against the association of the Absolute with reason or mind; it is, rather, 'supramental' awareness.<sup>1111</sup> As opposed to idealists, Sri Aurobindo's concept of the Absolute is not static oneness, but a triple movement of involution-evolution, or separation and return. The self-unfolding of Spirit is not linear or mechanistic but one animated by evolutionary principles from the supramental plane. Also, as opposed to Hegel, involution-evolution is value-centric, grounded in *ānanda* or 'Supreme Bliss', and this is “the aesthetic-value principle underlying the cosmos”.<sup>1112</sup>

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<sup>1107</sup> Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 77

<sup>1108</sup> Steve Odin, “Sri Aurobindo and Hegel on the involution-evolution of Absolute Spirit” (1981) 31:2 *Philosophy East and West* 179-191, Sri Aurobindo, *The Life Divine* (Pondicherry, India: Sri Aurobindo Ashram Press, 1973).

<sup>1109</sup> Vedanta is one of the six systems of Indian philosophy.

<sup>1110</sup> Steve Odin, “Sri Aurobindo and Hegel on the involution-evolution of Absolute Spirit” (1981) 31:2 *Philosophy East and West* 179-191 at 180

<sup>1111</sup> *Ibid.*

<sup>1112</sup> *Ibid.* at 188

Sri Aurobindo shows how the body, vital, mind and supermind are all vehicles for the manifestation of Absolute Spirit, in a cosmological process that is free and expressive “as opposed to one emanating from privation and necessity”.<sup>1113</sup>

At the same time, I acknowledge the difficulty one would have squaring *ānanda* as the underlying principle of the cosmos when we think of the increasing precarity of bodies under constellations of multiple modes of power – sovereign, disciplinary, and biopolitical in the age of the Anthropocene.

Renowned Hegelian philosopher, Houlgate is particularly helpful for readers grappling with Hegel’s texts, in particular with the concept of Absolute Spirit. When Hegel refers to ‘God’ or ‘Absolute Spirit’ he is certainly not talking about the metaphors or other representations of ‘God the Father’ or the ‘Holy Spirit’. Rather, he refers to “*existence, actuality or being as such*”.<sup>1114</sup>

Philosophy is the driver that moves us from seeing ‘God’ as image/representation to seeing ‘God’ as absolute being and human self-consciousness as one single actuality. When actuality becomes self-conscious in human beings within a community of reciprocal recognition, this is Absolute Spirit.<sup>1115</sup>

According to Houlgate’s reading of Hegel, then, how do humans become free and autonomous? Since the spectre of war and death persistently hover, and freedom is often construed as a ‘right’ to be affirmed by the sovereign, so there will always be limits to freedom’s bestowal and exercise. Accordingly, humans become free not through economic or political work, “but through an understanding of the absolute character or *truth* of existence in art, religion and philosophy”.<sup>1116</sup>

For Judith Butler, seeking to know oneself, as well as to overcome external objects, is the fuel behind the Spirit’s journey. What motivates the ‘desire for recognition’ is the desire for self-consciousness.<sup>1117</sup> All the same, the subject can only know itself through recognizing and knowing *another*. In Hegel’s *Phenomenology*, there are two modes of desiring: desire for Other leading to loss

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<sup>1113</sup> *Ibid.* at 189-190

<sup>1114</sup> Stephen Houlgate, *An Introduction to Hegel: Freedom, Truth and History* (2d ed.) (Oxford: Blackwell Publishing, 2005) at 100

<sup>1115</sup> *Ibid.*

<sup>1116</sup> *Ibid.* at 210

<sup>1117</sup> Sara Salih (ed.), *Judith Butler* (London and New York: Routledge, 2002) at 25-26

of Self and the desire for self-consciousness (which entails autonomy) which leads to the loss of the world.<sup>1118</sup>

Yet, like other critics of the dialectic that I've mentioned above, Butler appreciates how social norms define the dialectic of recognition. Therefore, who is recognized and how she is recognized is determined by the social conventions, language and norms that frame the encounter with the other.<sup>1119</sup>

All the same, Butler does not understand the subject as 'subjected', but as one acting with agency. Although a person is shaped by social norms, the subject "participate(s) in the discursive processes that define its existence".<sup>1120</sup>

