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**The Hermeneutics of Sovereignty: The Written Word, State Sovereignty, and Freedom of Religion in the Late Antiquity Roman Empire**

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Words are important.<sup>1</sup> We order our lives around words. States and international bodies, themselves, are set forth as being based on what amount to collections of words in constitutions, charters, and codes. But these written legal instruments all refer to more basic philosophical principles and notions of justice, and those are the basis and justification for the laws themselves. But that they are written is important, and it gives us a starting point for trying to determine just what those principles are on which our society is based. We can also look back at the laws of earlier times to see just what principles guided their justifications, and very likely see reflections of our own choices on principles in theirs. The various states of the world constitute themselves based on documents which refer to these principles, as noted. What makes them a state, and one that can be thought of and recognized as a state vis-à-vis other states, is based on another principle laden idea, that of state sovereignty. But state sovereignty is not a thing, it does not really have an existence, instead it describes things, groups of people who order their lives around words. State sovereignty, in a real sense, is just words: what is far more important is what it signifies, and that is fairness and functional order in a defined societal unit.

Related to this, I have noted elsewhere the fact that since at least the time of the Greeks, sovereignty has always been defined, in theory, as an attribute of a state when, and only

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<sup>1</sup> I first heard this turn of phrase ‘Words are important’ from Professor Eugene Petersen in a lecture he gave at Regent College, and even though he would not claim it as his own, I have found it applicable on a number of occasions and wanted to credit him as being the first person from whom I heard the phrase.

when, that state acts in the best interests of its citizens, ergo, the community at large.<sup>2</sup> I have also suggested: “unless theoretical sovereignty can be meaningfully connected to its epistemological roots, wherein the citizen’s protection and benefit is the body around which all other incidental considerations orbit, ...our investigations into its true nature are near meaningless gestures reflecting, rather, what given interests think it ought to be.”<sup>3</sup> Certainly, what a sovereign state has come to be understood as now is basically a list of bare physical attributes: population, territory, recognized government, etc.; but there are significant efforts, such as the Responsibility to Protect initiative, to attach a moral imperative to the benefits of its use, i.e., continuing to be a recognized member state of the United Nations.<sup>4</sup> Yet, even these noble efforts are going to need to be put in to written legal form before any group of nations could expect to hold a single nation accountable for a breach of any such law. One can see how constructions of words are powerful and necessary for the creation of constitutions which set out the parameters of obligation on the state, which will protect the needs of citizens; it is also clear that in some cases new words must be added to make those laws more just, as with the above example.

Sovereignty is a concept absolutely at one with the aforementioned human fascination and dependence on words, and our legislatures, coming from the Latin word *legere*, meaning read,<sup>5</sup> appeal to their use of words to define their own sovereign status. This use of words to establish a sense of sovereignty has a long pedigree. As legal historian Sir Henry Maine wrote so notably over a century ago, “[t]he most celebrated system of

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<sup>2</sup> Craig Garfield Bateman, 2009. “Nicaea and Sovereignty: Constantine’s Council of Nicaea as an Important Crossroad in the Development of European State Sovereignty,” Electronic Theses and Dissertations (ETDs) 2008+. T, University of British Columbia, 54. doi:<http://dx.doi.org/10.14288/1.0070866>.

<sup>3</sup> C.G. Bateman, “Sovereignty’s Missing Moral Imperative,” *International Zeitschrift* 8.2 (May 2012): 30-41.

<sup>4</sup> United Nations 2005 World Summit Outcome, September 15, 2005, U.N. Doc. A/60/L.1, available at [http://responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005\(1\).pdf](http://responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005(1).pdf).

<sup>5</sup> Isidore of Seville, *The Etymologies of Isidore of Seville*, trans. eds. Stephen A. Barney et al. (Cambridge: Cambridge University Press, 2006), V.iii.2-4, 117.

jurisprudence known to the world begins, as it ends, with a Code.”<sup>6</sup> A code is a written instrument of words. The written word was venerated by the Romans: beginning with the *Twelve Tables* (the earliest public Roman code of law) in 450 B.C.E, and later in the Principate (27-284 C.E.) and Dominate (284-476 C.E.) eras, the emperor’s laws, the *constitutiones principis* in various forms: *edicta*, *decreta*, *rescripta* and *mandata*.<sup>7</sup> These latter had an existence and authority all their own, and were equivalent in status to previous legislation out of the Roman Senate. George Mousourakis notes: “The direct law-making power of the princeps-emperor was justified on the ground that the law that conferred imperium on the emperor (*lex de imperio*) transferred to him the authority to legislate in the name of the Roman people.”<sup>8</sup> Yet, “...the true foundation of the emperor’s legislative authority is not discovered in legal rationales but in political reality: the emperor’s socio-political power evolved so that his assumption of a direct legislative role could not be challenged.”<sup>9</sup> John Firth, in his classic study on Constantine (272-337 C.E.), aptly notes: “The Emperor, in brief, was absolute monarch, autocrat of the entire Roman world, and his will and nod were law.”<sup>10</sup> As powerful as they were, these individual emperors were, like all people, a product of their environment, and that religion was seen as directly connected to the fortunes of all people and nations was an idea which was imbued in, and given form in, their legislation. The emperors as lawmakers engaged in the interweaving of religion and law on behalf of the state’s sovereign organizing matrix. Emperors in late antiquity legislated on religion because they believed that the prosperity of the Roman state depended on the approval of the deity. In their specific late antiquity context, they could hardly have done otherwise.

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<sup>6</sup> Sir Henry Maine, *Ancient Law, Everyman’s Library*, vol. 734, ed. Ernest Rhys (New York: E.P. Dutton, 1931; 1861) 1.

<sup>7</sup> See generally, George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (New York: Springer, 2015), see discussion at 65-66 on the laws of emperors.

<sup>8</sup> *Ibid.*, 65.

<sup>9</sup> *Ibid.*

<sup>10</sup> John Firth, *Constantine the Great: The Reorganization of the Empire and Triumph of the Church* (New York: Palatine Press, 1905; 2015), chp. 16.

*Roman Emperors Galerius and Constantine on State Order*

This idea is at least connected to our own day, because major constitutions in the Western experience today still either refer to the fact, or imply it, that the deity is the guarantor or the basis on which rights can be grounded.<sup>11</sup> So, let us return to Maine's Late Antiquity Rome and look for an example of where this practice of referring to the deity can be seen in full bloom. Take, for instance, these excerpts from the *Edict of Toleration* (311) from the Roman Emperor Galerius (r. 305-311 C.E.), the erstwhile persecutor of Christianity. Keep in mind Galerius had initiated one of the worst periods of persecution against Christians in Rome's history, from 303-311. Ultimately, and suffering from a terminal illness, he conceded this had been a mistake.

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<sup>11</sup> Several nations' Constitutions make use of the *invocatio dei* (call on God), usually located in the preamble of such documents. For instance, in Canada, in the recent *Charter of Rights and Freedoms* (1982), the preamble reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law." The United States Declaration of Independence reads, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Many states' constitutions employ the invocation, but many more do not. Besides their position as Defender of the Faith, British monarchs, since William and Mary in the seventeenth century, are required to maintain the laws of God, the true profession of the gospel, and the Protestant Reformed faith established by law. Add also their role as head of the Church of England. This relates specifically to the *Coronation Oath Act*, 1688. The Magna Carta is set forth as being related to God in the following important ways: One, again, in the preamble, "JOHN, by the grace of God King of England"; second, "KNOW THAT BEFORE GOD, for the health of our soul and those of our ancestors and heirs, to the honour of God, the exaltation of the holy Church, and the better ordering of our kingdom," [notice here the connection between God and state order that could be inferred.]; third, "FIRST, THAT WE HAVE GRANTED TO GOD, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired.; lastly, SINCE WE HAVE GRANTED ALL THESE THINGS for God, for the better ordering of our kingdom, and to allay the discord that has arisen between us and our barons, and since we desire that they shall be enjoyed in their entirety, with lasting strength, for ever, we give and grant to the barons the following security. Australia's Constitution of 1900 reads: "Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established..." The number of world nations that still employ an *invocatio dei* is somewhere north of thirty.

Among all the other arrangements which we are always making for the advantage and benefit of the state, we had earlier sought to set everything right in accordance with the ancient laws and public discipline of the Romans and to ensure that the Christians too, who had abandoned the way of life of the ancestors, should return to a sound frame of mind;<sup>12</sup>

Here is the *sin qua non* of the imperial will, according to Galerius: the stability of the state; and how did he intend to bring this about, by encouraging a religion to return to its roots and practice their faith in accordance with ancient principles which even the Romans would appreciate.

When finally our order was published that they should betake themselves to the practices of the ancients, many were subjected to danger, many too were struck down. Very many, however, persisted in their determination and we saw that these same people were neither offering worship and due religious observance to the gods nor practicing the worship of the god of the Christians.<sup>13</sup>

The instability of the state, according to Galerius, was being caused by improper religious worship.

...we have taken the view that in the case of these people too we should extend our speediest indulgence, so that once more they be Christians and put together their meeting-places, provided they do nothing to disturb good order. We are moreover about to indicate in another letter to governors what conditions they ought to observe.<sup>14</sup>

“Good order,” this was the heart of the *Edict of Toleration*. Further, this law was going to get further enforcing mechanisms in direct missives to the governors, which were orders directing the hand of the governments of the provinces which Diocletian had set in order. Constantine’s subsequent legislative activity, through this lens of his rival,

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<sup>12</sup> Lactantius, *De Mortibus Persecutorum*, ed. and trans. J.L. Creed (Oxford: Clarendon Press, 1984) 34.1-5, 53.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid., 34.1-5, 53.

Galerius, are far more understandable and make him far less unique as an emperor convinced of the importance of religion, Christian or not. Galerius goes on:

Consequently, in accordance with this indulgence of ours, it will be their duty to pray to their god for our safety and for that of the state and themselves, so that from every side the state may be kept unfarmed and they may be able to live free of care in their own homes.<sup>15</sup>

Following Galerius' Edict in 311, came the *Edict of Milan* in 313, penned by co-emperors Licinius (r. 308-324) and Constantine. It comes as no surprise that in such a context Constantine, who is most notable as the emperor who adopted the Christian religion into the state's organizing matrix, would be just as assiduous in ensuring the Christians and other religious adherents got down to proper worship.<sup>16</sup> That it reaffirms and expands on the Toleration edict is clear, and its opening shows that the connection between state order and good religious practice was paramount in the minds of its authors, just as it was for Galerius.

When we, Constantine and Licinius, emperors, had an interview at Milan, and conferred together with respect to the good and security of the commonweal, it seemed to us that, amongst those things that are profitable to mankind in general, the reverence paid to the Divinity merited our first and chief attention, and that it was proper that the Christians and all others should have liberty to follow that mode of religion which to each of them appeared best; so that God, who is seated in heaven, might be benign and propitious to us, and to every one under our government.<sup>17</sup>

These emperors were concerned about ensuring that "reverence paid to the Divinity" was carried out properly, so that God would prosper their state and empire, and it is

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<sup>15</sup> Ibid.

<sup>16</sup> MacMullen, *Constantine*, 64. He writes: "The advantage and profit of the state, stressed at the outset [of Edict] as the reason for any kind of legislation.... Prayer is patriotism, the gods directly save or destroy."

<sup>17</sup> Lactantius, *Of the Manner in Which the Persecutors Died*, trans. Rev. William Fletcher, *Ante-Nicene Fathers: The Writings of the Fathers Down to A.D. 325*, vol. 7, eds. Alexander Roberts and James Donaldson, rev. & arr. A. Cleveland Coxe (Peabody: Hendrickson Publishers, 1886; 2004) XLVIII, 320.

interesting that they believed the security of the state, a serious issue given the violent incursions of barbarians, was at issue. Like Galerius, state order was something they were aiming at with this law. They go on: “For it befits the well-ordered state and the tranquility of the times that each individual be allowed, according to his own choice, to worship the Divinity; and we mean not to derogate aught from the honour due to any religion or its votaries.”<sup>18</sup> This highlights the fact that this Edict was not merely about encouraging the practice of Christianity, although that was surely a key tenet, but about encouraging the free practice of all religions who worshipped the Divinity. Here was a sea change going on in imperial state governance and order: no longer would the persecution of religious adherents be carried out, at least in theory, something the imperial state had engaged in since the times of the Julio-Claudian dynasty in the first century. Further, religions were now to be encouraged, because the rulers saw a direct connection between the success of their rule and freedom of the people to worship the Divinity in the way they saw fit.

*The Edict of Toleration* (311) and its companion,<sup>19</sup> *The Edict of Milan* (313), were the Roman state’s adoption papers, if you will, pursuant to the Christian religion. In those two edicts we find the basis for all other legislation relating to the vaulted place of Christian Bishops in the Roman legal and societal constitutional framework of the fourth century and beyond. One scholar refers to the Milan Edict as a “turning point in world history.”<sup>20</sup> All one has to do is consider medieval history in Europe at any point along a 1200 year timeline, 4<sup>th</sup> – 16<sup>th</sup> centuries, to realize how the ubiquitous presence of Christianity, in society, law and politics, most notably, began in earnest as Constantine extended his favour to this religion; and importantly, it is with the *Edict of Milan* in 313 that we see the beginning of this relationship set out in clear terms by a legal instrument,

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<sup>18</sup> Ibid.

<sup>19</sup> Philip Hughes saw the *Edict of Milan* as a supplement to the *Edict of Toleration*. Hughes, *History of the Church*, (London: Sheed & Ward, 1947), 176.

<sup>20</sup> Herbert H. Gowen, *A History of Religion* (Milwaukee: The Morehouse Publishing Co., 1934), 489.

a law. The two edicts not only made the practice of Christianity legal, but encouraged its practice. In both edicts, the stability of the state was the aim, and the practice of the Christian religion, along with the other religions, if carried out in an orderly way would apparently encourage such an aim. But the Milan Edict was also about emphasizing anyone's right to worship in the way they saw fit. In a later rescript of Constantine and Licinius, quoted by Eusebius of Caesarea, we read the words of the Emperors themselves on this matter:

When [we] had come under happy auspices to Milan, and discussed all matters that concerned the public advantage and good... we resolved to make such decrees as should secure respect and reverence for the Deity; ... [that besides the Christians] authority has been given to others also, who wish to follow their own observance and form of worship – a thing clearly suited to the peacefulness of our times – so that each one may have authority to choose and observe whatever form he pleases. This has been done by us, to the intent that we should not seem to have detracted in any way from any rite or form of worship.<sup>21</sup>

...

In all these things thou shouldest use all the diligence in thy power for the above-mentioned corporation of the Christians, that this our command may be fulfilled with all speed, so that in this also, through our kindness, thought may be taken for the common and public peace.<sup>22</sup>

While it is true the Milan edict was undoing the damage done to the Christian religion during a long period of persecution at the hands of the state, it was also levelling the playing field for every religion, and it gives one the impression that the emperors were giving the first voice to, as H.A. Drake pointed out, the idea of freedom of religion.<sup>23</sup> These two laws, focused as they were on both the right practice of religion (*Toleration*) and the freedom to choose religion (*Milan*), are paramount to understanding what

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<sup>21</sup> Eusebius, *HE*, X.v.6-9, 449.

<sup>22</sup> *Ibid.*, X.v.9-13, 451.

<sup>23</sup> H.A. Drake, *Constantine and the Bishops* (Baltimore: The Johns Hopkins University Press, 2000), 194; See also, John Firth, *Constantine the Great: The Reorganization of the Empire and Triumph of the Church* (New York: Palatine Press, 1905; 2015), chp. 6.

Constantine's actions concerning the Church were founded on, and they seem to point to an attitude of forbearance in religious matters, as Ramsay MacMullen noted was true of this emperor in his religious policy;<sup>24</sup> and as for the impetus behind such an attitude, the desire for a secure and prosperous dominion under his rule plainly suggests itself in the "public peace" Constantine wrote of. But the notion of freedom of religion came to be mangled almost immediately after the Milan law. As John Firth notes on Constantine's reaction to the Donatist crisis, "[s]o little observant was he of his own edict of toleration that he was prepared to use force to secure uniformity within the Church!"<sup>25</sup> Of course, such an observation can be applied to some of Constantine's actions to do with the Church in the later Arian crisis as well, where he openly exiled various persons and outlawed their writings based on their theological views. The Church and state in Western Europe during the early Medieval period would completely ignore the Milan Edict's institution of freedom of religion, and this attitude was only to be shook off with the early Modern Period's cultural, scientific, and religious revolutions and wars, most pointedly the 'Thirty Years' War, which gave rise to the sovereign and independent state system.

In these two edicts, "the state" is clearly the entity around which all other considerations orbit. 'Benefit of the state,' 'safety of the state,' 'state kept unharmed,' and how were Galerius, Constantine, and Licinius and their legal advisors hoping to achieve this? According to these legal pronouncements, it was proper religious observance by the Christian population of the Empire, a segment of Roman society which was growing beyond the control, in both numbers and devotion, of any emperor, Galerius or Constantine. Religious affiliations in the fourth century were at the heart of Roman culture, and they remained that way in Western Europe until, perhaps, the enlightenment. In order to appreciate Constantine's actions, legal or otherwise, one must

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<sup>24</sup> Ramsay MacMullen, *Constantine* (New York: Dial Press, 1969), 165.

<sup>25</sup> Firth, *Constantine the Great*, chp. 9.

keep this essential element of context at the forefront of their minds to better understand why he likely made those decisions which, in hindsight, have shaped an enormous part of our culture to the present day. Like Galerius, Constantine's words would be imbued with a sense of duty towards proper religious observance, and his goal in crafting laws this way, as with the peaceful facilitation of the complex relationships within society is the main goal of a sovereign state today,<sup>26</sup> was to bring stability to the state.

*History, Nomos, and Order*

Beyond the legal instruments of emperors, there are the societal raconteurs, historians, who with words kept track of events as they understood them. Written words from the hands of historians like Herodotus, Suetonius, Josephus, and Eusebius of Caesarea, taking directly from Berger's and Luckmann's suggestions on the importance of symbolic activity, of which religion is an obvious example, created in their writings part of the matrix of cohesive words which gave their societies a sense of meaning and legitimacy. Berger and Luckmann wrote: "The symbolic universe ...orders history. It locates all collective events in a cohesive unity that includes past, present, and future."<sup>27</sup> Religion does exactly that: it tells us where we came from, God, where we are, under God, and where we are going, to be with God. We are hemmed in like chicks in a nest of symbolic interpretations about reality, and there is the rub. People like to be in the safety of these constructions.