Recognition comes about through seeing vulnerability as a condition of our ethical relation to another, that is we are all at risk of being infringed and hurt. Further, acknowledging we cannot know ourselves completely, allows us to suspend judgement of the other, and this is what enables us to experience the other in the first place.<sup>1121</sup> For Butler, recognition is not the pursuit of consciousness' self-affirmation, rather it is one of intersubjective agency, something to be performed, and something that happens in a community of reciprocal recognition.<sup>1122</sup>

### *Agency and Fracture*

Yet, what happens when one does not live in a community of reciprocal recognition? For Palestinian Bedouin in the Naqab, where the forms of recognition are those symptomatic of a settler colonial situation as described above, how does the subject effect agency towards her freedom and autonomy?

There were numerous instances in the five case studies where Palestinian Bedouin exhibited agency. They do it in the act of *sumoud* – insisting on a persistent, stubborn presence on their historical lands in spite of considerable pushback by the state. This particular modality of agency

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<sup>1118</sup> *Ibid.* at 26

<sup>1119</sup> Kathy Dow Magnus, "The Unaccountable Subject: Judith Butler and the Social Conditions of Intersubjective Agency" (2006) 21:2 *Hypatia* 81-103, 99-100

<sup>1120</sup> *Ibid.* at 101

<sup>1121</sup> *Ibid.* at 95

<sup>1122</sup> *Ibid.* at 99-100

has echoes in that signalled by Brenna Bhandar with how Palestinians in the Dheisheh camp are engaging in extraterritorial practices to undermine the logic of state sovereignty, in spite of the logic of state sovereignty (and its attendant practices of disciplinary and biopolitical power).

In the lived space of Umm al-Hieran, we identified a couple of instances of agency. Naqab Bedouin of Umm al-Hieran resist via outreach to the public sphere by engaging journalists and researchers so that they can tell their stories and through performing 'checkpoint cheek', or confronting racism at the checkpoint when they encounter it.

With the women of Bir al-Mashash, I noted how subversive speech acts fractured the assemblage.<sup>1123</sup> Therefore, in the informal gathering, they shared statements such as "The state isn't looking out for us", "Why is it that when a home or two of an Israeli Jew is destroyed, they turn the world upside down?", "Don't they tell us to take cover in shelters when the bombs fall, where do we take cover? There are no shelters", "Why are so many millions of dollars being spent daily on the war... when the same could have been used to ease the suffering of the poor"?

These statements dispel myths of a state looking out for its citizens and highlight the double standard applied when the state deals with Israeli Jews and Palestinians. The codification of the promise of citizenship is therefore undone in informal conversation.

In all these acts, we note the subversion of recognition as is particularly taken up in the materialist sense in settler-colonial situations. Naqab Bedouin are effectively saying, "This is not a community of reciprocity, so I do not expect recognition for our lifeways and for our lands to come from you, the sovereign".

This stands in stark contrast to the community's formal, institutionalized approach to recognition, where the community seeks to be recognized by the state and to be absorbed into some sort of liberal form of recognition as a minority community in the Jewish state. We saw this, for example, in the setting up of the Regional Council for the Unrecognized Villages (RCUV), the most prominent of Bedouin NGOs, whose *raison d'être* was government recognition for four dozen Bedouin villages. And we see it in community participation in the state-sanctioned Goldberg Commission 'seeking to

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<sup>1123</sup> Judith Butler, *Excitable speech: A politics of the performative* (New York: Routledge, 1997)

regulate Bedouin settlement' and in the everyday practices by leading NGOs campaigning for recognition.<sup>1124</sup>

The use of the court very much falls in line with the more acceptable forms of agency. Conditioning the citizen-state encounter in the court, as in other state-sanctioned participatory forums, is a first-step conditional in order to be recognized as a political person in the settler colony.

What is particularly interesting, however, particularly in the agency exhibited by the women of Bir al-Mashash, is the affective turn. Affective praxis has the potentiality imminent to its production to fracture the assemblage.