In Peter L. Berger's earlier work, he defined this construction as '*nomos*.' Berger writes: "It may now be understandable if the proposition is made that the socially constructed

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<sup>26</sup> F.H. Hinsley, *Sovereignty* (New York: Basic Books, 1966), 233-234.

<sup>27</sup> Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Garden City, N.Y. : Doubleday, 1966), 95.

world is, above all, an ordering of experience. A meaningful order, or *nomos*, is imposed upon the discrete experiences and meanings of individuals. [\*] To say that society is a world-building enterprise is to say that it is ordering, or *nomizing*, activity.”<sup>28</sup> If we then take this idea and apply it to our subject matter, we can see that the Roman state and leadership apparatus, by employing the state sponsored practice of religion focused on a pantheon of gods based on earlier Greek practice, had furnished their citizens with a past, present, and future which had continuity and seemingly bred stability. So we observe that it was the laws, the religion, the histories, and traditions which gave the Greek and Roman societies their stabilizing matrix, and ones that were built on and ensconced within the written word.<sup>29</sup> In Rome’s history, the written words of a king, the Senate, the consuls, and emperors became a sacred part of daily life for those living within Roman environs, and each of the aforementioned were as involved in religion as they were in matters of state. We see this writ large in the later designation expropriated by Emperor’s beginning with Augustus, *Pontifex Maximus*. This title comes from the leader of the College of Pontiffs who were the keepers of the law in Rome’s early monarchy and in to the Republican period: the archaic era from the eighth to third centuries B.C.E.<sup>30</sup> That law was first in the possession and under the influence of religious functionaries in early Roman society is interesting when we think how Roman law was much later, in a variety of ways, carried into the Middle Ages via the Roman Catholic Church.

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<sup>28</sup> Peter Berger, *The Sacred Canopy*, 19. \* Berger notes: “[t]he term “*nomos*” is indirectly derived from Durkheim by, as it were, turning around his concept of *anomie*. The latter was first developed in his *Suicide* (Glencoe, Ill.: Free Press, 1951), 192.”

<sup>29</sup> The subject of why the old pantheons were ultimately discarded for a new belief system focused on a single God relates to a number of factors: the influence on the Tetrarchic, and following, Empire of, then, Asiatic/oriental religions more focused on single deities, the fact that a lone Emperor inheres to the belief and allegiance to a single God, and the most compelling factor being that bringing all peoples under a single God under the authority of the Empire tends to more order and stability, hallmarks for what would become state sovereignty.

<sup>30</sup> George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition*, 2.

After the Western Empire had fallen to the so-called “barbarian” tribal peoples of Europe in the fifth century, in the seventh century, Isidore of Seville (c. 560-636 C.E.) wrote his renowned *Etymologiae*, a compendium of general classical knowledge, and left it unfinished at his death in the 1<sup>st</sup> half of the seventh century. Isidore’s work, *inter alia*, encompasses a brief overview of the evolution of legal systems throughout history as Isidore understood it, and it is perhaps no surprise that as a Bishop of the Christian Church he began his cursory survey with Moses as the first law-giver.<sup>31</sup> An interesting observation to be made about the Bishop of Seville’s survey on laws is that having begun with the Israelite prophet’s delivery of law, he then goes directly to the ancient roots of law for the Greeks, Egyptians, Athenians, Spartans, and then brings us to King Numa Pompilius (753-673 B.C.E.), Romulus’s successor, who gave the earliest Romans a set of laws. Then, importantly, came the *Decemvirs*, the “ten men,” a democratically appointed group whose incarnation only lasted three years, from 451-449 B.C.E., who may have taken their lead from the Greek laws of Solon to create Rome’s famous *Twelve Tables*. We learn from Isidore that long after this, the consul, Pompey (106-48 B.C.E.), sought to gather all the laws into writing, but feared retribution for doing so and demurred. Then, Julius Caesar (100-44 B.C.E.) embarked on the same project but was killed before he could accomplish this. The ancient laws apparently grew obsolete in neglect over a period of three hundred years. Then, we are told, it is when we get to the age of the Emperor Constantine and his legal innovations that we begin to see written laws in the Roman world once again. This is, of course, not correct, laws had been issued by emperors all through the principate and dominate periods, but Isidore points to Constantine as the reviver of written Roman law because, most likely, he was the first Christian emperor, and certainly he wrote a great deal of them, somewhere north of three hundred. These laws were indeed written in Constantine’s time, but were not, then, collected in any ordered fashion. It was Theodosius Augustus the younger (401-450

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<sup>31</sup> Isidore of Seville, *The Etymologies of Isidore of Seville*, trans. Stephen A. Barney, W.J. Lewis, J.A. Beach, and Oliver Berghof, collab. Muriel Hall (Cambridge: Cambridge University Press, 2006), V.i.1-7, 117.

C.E.) who later collected the laws from Constantine's time until his own to create his *Theodosian Code* (created between 429-438). Why is this important to mention? It is important because Isidore comes from just the other side of two-hundred years from the life of Constantine and we can see exactly how influential Constantine's reign had been for the revival of law making. The Catholic Church now carried with it the Roman Law, and in a real sense gave it to the nations of Europe with the re-introduction of the Code of Justinian (*Corpus Juris Civilis*) by the Church into their own legal framework in the eleventh century, and this inspired the reception and concomitant influence of this same legal document by the "secular" governments, monarchies, over many centuries — the most famous example being the creation of the Napoleonic Code.

In his *Etymologiae*, Isidore lays out some basic assumptions of the time on the nature of law, and they are worth mentioning: "A law is a written statute. A custom is a usage tested by age, or unwritten law, for law (*lex, gen, legis*) is named from reading (*legere*), because it is written."<sup>32</sup> He does go on to say, however, that 'customary law' can be taken as law when an actual law is lacking because, and even though it does not exist in writing, it can be validated by reasoning, hence reason.<sup>33</sup> Consistent with the suggestion that sovereignty resides in that body which provides a stabilizing matrix in society, he goes on to write, *inter alia*, that "...if law is based on reason, then law will be everything that is consistent with reason — provided that it agrees with religion, accords with orderly conduct, and is conducive to well-being."<sup>34</sup> The latter two requirements are in accord with the idea of a stabilizing matrix (order, well-being), and Isidore was a Bishop of the Roman Christian Church of whom I suggest had more influence on the stability of the European peoples after the Western fall of Rome than any King or Emperor. Since Isidore's work is admitted to be a portrayal of all the learning gained by the Roman

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<sup>32</sup> Isidore of Seville, *The Etymologies of Isidore of Seville*, trans. eds. Stephen A. Barney et al. (Cambridge: Cambridge University Press, 2006), V.iii.2-4, 117.

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

<sup>34</sup> *Ibid.*

world up to his own seventh century provenance, we can observe that, at least in the Roman experience of his times, law simpliciter was predicated on the fact that it must be in the form of writing. The Romans were not the first society to recognize the value of written laws, but theirs is the society upon which Europe's was based, and thus for the study of our laws and their concomitant justifications, we can learn much from the source. Isidore went on further to define law.

X. What a law is (*Quid sit lex*) A law is a rule for a people – through it those who are nobler by birth, along with the common people, have ordained something.

...

XX. Why a law is enacted (*quare facta est lex*) Laws are enacted in order to control human audacity though the fear they arouse, and so that innocent people may be safe in the midst of reprobates, and so that even among the impious the power of doing harm may be restrained by a dreaded punishment.

XXI. What sort of law should be made (*qualis debet fieri lex*) A law should be honorable, just, feasible, in agreement with nature, in agreement with the custom of the country, appropriate to the place and time, necessary, useful, and also clear, lest in its obscurity it contain something deceitful and it should be written not for private convenience, but for the common benefit of the citizens.<sup>35</sup>

Isidore insists that law is enacted so that innocents may be kept safe — a key element of the moral imperative for a sovereign power — and this definition is one that assumes order will be the outcome. Finally, notwithstanding the various requirements which make up his conclusion on what sort of law ought to be made, he writes that it should be for the common benefit of the people who make up the society. Each of these aspects speak to the insistence on a stable and ordered society which were originally made the highest priority by Constantine. We have to remember this. Why? Because Isidore was a Roman Christian Bishop and all of Europe at that time, the way we think of Europe, was quickly becoming entirely Christian, even if in name only. I suggest that the fact Isidore gave primacy of place to Constantine as being the first Roman Emperor to begin issuing

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<sup>35</sup> Ibid., V.x, 118; V.xx, 119; V.xxi, 119.

a series of written laws<sup>36</sup> merely points to the significance of Constantine's legislating activity as he attempted to use the instrumentality of law to stabilize the Roman state. His prolific legislative efforts were, importantly, collated into a Code for use, along with other subsequent Emperor's laws, by Theodosius the Younger – the *Theodosian Code*.<sup>37</sup>

Isidore is a paradigmatic example of a mind moulded under the Roman-Christian model, a direct result of Constantine's adoption of the religion of Christianity. Isidore uses phrases like "divine laws" and "Sacred Scriptures," the same words once used by the famous Christian philosopher and theologian, Origen of Alexandria (185-254 C.E.), one hundred years before Constantine. If we remember that Origen's most famous supporter was the Church historian Eusebius of Caesarea (260-340 C.E.), the confidant and friend of Constantine and the one to whom the construction of a Roman-Christian worldview can be somewhat credited, we see a lineage of burgeoning culture and set of ideals running from Origen to Isidore, beginning in Greek Christianity and ending in Constantine's Roman Christianity. In Constantine's reign we find a Roman Empire in the nascent stages of being Christianized and an international Christian religion in the process of being Romanized. Concomitant with this are the two interweaving historical realities that Rome was changing from supporting a plurality of Gods to supporting one God, and that the Church was being transformed from being the keepers of only God's

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<sup>36</sup> Of course, as noted above, Isidore is a Christian Bishop and author and the fact that he incorrectly ascribes Constantine as being the first to promulgate written laws, because edicts and law had been fulsome previously in the Republic and Empire, means perhaps two not so surprising things. First, Constantine was the first Christian emperor, and thus Isidore regards him as the keystone of laws emanating from a Christian regime, thus the first "legitimate" set of written laws; second, Constantine was very concerned about drawing all legal decisions towards his authority and purview (John Noël Dillon, *The Justice of Constantine: Law, Communication, and Control* (Ann Arbor: University of Michigan Press, 2012) and as such likely did promulgate more written edicts and rescripts to the provinces than any emperor before him. He had every wish to stop the provincial governors and civil servants from taking bribes and being inconsistent in their judgments, and give the empire's subjects, to the best of his ability, a legal system that was more equal in application and which endeared citizens to his unifying and fair rule. He was ruthless, but he was not ignorant of the importance of both ethics and optics. The former could be said to be a Christian and Stoic sentiment while the latter was strictly political and expedient.

<sup>37</sup> *Ibid.*, V.i.7, 117.

law, to being the keepers of Roman law as well. The praetor would become a priest, and the priest, a praetor.<sup>38</sup>

*Judaism, Christianity, and the Written Word*

For another group of people in Late Antiquity Roman society, the written word was also sacred, and had actually become considered thus many centuries earlier. I refer to the Jewish nation and peoples. Their written word served to preserve their ways, laws, and traditions, and it came to be treated by all Jews as the very words of God. This allowed King Josiah (641-609 B.C.E.), the king historians believe most likely to have put together the first part of the Jewish Scriptures as we know them, to draw all authority under one God.<sup>39</sup> The words of the Torah provided a stabilizing matrix for all peoples within the separate Kingdoms of Israel and Judah to belong to, and thus a unifying and centralizing of power and authority: a sovereignty. It has been noted: “Josiah is the only king who made a covenant on the basis of “the book of the Torah”; in so doing he gave this book the force of a state law. ...it was given constitutional force by Josiah.”<sup>40</sup> Further, as we see in the much later mission of Judas of Galilee, which predates Christ’s revolutionary activities by only twenty years, the sovereignty we are talking about belonged to Yahweh. Judas’ movement was based on the principle of “the absolute sovereignty of Yahweh,

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<sup>38</sup> Augustine would be a Bishop who was also a judge; Gregory the Great was a praetor/judge who was pressed ganged into the seat of Roman Bishop, and raised a standing army for the city of Rome and established a taxation system for the Western Church. Thus, within two hundred years of Constantine’s death, his adoption of the Christian Church into the state was getting traction and this is shown by the careers of the two most influential Western characters of the early Middle Ages, Augustine and Gregory.

<sup>39</sup> Israel Finkelstein and Neil Asher Silberman, *The Bible unearthed: archaeology’s new vision of ancient Israel and the origin of its sacred texts* (New York: Free Press, 2001); See also Joseph Campbell’s observation, reasonable as well, that it was the sixth century BCE exile of the Israelites in Babylon which occasioned this transformation of focus from one God of many, to a single God: Joseph Campbell, *The Power of Myth*, ed. Betty S. Flowers (New York: Doubleday, 1988), 21.

<sup>40</sup> Yehezkel Kaufmann, *The Biblical Age: The Age of Classical Prophecy*, in *Great Ages and Ideas of the Jewish People*, Salo W. Baron, et al., ed. Leo W. Schwarz (New York: The Modern Library, 1956), 71-72.

the God of Israel.”<sup>41</sup> G.F. Brandon notes, ‘...Judas obviously conceived of Israel as a theocracy, and he was prepared to face the practical consequences of that conception, namely, to refuse to recognize and support the alien power that had possessed itself of Judaea, the holy land of Yahweh.’<sup>42</sup> The aforementioned principle of the sovereignty of Yahweh, enshrined in the Jewish Scriptures, was also at the heart of Jesus’ version of Judaism, and such an ideal was transferred to the religion that sprung from his teaching, Christianity.<sup>43</sup> This new religion, like its Jewish predecessor, treasured the written word as well, and took much of Jewish literature into their new religious matrix; and just as with the Jews, these writings, these words, served as a sovereign stabilizing matrix for the new religious community to grow around. Some letters of the first Christian Apostles, followed by the oral traditions of Jesus, were copied and written down, and a select collection<sup>44</sup> of these came to be thought of as sacred documents, inspired by God himself. The point here is that the written word was deeply important to all three cultures: Roman, Jewish, and Christian. This written word had the power to punish an offender; it also had the power to exonerate an offender. It had the power to set geographical boundaries and mark certain places as being of special significance or belonging to a certain people, and these written words also instructed the people on how to live their daily lives. These were powerful words. Our modern societies are based on the same kinds of words, found in our legal systems.

In fact, scholar Joseph Campbell noted that because modern society has jettisoned most of its mythological connections due to a pluralistic reality, “[l]awyers and law are what [now] hold us together. There is no ethos.”<sup>45</sup> What Campbell is conveying is that with no

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<sup>41</sup> G.F. Brandon, *Jesus and the Zealots: A Study of the Political Factor in Primitive Christianity* (Manchester: Manchester University Press, 1967), 32.

<sup>42</sup> Ibid.

<sup>43</sup> R. M. Grant, *Augustus to Constantine*, 42.

<sup>44</sup> C.G. Bateman, *Origen's role in the formation of the New Testament Canon*, Thesis (M.C.S.) Regent College, Vancouver, B.C., 2008. Theological Research Exchange Network (Series), #048-0352. Pages 105-112.

<sup>45</sup> Joseph Campbell, *The Power of Myth*, ed, Betty S. Flowers (New York: Doubleday, 1988), 9.

sacred myths by which a society, such as the Israelites under Josiah, can orient their lives and goals, a pluralistic society needs another manifestation of words by which to order the multivariate rites and traditions attempting to co-exist in one state: the law. When examining the context of the late antiquity Roman Empire, we see words in the form of scriptures guiding groups within society, but we also see how law from Diocletian, Galerius, and Constantine attempted to bring sovereign order to the diverse commitments at play in the world of religions. Law, for perhaps the first time, was being used to challenge the authority of scripture and become kind of a “scripture” of the state.

Both the Late Antiquity Jewish and Christian communities had sacred collections of words around which their religions’ revolved: Israel’s sacred collection, in various writings, beginning around the seventh century B.C.E., and then with the Christian’s relying on Israel’s sacred scriptures initially, ultimately adding their own writings which were recognized tentatively by the Church in the late fourth century.<sup>46</sup> Today, we have sacred documents as well, our constitutions. If you doubt the sanctity of the Constitution of the United States, try and get your hands on an original copy. True, it is not kept in a Temple, but in the National Archives in Washington, D.C., a building very similar in structure to an ancient temple, and the document is kept behind bullet proof glass. Canada’s constitution was kept in the Tower of London until 1982 when it was repatriated under the leadership of Prime Minister Pierre Trudeau (1919-2000). These constitutions are the legitimizing and legitimate words which give rise to sovereign nations, and along with these come the several Codes and Acts around which we have agreed to order our lives. If a citizen of B.C., Canada, breaches a part of the, let us say, *Criminal Code*, the police then, under another set of authorizing words, the *Police Act of*

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<sup>46</sup> In a festal letter of 367 written at Easter, then Pope, Athanasius specified the only accepted writings of the Catholic Christian Church: see specifically, Athanasius, Letter XXXIX (For 367.) in Philip Schaff and Henry Wace, Editors, *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church*, vol. 4, (Grand Rapids: Eerdmans, 1975), 551 – 552.

*British Columbia*, may detain or arrest a person on the authority of these words. The same was true of the Ancient state of Israel. Based on the sacred words of the Torah, people could be detained and brought before priests to be judged, not by the priest's inclinations, but by the words of God written in their 'Constitution'. The emphasis on a supernatural guarantor as the author of these texts has not survived into modern day Western legal systems, but it should be pointed out, as noted above,<sup>47</sup> that God is referred to in the original constitutional documents of the United Kingdom, the United States, and Canada, just to name a few; and the collections of words pertaining to the two latter states were solemnized only a couple hundred years from our own time. Henry Maine noted how just such legislation has a long and identifiable pedigree in the environs of the late Roman Empire, exactly where we find Constantine.