### *On Affect*<sup>1125</sup>

Affect exists in the interstices of the intimate, it is obtuse and fleeting. As Roland Barthes has put it, while the material and symbolic are both signifiers, 'the third meaning', which we can take to mean 'affect', is *significance*. It is of consideration, but it does not conclusively signify any one thing.<sup>1126</sup> They pick up texture as they move through bodies, dreams and lifeways.<sup>1127</sup>

Although affect is commonly taken to be 'emotion', the two pertain to different orders. Affect is different from emotion since emotion is subjective, recognizable, knowable, defined, unlike affect.<sup>1128</sup> The spark of affect can spring up in the encounter with another being, an object, in a

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<sup>1124</sup> See, for example, the "I Am Invisible – Because You Refuse to See Me" campaign by Adalah: The Legal Center for Arab Minority Rights in Israel, online: <https://www.facebook.com/invisiblebecauseyourefuse/> and the "Please Recognize" newsletter column by Dukium – The Negev Coexistence Forum, see for example, the May 2011 issue.

<sup>1125</sup> I quote Kathleen Stewart at length here for her description of how the everyday is replete with affect, "Ordinary affects are the varied, surging capacities to affect and to be affected that give everyday life the quality of a continual motion of relations, scenes, contingencies, and emergences. They're things that happen. They happen in impulses, sensations, expectations, daydreams, encounters, and habits of relating, in strategies and their failures, in forms of persuasion, contagion, and compulsion, in modes of attention, attachment, and agency, and in publics and social worlds of all kinds that catch people up in something that feels like something... they pick up density and texture as they move through bodies, dreams, dramas, and social worldings of all kinds... At once abstract and concrete, ordinary affects are more directly compelling than ideologies, as well as more fractious, multiplicitous, and unpredictable than symbolic meanings". Kathleen Stewart, *Ordinary Affects* (Durham & London: Duke University Press, 2007) at 1-3.

<sup>1126</sup> Roland Barthes, "The Third Meaning: Research Notes on Some Eisenstein Stills," in *The Responsibility of Forms: Critical Essays on Music, Art, and Representation* (trans. Richard Howard) (Berkeley: University of California Press, 1985) at 318, cited in Kathleen Stewart, *Ordinary Affects* (Durham & London: Duke University Press, 2007) at 3

<sup>1127</sup> Kathleen Stewart, *Ordinary Affects* (Durham & London: Duke University Press, 2007) at 3

<sup>1128</sup> Brian Massumi, "The Autonomy of Affect" (1995) 31 *Cultural Critique* 83-109 at 88

particular situation, with one self and in the everyday. And crucially, it also contains the recipe of its own unmaking.

It wouldn't be accurate to say that affect exists within a person. It isn't just about the fact that I feel a certain something about a certain something. Rather, affect is potential, because as Sara Ahmed reminds us, it is *circulatory* and *mobile*. In that erratic and unstable movement between the material, symbolic, and the embodied, it has the potential to disrupt and break. In that movement, affects construct persons and bind bodies, reminding us that we are not fully autological authors – we do not alone make ourselves, nor can we easily speak of an essence that we possess, rather we are *effects of effects* and *affect* and its movement remind us of that.<sup>1129</sup>

The subversive speech acts of the women of Bir al-Mashash were a product of *something* that emanated in the space between the content (so, when the state promises to cater to citizens and when the state drops bombs in a tit for tat with Gazan 'bottle rockets') and the effect (the home demolitions that the community experiences and the reverberations of the earth and there being no shelter to run to). The something that emanates in that interstitial space between content and effect is the fleeting, and circulating, sense of being hoodwinked and of not being seen as fully human, even though clearly, they are.

By attuning ourselves to such affective currents, we can trace the potentiality for the undoing of the assemblage. So, if recognition is fleeting for Naqab Bedouin in the state-citizen dialectic, why does the desire for it persist?