The true period of Roman Statute Law does not begin till the establishment of the empire. The enactments of the emperors, clothed at first in the pretence of popular sanction, but afterwards emanating undisguisedly from the imperial prerogative, extend in increasing massiveness from the consolidation of Augustus's power to the publication of the Code of Justinian. It will be seen that even in the reign of the second emperor a considerable approximation is made to that condition of the law and that mode of administering it with which we are all familiar. A statute law and a limited board of expositors have risen into being; a permanent court of appeal and a collection of approved commentaries will very shortly be added; and thus we are brought close on the ideas of our own day.<sup>48</sup>

In other words, not much has changed. While much has, no doubt, changed, the fact that Constantine's historical context puts him at the beginning of the constitutional era which we are still a part of is important: some ideas become foundational for future formulations, as Drake points out on the principle of Freedom of Religion spelled out clearly by Constantine and Licinius in the *Edict of Milan*.<sup>49</sup>

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<sup>47</sup> See footnote 11.

<sup>48</sup> Sir Henry Maine, *Ancient Law*, 25; see also in the same work, 40.

<sup>49</sup> Vide infra.

Words are important. Words are the basis upon which states are sovereignly organized through collections of words, constitutions, that constitute authority over a specific territory, a specific population, and such populations must be so ordered and consistent in their governance as to be recognized as a legitimate state by the international community of states.

Yet words are not universally thought of as being capable of conveying meaning in all circumstances. In fact, the words of the Jewish Law and Christian scriptures are examples of metaphors for what, by their own admission, are beyond total human comprehension and actually belong to their God instead. Heinrich Zimmer suggested, “[t]he best things can’t be told because they transcend thought. The second best are misunderstood, because those are the thoughts that are supposed to refer to that which can’t be thought about. The third best are what we talk about.”<sup>50</sup> Based on the foregoing discussion, what nations “talk about” is reflected in their laws that quite literally, and stated outright in the various scriptures and constitutions, are claimed to be in reference to a being that transcends our mortal sojourn. Laws are not posited on the wisdom of people, they claim to be referring to a higher order or norm that, while not marked out in the temporal world, is yet accessible to people through principles or self-evident truths, the latter of which is the outcome of the former.

### *Conclusion*

Words have been essential to the creation of sovereign states since at least, referring to the history of the Western world, the seventh century B.C.E; and for most of the intervening twenty-seven centuries, the belief in a single deity has set the parameters for what the Constitutions of the various Western states in our common history were based

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<sup>50</sup> Zimmer, Heinrich, as in Joseph Campbell, *The Power of Myth*, ed. Betty S. Flowers (New York: Doubleday, 1988), 49.

on. It is only in the last five centuries, perhaps, that Religion began to lose its *sin qua non* status in the organization and delivery of social services and justice in the Western experience. If historical context means *everything*, then historical context *is* everything when it comes to interpreting historical events. Like historian John Lukacs noted: "...the history of everything amounts to the thing itself."<sup>51</sup> Constantine and other emperors of Rome made laws they believed would encourage the stabilizing of their societies; we make laws for the same reason. We use the same means, legislation, but we justify it not on the pleasure of the gods, but on principles we believe in just as strongly. But these principles are in flux, and just as religion was jettisoned as a justification, so some of our ideas about justice have had to change.

Words are arranged to reflect ideas, and as noted above, these ideas can alter the course of history, and we do well to note that our recent *Western* history has shown how monstrously such arrangements of words into ideas have been employed in society and yet bereft of any moral imperative. Howard Zinn wrote:

The idea, which entered Western consciousness several centuries ago, that black people are less than human, made possible the Atlantic slave trade, during which perhaps 40 million people died. Beliefs about racial inferiority, whether applied to blacks or Jews or Arabs or Orientals, have led to mass murder.

The idea, presented by political leaders and accepted by the American public in 1964, that communism in Vietnam was a threat to our "national security" led to policies that cost a million lives, including those of 55,000 young Americans.

The belief, fostered in the Soviet Union, that "socialism" required a ruthless policy of farm collectivization, as well as the control of dissent, brought about the deaths of countless peasants and large numbers of political prisoners.

Other ideas – leave the poor on their own ("laissez-faire") and help the rich ("economic growth") – have led the U.S. government for most of its history to

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<sup>51</sup> John Lukacs, *Historical Consciousness: The Remembered Past* (New Brunswick (U.S.A.): Transaction Publishers, 1968; 1985;1994; 2003), ix.

subsidize corporations while neglecting the poor, thus permitting terrible living and working conditions and incalculable suffering and death. In the years of the Reagan presidency, “laissez-faire” meant budget cutting for family care, which led to high rates of infant mortality in city ghettos.

We can reasonably conclude that how we *think* is not just mildly interesting, not just a subject for intellectual debate, but a matter of life and death.<sup>52</sup>

For Constantine, the thwarting of sectarian groups of Christians such as the Donatists was an example of how a mere idea about a religion, about which no one had any evidence other than the fact that the belief was widespread and adopted by the state, resulted in people being killed. Today, one might argue, we are aghast at these past ideas and their horrific outcomes, and yet we still live in a world where mere words, whether religious or political in nature, lead to tragic events. We as human beings have not outgrown our addiction to flawed ideas and beliefs, but the hope is that the continuing outgrowth of ideas that began with the enlightenment will continue to transform the written legal instruments we have created with the aim of protecting human rights and promoting peace. It is acknowledged that it is with no small difficulty that societies who promote the latter are forced to deal with societies who cling to the former.

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<sup>52</sup> Howard Zinn, *Declarations of Independence: Cross Examining American Ideology* (New York: Harper Collins, 1990), 1-2.

**The Role of the Judiciary in Dispossessing Indigenous Peoples' Land:  
The Bedouin Case in Israel**

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**ABSTRACT**

The European discovery of the New World and its conquest, occupation, and colonization entailed many vicious acts against indigenous peoples. Through well-designed, multi-faceted plans, colonial powers gradually took over the indigenous peoples' land. While conquest and occupation enabled physical possession, colonial powers also utilized political and legal methods to legitimize their acts of dispossession.

The Bedouin in Israel have gone through similar processes of conquest and occupation, and have been dispossessed of their land through European Jewish/Zionist colonization. It is, in fact, much like Christian European colonization of the New World, which originally began as a colonization project that sent new European immigrants to settle on indigenous land. Later, the Zionist colonizers evicted most Palestinians, including the Bedouin, and established their new state, Israel, on their land. After the establishment of the State, it continued to utilize political, legislative, and legal methods in order to legitimize the seizure of the rest of the land.

This article describes the process that dispossessed the Bedouin of their land, focusing mainly on the legal aspects of the dispossession. It first introduces the processes and legal methods colonial states, in general, have practiced in dispossessing indigenous peoples of their land, and then describes the legal aspects and methodology of the seizure of Bedouin land in Israel.

The article examines and compares similarities between the dispossession of other indigenous peoples of their land and the case of the Israeli Bedouin while focusing on the judiciary's role. It considers whether the Israeli judiciary has been able to fairly adjudicate Bedouin land rights, or whether it was recruited in order to support the dispossession policy.

## Introduction

Despite the recent achievements of indigenous peoples on both national and international levels, the dispossession of their land rights remains one of the most common and compelling human rights violations around the world.<sup>1</sup>

The roots of this issue can be traced back to the European discovery of the New World, and the beginning of the conquest, occupation, and colonization of indigenous peoples' land.<sup>2</sup> The European colonial powers who had discovered the New World knew that indigenous land was essential for European colonization and settlement of the new immigrants in the colonies. Thus, they began taking over the land of indigenous peoples while refusing to acknowledge indigenous peoples' rights, and denying their sovereignty, their freedom to practice their culture, and, on several occasions, even their very existence.<sup>3</sup>

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<sup>1</sup> Erica-Irene A. Daes, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous Peoples and Their Relationship to Land* 38 (Comm'n on Human Rights, Working Paper No. E/CN.4/Sub.2/2001/21, 2001), available at [http://www1.umn.edu/humanrts/demo/RelationshiptoLand\\_Daes.pdf](http://www1.umn.edu/humanrts/demo/RelationshiptoLand_Daes.pdf).

<sup>2</sup> S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3 (2nd ed. 2004).