As Lauren Berlant has shown, affect also clues us into why we desire recognition. In *Cruel Optimism*, Berlant outlines why the desire (for recognition, for love) is a cluster of promises we want someone to make possible for us. Our attachment, however, to this object of desire is incoherent because it doesn't guarantee us that which we seek, and often fails to do so.<sup>1130</sup>

Nevertheless, there is something intrinsic to its promise that keeps us seeking it out. In this sense, Naqab Bedouin's desire for recognition from the state is also a form of 'cruel optimism'. It is attachment to *that which is not yet lost*. It gives the Naqab Bedouin subject a sort of continuity of

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<sup>1129</sup> Sara Ahmed, "Affective Economies" (2004) 22:2 *Social Text* 117-139

<sup>1130</sup> Lauren Berlant, "Cruel Optimism" (2006) 17:3 *differences: A Journal of Feminist Cultural Studies* at 20

what it means to 'keep living on and to look forward to being in the world'. All the same, the 'cruel' rears its head when we realise that the object of desire contributes to one's attrition where thriving is meant to occur.<sup>1131</sup> In this way, by tuning into affect, we can also see what makes the assemblage, and 'the struggle for recognition', so stable.

By way of conclusion to this dissertation, can we imagine a way forward for Naqab Bedouin in their dialectic with recognition? Is there something that would better help them realize thriving over merely surviving?

Assuming we give Houlgate's caution weight, that full freedom and autonomy of the Self through recognition can never be achieved in a situation like the one that Naqab Bedouins find themselves in – one of war, pervasive security and no minimum guarantees of liberty as license or liberty as independence – can they ever be fully free? And how would that look like within (or without) the dialectic of recognition?

*"There are no Bedouin but at most people who engage in Bedu-ing among other activities"*<sup>1132</sup>

One of the things that struck me the most in over a decade of fieldwork and interaction was how contingent *identity* was when working with the community. At times, community members identified as Muslim, at times Palestinian, on a few occasions as Israeli, even others as Arab, and certainly there were those that self-identified as 'Bedouin'.

It was striking because although I acknowledged that identity was a construct, very much like race, I nevertheless continued to recognize the community under that label. Even though I was told repeatedly by community members, even if implicitly so, that I ought not to take this for granted.

A famous lawyer from the community once guffawed when I asked him if his family was from the Tiyaha or Tarabin Bedouin tribes of the Naqab. He clarified to me after, "Yes, Tiyaha if you must know. But we stopped being 'Bedouin' a long time ago". By this he meant that the primary qualifier for that identity was being 'a desert dweller' engaged in nomadic or semi-nomadic temporal

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<sup>1131</sup> *Ibid.* at 21

<sup>1132</sup> An iteration of "there are no painters but at most people who engage in painting among other activities", from Karl Marx, Friedrich Engels, *The German Ideology* (ed. C.J. Arthur) (New York: International Publishers, 2004) at 109.

movements. Certainly, as a well-travelled lawyer who had received his Masters degree in Law from an American University, he wanted to make sure I knew that he was no such 'Bedouin'.

I also picked up on this among the women in Bir al-Mashash. In the interviews, there was a great deal of not knowing and no firm conviction that 'this' is who I am. Indeed, being from the Abu Skeik family, they don't consider themselves 'Bedouin' because the Abu Skeik family are among the 'falah' (peasant, agricultural labour) class that settled in the Naqab and were therefore distinguished from the majority nomadic tribes that lived in the Naqab.

When I met Sa'eed al-'Oqbi, a prominent shari'ah court judge, and Nuri's younger brother, the thing that haunted me most about him, months after I left his dwelling in the unrecognized village of Khirbet al-Hura, was the melancholy that stubbornly tagged itself to his skin. Still, Sa'eed didn't seem particularly eager to throw it off. Nuri, on his own volition, later told me Sa'eed's story. Sa'eed had lost his daughter when she was still very young because of a car accident. She was one among fifteen extended family members that had died because their village was 'unrecognized' and so lacked proper roads, walkways, and paved turn-offs from the highway.

It didn't strike me as obvious that Sa'eed would want to be recognized (by anybody) as a Bedouin or a judge, more than he would as a father who was still mourning his daughter. I am trying to lay the groundwork for an ethical relation to the dialectic that is also authentic to the very particular narratives of intimate realms; and one that doesn't assume that in a study such as this one we ought to capitulate to the grand narrative of Israel versus Palestine.<sup>1133</sup>

For Judith Butler, it is because the moral subject is embedded in so many social structures that she cannot definitively say 'this is who I am'. The moral subject is one that acknowledges that she cannot fully know herself. Such a moral subject that is able to acknowledge her own shortcomings and fallibility is also one to accept the shortcomings of others.<sup>1134</sup>

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<sup>1133</sup> Even though, in many ways, it is about that grand narrative. However, I am seeking some sort of opening out of the impasse and towards freedom and autonomy of a self imbricated in multiple entanglements of recognition. Accordingly, a strictly materialist reading of recognition as my point of focus will not suffice.

<sup>1134</sup> Kathy Dow Magnus, "The Unaccountable Subject: Judith Butler and the Social Conditions of Intersubjective Agency" (2006) 21:2 *Hypatia* 81-103 at 93

In *Parting Ways*, Butler attempts to critique Zionism as colonial subjugation from within the Jewish tradition, drawing on Levinas, Arendt, Benjamin and others and then effecting a break from such an identitarian discourse in order to account for living in a world of social plurality.<sup>1135</sup> Butler explains that ethical relationality, which we can appreciate as what ought to occur in the dialectic of recognition, is about displacing the self and opening to some demand that emanates from another. Alterity as the condition for such relationality is key to this displacement.<sup>1136</sup>

Accordingly, ethical relationality, or ethics for short, is about contesting sovereign notions of the subject and self-identity. Ethics therefore becomes about clearing a space for that which is 'not-me'. In her own words, ethics is "a way of being comported beyond oneself, a way of being dispossessed from sovereignty and nation in response to the claims made by those one does not fully know and did not fully choose".<sup>1137</sup>

Butler draws our attention to how Levinas himself insisted that we are bound by those who we do not know or choose, in a precontractual obligation. At the same time, it was also Levinas who said that the 'Palestinian had no face', and Levinas' ethical obligation could only extend to those like him who were bound to Judeo-Christian and classical Greek origins. Butler responds by saying that we are obligated to extend that principle to Palestinians precisely because Levinas could not.<sup>1138</sup>

While Butler is proposing an ethical relation for the Jew towards the non-Jew in Israel/Palestine, the anti-identitarian current is instructive for Naqab Bedouin also seeking freedom and autonomy through the dialectic of recognition.

Although I stated at the start of this section that what the wretched of the earth seek is freedom and autonomy for a *particular identity*, full freedom and identity does not come about without the requisite displacement of identity that Butler and Levinas speak about. In the movement towards Absolute Spirit, it is only when the bondsman confronts his own nothingness, does his consciousness understand that his essence lies *in being nothing in particular*. This being nothing "affords him a profound sense of freedom by allowing him to uncouple his identity from the

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<sup>1135</sup> Butler, *Parting Ways*, *supra* note 17 at 9

<sup>1136</sup> *Ibid.* at 5-7

<sup>1137</sup> *Ibid.* at 9

<sup>1138</sup> *Ibid.* at 23

particular labor he undertakes.”<sup>1139</sup> True being in and for itself, towards the realization of Absolute Spirit, is therefore necessarily anti-identitarian.

So, does a Naqab Bedouin person finally become free when they cease identifying as ‘Bedouin’? To be clear, I am not suggesting that people in the community no longer identify as ‘Bedouin’ or any such identifier. Indeed, it would be very difficult to be ‘of this world’ and engage in the social projects that one is embedded in, without an identity per se. What I am suggesting, however, is that a space is created within this self-identity that is ‘nomadic’; not in the sense of desert dweller moving hither and thither, but rather in the sense deployed by Deleuze and Guattari – one that is not repose in identity, but one that rides difference.<sup>1140</sup>

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<sup>1139</sup> Stephen Houlgate, “G. W. F. Hegel: The Phenomenology of Spirit” in Robert Solomon and David Sherman (eds.), *The Blackwell Guide to Continental Philosophy* (Oxford: Blackwell Publishing, 2003) at 24

<sup>1140</sup> As Brian Massumi explains ‘nomad thought’, “it does not immure itself in the edifice of an ordered interiority; it moves freely in an element of exteriority. It does not repose on identity; it rides difference”. Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (trans. Brian Massumi) (Minneapolis, London: University of Minnesota Press, 1987) at xii

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