<sup>3</sup> See FIRST NATIONS SUMMIT, *IMPLEMENTATION OF JURISPRUDENCE CONCERNING INDIGENOUS PEOPLES' RIGHTS: EXPERIENCES FROM THE AMERICAS - A CANADIAN PERSPECTIVE* 19-20 (2005), available at [http://www.fns.bc.ca/pdf/ImplementationofJurisprudence\\_IP1005.pdf](http://www.fns.bc.ca/pdf/ImplementationofJurisprudence_IP1005.pdf); see also PETER H. RUSSELL, *RECOGNIZING ABORIGINAL TITLE: THE MABO CASE AND INDIGENOUS RESISTANCE TO ENGLISH-SETTLER COLONIALISM* (2006) (discussing how Aboriginal peoples' leaders and state representatives, such as Edward Woodward, head of the Woodward Commission, traveled from Australia to the United States and Canada to learn about the recognition of indigenous peoples land rights); (2017) J. JURIS. 334

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Indigenous peoples' land dispossession was done gradually in several phases through a process, driven by colonial powers. The first phases were conquest and occupation,<sup>4</sup> followed by more sophisticated political and legal means. Conquest and occupation enabled physical possession, but colonial powers also utilized political and legal methods to legitimize their acts of dispossession while blocking any legal or political options indigenous people might use to defend their land rights.<sup>5</sup>

During that time, not only colonial powers legitimized and approved indigenous peoples' land dispossession but also international law supported such colonial acts and theories.<sup>6</sup> Old International law principles and legal doctrines, such as the Doctrine of Discovery and *terra nullius*, justified the occupation and the dispossession of indigenous peoples' land. As Jeremie Gilbert describes, relying on international law, colonial powers made two major assumptions regarding indigenous peoples' land that severely affected their land rights: first, they claimed that indigenous peoples did not legally exist (thus their land could be acquired); then, they argued that indigenous peoples were inferior to the colonial powers (thus their right to lands could be extinguished).<sup>7</sup> These principles continue to justify the dispossession of indigenous peoples' land even after the establishment of the colonial countries. In the United States, for example, Chief Justice of the Supreme Court John Marshall similarly justified the way in which colonial powers laid claim to indigenous peoples' lands during the Age of Discovery.<sup>8</sup>

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EPHRAIM YUCHTMAN-YAAR & ZE'EV SHABAT, MAGAMUT BAHEVRAH HAYESRAILIT [TRENDS IN ISRAELI SOCIETY] 1218 (2003) (discussing former Israeli Prime Minister Golda Meir's denial of the existence of a Palestinian nation).

<sup>4</sup> See generally JÉRÉMIE GILBERT, *INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS* (2006) (describing methods of land dispossession).

<sup>5</sup> See generally, Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605 (2006).

<sup>6</sup> ANAYA, *supra* note 2, at 6, 15, 16-26.

<sup>7</sup> GILBERT, *supra* note 4, at 1.

<sup>8</sup> According to Porat, Bedouin submitted land claims as early as the 1950s. They based their land claims on documents proving that they had paid taxes. However, the State claimed that no land titles settlement occurred in the Negev; therefore, Bedouin did not possess any proof of land ownership. In addition, the

On the other side, through the years indigenous peoples aggressively resisted the conquest and occupation of their land and continued struggling hard to protect their land in several ways.<sup>9</sup> At the beginning, they engaged in wars against foreign invaders in order to resist the acquisition and the occupation of their land. Later, having lost those wars, they had no choice but to struggle through the colonialists' Western legal system in an attempt to assert their land rights. Unsurprisingly, and with little exception, colonial legal and political systems continued to support colonial policies, and dispossess indigenous groups of their land. Courts in these countries made it almost impossible for indigenous peoples to prevail in court.<sup>10</sup>

During the last few decades, however, indigenous peoples have succeeded in bringing their issues (including their land claims issue) to the attention of the international community, with some success in their movement toward rights recognition. Several international organizations, such as the International Labor Organization (ILO), have raised the issue and called for recognition of indigenous peoples' land rights.<sup>11</sup> Others have articulated several instruments that recognize and protect indigenous peoples' rights. In 2007, such efforts culminated with a major step towards supporting their struggle: the international community recognized indigenous peoples' land rights through the United Nations Universal Declaration for the Rights of Indigenous Peoples in 2007.<sup>12</sup> However, despite these developments, many indigenous peoples continue to have very limited success in land rights issues.

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State claimed that tax documents were lost from the State archives. Chanina Porat, *Israel's Policy on the Bedouin Issue and Left-Wing Alternatives, 1953-1960*, 10 IYYUNIM BITEKUMAT ISRAEL 420–476, 457.

<sup>9</sup> LOUIS A. KNAFLA, *ABORIGINAL TITLE AND INDIGENOUS PEOPLES: CANADA, AUSTRALIA, AND NEW ZEALAND* 173 (2010).

<sup>10</sup> SHLOMO SWIRSKI & YAEL HASSON, *INVISIBLE CITIZENS: ISRAEL GOVERNMENT POLICY TOWARD THE NEGEV BEDOUIN* (2006).

<sup>11</sup> See generally ANAYA, *supra* note 2.

<sup>12</sup> Universal Declaration for the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc.A/Res/61/295 (Oct. 2, 2007).

This article examines the Negev Bedouin's land issue in order to show the many similarities with the general historic pattern outlined above of the colonial methodology of dispossession of indigenous peoples' land via the Western "justice system". This paper offers the particular details of another example of juridical involvement in indigenous peoples' land dispossession. The first part of this paper introduces two major elements that constitute the general framework for the policy of indigenous peoples' land dispossession and the land tenure in Israel and the State's land policy toward Arab and Bedouin land. Then it introduces the important court precedents (such the *Alhawashelah* case) and explains how the judiciary, that is supposed to grant them justice, rejected their land rights and supported the acts of the State. The second section describes how the law and the judiciary in Israel unjustly expropriated the Bedouin land rights using legal doctrines like the *Mawat* doctrine and other similar techniques, exactly like other Western European settler states did with the indigenous peoples they had conquered.

## I. THE BEDOUIN IN ISRAEL

The Bedouin are part of the Arab-Palestinian citizens of the State of Israel.<sup>13</sup> Their population is estimated between 200,000 – 230,000 people, making up 3.5 percent of the State's population.<sup>14</sup> They represent about 15 percent of the Arabs in Israel overall.<sup>15</sup> The Bedouin in Israel are divided into two groups. One is in the northern part of the State and the other in the southern part of the State, in the Negev.<sup>16</sup> This paper deals with the Bedouin of the Negev region.

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<sup>13</sup>See Salman Elbedour et al., *Bedouins of the Negev: Ethnicity and Ethnic Identity among Bedouin Adolescents in Israel*, 2 INTERNATIONAL JOURNAL OF CHILD HEALTH AND HUMAN DEVELOPMENT 177 (exploring Bedouin identity).

<sup>14</sup>*Lexicon of Terms: Minorities in Israel, Bedouin*, THE KNESSET (July 2007), <http://www.knesset.gov.il/lexicon/heb/bedouim.htm>.

<sup>15</sup>Shiri Bass Spector, Knesset Research and Information Center, *Sogiot Breut wesviva Bakfarim Habedouim Halu-Mokarim Banegev* [Environmental and Health Issues Among Bedouin in the Negev Unrecognized Villages](2011), <http://www.knesset.gov.il/mmm/data/pdf/m02809.pdf>.

<sup>16</sup>Ghazi Falah, *Israeli State Policy toward Bedouin Sedentarization in the Negev*, 18 JOURNAL OF PALESTINE STUDIES 71, 78 (1989).

The Bedouin have lived in the Negev for many centuries, well before the establishment of the State. Some claim the Bedouin have inhabited the Negev since the fifth century C.E.,<sup>17</sup> while the Bedouin themselves insist they have been living in the Negev from time immemorial and, therefore, are the native people of the Negev.<sup>18</sup>

Before the establishment of the State in 1948, the Bedouin in the Negev numbered between 65,000-95,000 people.<sup>19</sup> However, as a result of the 1948 War, the Bedouin population was significantly reduced. The majority of the Bedouin population, about 90 percent, was forced to leave or fled the country to neighboring jurisdictions, including Jordan and Egypt.<sup>20</sup> After the War, the remaining 11,000 Bedouin were rounded up by the Israeli military and forced to live within a restricted area called the *Siyag* (“the fence” in Hebrew), a triangular area in the northern Negev. They lived under a military rule in the *Siyag* zone, on one-tenth of the land that they had previously occupied, until 1966. During this period the State put into action a plan that later shaped the policy and laws to dispossess the Bedouin of their traditional lands in perpetuity.

Today, half of the Negev Bedouin population<sup>21</sup> lives in 17 recognized towns and villages and the other half lives in about 35 unrecognized villages.<sup>22</sup> The Bedouin who live in these unrecognized villages are deprived of very basic rights such as housing, running water, electricity, basic infrastructure, education, health services, and social services.<sup>23</sup> Furthermore, they are subject to harsh State acts such as ongoing house demolitions, crop destruction, livestock confiscation, and land expropriation that are part of an

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<sup>17</sup>PENNY MADDRELL & YUNIS GRINAWI, *THE BEDUIN OF THE NEGEV* 4 (1990).

<sup>18</sup>Oren Yiftachel, Alexander (Sandy) Kedar & Ahmad Amara, *Re-Examining the “Dead Negev Doctrine”: Property Rights in the Bedouin-Arab Space*, 14 *MISHPAT UMIMSHAL*, 134–36 (2012).

<sup>19</sup>PENNY MADDRELL, *BEDUIN OF THE NEGEV* 6 (First Edition ed. 1989).

<sup>20</sup>*Id.*

<sup>21</sup>SHIRI BASS SPECTOR, KNESSET RESEARCH AND INFORMATION CENTER, *Environmental and Health Issues Among Bedouin in the Negev Unrecognized Villages* (2011), <http://www.knesset.gov.il/mmm/data/pdf/m02809.pdf>.

<sup>22</sup>Ten of which have been recognized between 2000 and 2010 and they are now in the planning phase.

<sup>23</sup>HUMAN RIGHTS WATCH, *OFF THE MAP* 57, <http://www.hrw.org/reports/2008/03/30/map> (last visited Sep 6, 2016).

apparent attempt to dislodge them from their historical villages in order to concentrate them in small villages and dispossess them of their land.<sup>24</sup> One of the main reasons behind the current situation is a long-lasting dispute over their lands and their customary rights on their historical lands, on the one hand, and the State's insistence to dispossess Bedouin lands, on the other hand.

## II. THE DISPOSSESSION OF BEDOUIN LAND

Bedouin traditional lands are the lands that they own according to their customary tribal law. Such lands are not registered with the State of Israel's Land Registry Office. Therefore, Bedouin do not hold title deeds nor other *official* Israeli documents that prove their land ownership under the State's laws. However, many Bedouin hold traditional documents called *Sanadat* (singular: *Sanad*) or *Hujaj* that define their land rights and describe the source of that right, either by inheritance, purchase, rental, lease, or mortgage. These documents describe the borders of the land, the size, and the owners, just like any other deed.

Similar to the dispossession of many indigenous peoples' lands around the world, the dispossession of Bedouin lands<sup>25</sup> can be divided into three phases: occupation of the land, legalization of the occupation, and land dispossession. In the Bedouin case, the State first evicted Bedouins from their lands, concentrated them into a small area called the *Siyag*. Then, the State enacted several laws that further enabled the dispossession of Bedouin lands through legislative and judicial means. On the judicial level, courts have supported land dispossession and made sure the interpretation of the law maintained the same principles. The dispossession of Bedouin land was done, however, on two levels: The first on the general level, as part of the whole Arab lands dispossession, and the second one on the specific level, as a separate "process" for the Bedouin lands.

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<sup>24</sup>*Id.*

<sup>25</sup>The dispossession of Bedouin land prior to and following the establishment of the State.

### **A. The General Dispossession of Arab Land**

The roots of the Arab land issue in Israel go back to the beginning of the Zionist Movement's settlement in Palestine in the late 18th century and the need of the Zionist movement to own and possess land in order to establish their first settlements in Palestine. Over time, to establish its "Jewish National Home in Palestine," the Zionist movement, first, sought to occupy or take over any and all land it could in Palestine. Once the State of Israel was established, a significant part of Bedouin lands were expropriated or possessed under the policy of "expropriation of Arab lands," supported by ideological and practical justification. On the ideological level, many Zionists believe that the land in Israel is divinely given to the Jewish people and that Jews have a biblical obligation of "land redemption". Those beliefs and other similar theories have significantly shaped the land policy of the State. On a practical level, the colonial need to establish and protect the State during the first years of its existence also led to a concentration of land in the hands of the State. Zionist leaders, such as David Ben-Gurion, Avraham Ganott, and Moshe Dayan, believed that State control of land was an essential element for the Zionist State's existence.<sup>26</sup> After the establishment of the State in 1948, land control started to be an essential element in plans for settlement, development, and defense. These plans focused on demography and population distribution in the State, particularly on a Jewish presence in most areas of the country—a goal that relied heavily on State's control of land.<sup>27</sup>

On the legislative level, the State adopted the British Mandate's legal system.<sup>28</sup> And through selectively applying earlier laws and legal doctrines, the State shaped legislative

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<sup>26</sup> YEHUSHOA PORAT&YAKOVSHAVIT, THE HISTORY OF ERETZ YESRAEL: THE BRITISH MANDATE AND THE JEWISH NATIONAL HOME 102 (1998).

<sup>27</sup> IAN LUSTICK, ARABS IN THE JEWISH STATE: ISRAEL'S CONTROL OF A NATIONAL MINORITY 3 (1980); Rasseem Khamaisi, *Territorial Dispossession and Population Control of the Palestinians*, in SURVEILLANCE AND CONTROL IN ISRAEL/PALESTINE: POPULATION, TERRITORY AND POWER (Elia Zureik ed., 2011).

<sup>28</sup> HAYA NOACH, THE EXISTENT AND THE NON EXISTENT VILLAGES 31; HUSSEIN ABU HUSSEIN & FIONA MCKAY, ACCESS DENIED: PALESTINIAN LAND RIGHTS IN ISRAEL 105 (2003).

policy that deprived Arabs of their land. Through Article 46 of the Palestine Order in Council 1922, for example, the State adopted the Ottoman law the *Majallah*.<sup>29</sup> Over time, Israel amended or terminated many of the Ottoman laws and enacted new laws, changing the Ottoman land regime and establishing new property laws.<sup>30</sup> However, despite these changes, many components of the Ottoman land regime remain and continue to define land rights in Israel, especially land rights established before the creation of the State, such as Bedouin land rights in the Negev.<sup>31</sup>

### Land Tenure in Israel

Zionist leaders have always viewed Jewish settlement and control of the land in Palestine as the major component of their success in their struggle for a Jewish state.<sup>32</sup> For example, Menahem Ussishkin, the head the Jewish National Fund (JNF) during the British Mandate, stated that Jewish control of land in Palestine was essential for the establishment of a Jewish State.<sup>33</sup> Avraham Granott, another leader, stated that Jewish control of the land was literally a “question of life and death for Zionism and the Jewish National Home.”<sup>34</sup> According to scholars such as David Kretzmer, land was needed not only as a resource for Jewish settlement, but also for the transformation of the social and economic structure of the Jewish people who had been removed from their work in agriculture before they immigrated to Palestine.<sup>35</sup>

On the ideological level, after the establishment of the State in 1948, the new State officially adopted Zionist ideology. This ideology continued to steer and shape the State’s land policy beyond its first years. The new Zionist leaders as well believed the

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<sup>29</sup> Palestine Order in Council, art. 46, 1922 Stat. R.O. 1922/1282, *available at* <http://unispal.un.org/UNISPAL.NSF/0/C7AAE196F41AA055052565F50054E656>.

<sup>30</sup> MEIR DELBRI, NEHULNADLAN, LAND LAW IN REAL ESTATEMANAGEMENT 57-59 (1997).

<sup>31</sup> See Oren Yiftachel, *Land, Planning and Inequality: the Division of Space between Arabs and Jews in Israel*, TEL-AVIV: ADVA CENTER (2000), <http://www.kibbutz.org.il/karka/igun/Mercaz-Adva.htm>.

<sup>32</sup> DAVID KRETZMER, THE LEGAL STATUS OF THE ARABS IN ISRAEL 49 (1990).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*; see also AVRAHAM GRANOTT, THE LAND ISSUE IN PALESTINE 12 (1936).

<sup>35</sup> DAVID KRETZMER, THE LEGAL STATUS OF THE ARABS IN ISRAEL 49 (1990).

State must possess and control the land for Jewish settlement needs. Some have explicitly stated that the Arab population must be ejected from the land. In fact, Israel's first prime minister, David Ben-Gurion, wrote to his son: "We must expel the Arabs and take their place."<sup>36</sup>

Therefore, in order to ensure close control of land, the State adopted a centralized land regime based on the principle of national ownership of land. It took control of almost every piece of land by changing the legal categorization of the land needed to establish ownership.<sup>37</sup> The State then "locked" land ownership alienation in order to prevent any land transfer from the State to any non-Jewish entity.<sup>38</sup> This allowed the State to acquire control and ownership of 93 percent of land in Israel.<sup>39</sup>

#### Transfer of Land to the State and Limitation on Land Use

In addition to the traditional need of land for settlement and development, land policy in Israel has been considered one of the major tools used to achieve other goals, such as population distribution, Jewish presence, and, most importantly, security and population control.<sup>40</sup> Since the first years of its establishment, the State specifically utilized land policy to tighten control on the Arab population<sup>41</sup> and to dispossess them of their land<sup>42</sup> by limiting their use of land and limiting the State allocation of land for Arab development.

Such a policy limits the Arab citizen's option to obtain land in Israel. The only available option for Arabs, including Bedouin, to obtain land is to lease the land from the Israel

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<sup>36</sup> Benny Morris, *Refabricating 1948 Fabricating Israeli History: The "New Historians"* Efraim Karsh, 27 J. PALESTINE STUD.81, 84 (1998).

<sup>37</sup>ABRAHAM GRANOTT, THE LAND ISSUE IN PALESTINE 12 (1936).

<sup>38</sup>KRETZMER, *supra* note 36 at 50.

<sup>39</sup>*General Information: Israel Land Administration*, ISRAEL LAND ADMIN., [http://www.mmi.gov.il/Envelope/indexeng.asp?page=/static/eng/eng\\_general.html](http://www.mmi.gov.il/Envelope/indexeng.asp?page=/static/eng/eng_general.html) (last visited Sep. 7, 2016)

<sup>40</sup>see generally LUSTICK, *supra* note 15 (discussing how land regimes were used to control Arabs in Israel).

<sup>41</sup> The term Arab for the purposes of this paper includes the Bedouin, unless otherwise stated.

<sup>42</sup>Khamaisi, *supra* note 14, at 332.

Land Authority (ILA). Through this agency, the State has developed additional methods to control land allocation. Only the State can offer leases of land to individuals, companies, and other entities. As part of its policy to control population growth, population distribution, and economic development, the State also has been depriving Arab citizens of land acquisition by routinely discriminating against the Arab population.<sup>43</sup> Further, a large portion of the State land is unavailable to the Arab population. The Jewish National Fund (JNF), for example, sells land only to Jews, and prohibits the selling or leasing of land to Arab citizens.<sup>44</sup> Additionally, while Arab citizens cannot buy or lease public land that belongs to the JNF, Arabs from Jerusalem are banned from buying or leasing not only JNF lands, but any State land. According to Article 19 of the ILA land lease provision, “Under Israeli law, the ILA cannot lease land to foreign nationals,”<sup>45</sup> which includes Palestinian Arabs, residents of Jerusalem who are residents of the State, but not citizens.

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<sup>43</sup> Sandy Kedar & Oren Yiftachel, *Land Regime and Social Relations in Israel*, in 1 SWISS HUMAN RIGHT BOOK: REALIZING PROPERTY RIGHTS (Hernando de Soto & Francis Cheneval eds., 2006).

<sup>44</sup> The prohibition on Arabs’ ability to buy or lease land in certain areas designated for Jews was recently challenged in the Supreme Court in Kaadan. ( HCJ 6698/95 Kaadan v. Minhal Mekarke’ey Yisrael, Katzir Cooperative and Others 54(1) PD 258 [2000] (Isr.) In Kaadan case a Jewish town Selection committee rejected an Arab family’s application to lease a land for housing in a Jewish town. The Arab family appealed to the Supreme Court claiming discrimination based on racial identity. The Supreme Court, upholding the appeal, decided that such prohibition was discriminatory and impermissible. [See generally Sandy Kedar, *A First Step in a Difficult and Sensitive Road* 16 BULL. OF ISRAEL STUD. 3,3-11 (2000).] Despite that decision, in practice, however, Arabs continue to be banned from acquiring most State land both directly and indirectly. Moshavim are an example of acceptance committees in the Jewish towns and cooperative agricultural communities. See CA 7831/08 Navatim: Labor Moshav for Agriculture Settlement, Ltd. v. Zakai Wazman, Takdin Lite 1,701,140 [12/21/2010] (Isr.). The most common method is through “Selection Committees” in Jewish towns that are authorized by law to reject candidates who do not meet specific selection criteria, which discriminate against Arab citizens. See also Jonathan Lis & Jack Houry, *Knesset Panel Approves Controversial Bill Allowing Towns to Reject Residents*, HAARETZ (Oct. 27, 2010), available at <http://www.haaretz.com/news/national/knesset-panel-approves-controversial-bill-allowing-towns-to-reject-residents-1.321433>.

<sup>45</sup> Nir Hasson, *Most Arabs Can't Buy Most Homes in West Jerusalem*, HAARETZ (Jul. 21, 2009), <http://www.haaretz.com/print-edition/news/most-arabs-can-t-buy-most-homes-in-west-jerusalem-1.280392>.

During the War of Independence in 1948, the State seized a large strip of land, but much of it continued to be owned by original Arabs.<sup>46</sup> Thus the State's leaders, who sought to transfer ownership of those lands to the State,<sup>47</sup> enacted several laws that,—such as absentee land, *Mawat* land, or unclaimed land—justified legal transfer of ownership of those lands to the State.<sup>48</sup> In addition, the State placed all public land under a State management agency called the Israel Land Administration (ILA). The State then utilized a constitutional act, called Basic Law: Israel Lands, to define all land managed by the ILA as State land. Basic Law: Israel Lands, enacted in 1960, defines State land as land owned by three bodies: the State of Israel, the JNF, and the Development Authority. These three bodies own 93 percent of the land in the State, distributed as follows: a) the State owns 75 percent of all land in Israel;<sup>49</sup> b) the JNF owns 13 percent; and c) the Development Authority, a statutory body established by the Development Authority (Transfer of Property) Law-1950,<sup>50</sup> owns 5 percent.

In the 1950s, the State transferred all the Arab land from the Custodian of Absentee Property, a governmental body that had taken charge of land owned by Arabs who were expelled (or fled) from Palestine during the 1948 War, to the Development Authority.<sup>51</sup> Also, in 1960, the State enacted the Basic Law: Israel Lands.<sup>52</sup> Article 1 stipulates that “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.”<sup>53</sup>

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<sup>46</sup>Who became absent after they were displaced, evicted, or fled from the State.

<sup>47</sup>SOUAD R. DAJANI, RULING PALESTINE: A HISTORY OF THE LEGALLY SANCTIONED JEWISH-ISRAELI SEIZURE OF LAND AND HOUSING IN PALESTINE 37 (Rob Stuart ed. 2005).

<sup>48</sup>*Israel Lands: Privatization or National Ownership?*, JEWISH VIRTUAL LIBRARY, [http://www.jewishvirtuallibrary.org/jsource/Society\\_&\\_Culture/land.html](http://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/land.html) (last visited February 5, 2013).

<sup>49</sup>*Id.*; ABU HUSSEIN AND MCKAY, *supra* note 28 at 144.

<sup>50</sup>*Development Authority (Transfer of Property) Law*, 1950, 4 LSI 151 (1948-1987) (Isr.).

Available at:<http://www.israellawresourcecenter.org/israellaws/fulltext/devauthoritylaw.htm>

<sup>51</sup>Khamaisi, *supra* note 27 at 310.

<sup>52</sup>Basic Law: Israel Lands, 1960 S. H. 56 (Isr.).

<sup>53</sup>*Id.* (emphasis added).

These policies prevent land allocation to the Bedouin in the Negev as well. On the collective level, particularly, such policies prevent the recognition of many Arab villages under the claim that the land belongs to the JNF and cannot be allocated to a non-Jewish settlement.<sup>54</sup> Under this policy, the State amended existing laws to include goals based on Zionist ideology and canceled ones that did not support them.<sup>55</sup> Although the State initially operated under the Ottoman and British Mandate land laws, it gradually enacted new laws designed to increase the State's control of land. The Absentee Law and the Land Acquisition Law, both of which dispossessed many Arabs of their lands, provide the most dramatic examples of this policy.

The Absentee Property Law,<sup>56</sup> passed in 1950, authorizes the State to confiscate all Arab absentee property and lands (including that of the Bedouin in the Negev).<sup>57</sup> The law gives the State the right of possession to all land and property of Palestinian Arabs who were absent between 1949 and 1952. The State also utilized this law to confiscate land for military and other public needs<sup>58</sup> and transfer ownership of all absentee land to the State.<sup>59</sup> The Land Acquisition Law also retroactively legalized the confiscation of land belonging to non-absentee Arabs without legal authorization. After the War of 1948,

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<sup>54</sup>See generally ADALAH, THE LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL, NOMADS AGAINST THEIR WILL-THE ATTEMPTED EXPULSION OF THE ARAB BEDOUIN IN THE NAQAB: THE EXAMPLE OF ATIR-UMM AL-HIERAN 18 (2011), available at <http://www.adalah.org/eng/publications/Nomads%20Against%20their%20Will%20English%20pdf%20final.pdf>

<sup>55</sup>Sabri Jiryis, *Domination by the Law*, 11 J. PALESTINE STUD. 67, 75 (1981).

<sup>56</sup>The Absentees' Property Law was meant to serve as the legal basis to transfer the property of Palestinian refugees into the possession of the State of Israel. The law says that the land and property of Palestinian residents and nationals of Arab countries who were in one of the Arab countries or in any part of the Land of Israel that is outside of the area of Israel from November 29, 1947 until a declaration that the State of emergency declared in 1948 ended, which has not yet happened, would revert to the possession of the Custodian of Absentee Property, i.e. the possession of the State. 5710- 1950, SH No. 37, 86 (Isr.).

<sup>57</sup>See *id.* at art. 4, 30.

<sup>58</sup>Sabri Jiryis, *Domination by the Law*, 11 JOURNAL OF PALESTINE STUDIES 67-92, 84 (1981).

<sup>59</sup>M. CHERIF BASSIOUNI&SHLOMO BEN AMI, A GUIDE TO DOCUMENTS ON THE ARAB-PALESTINIAN/ISRAELI CONFLICT: 1897-2008 198 (2009).

those lands were allocated for military bases or Jewish communities.<sup>60</sup> The Prescription Law of 1958<sup>61</sup> is another law the State utilized for Arab land dispossession. The law utilized legal technicalities to dispossess Arab land. It extended the ten-year period of land cultivation to gain title for *Miri* land<sup>62</sup> to fifteen years for land that had not been settled and twenty-five years for settled land.<sup>63</sup> In addition, the Prescription Law further stated that the new provisions applied even if the fifteen or twenty-five year periods had elapsed before the Prescription Law came into effect.<sup>64</sup> Thus, as Kretzmer shows, a person who had already acquired title through possession under the Ottoman law could be deprived of that title through retroactive application of the extension of the prescription period.<sup>65</sup> According to Mohsen Sabri,<sup>66</sup> only by changing the prescription period, the State expropriated about 50,700 acres ( 205,000 dunams) of land from Arabs.<sup>67</sup>

Administrative tools, such as planning and zoning, provide additional methods for transferring Arab land to the State.<sup>68</sup> Through planning laws and policies, the State allocated most of the Arab land for Jewish settlement, public development, and military

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<sup>60</sup>DAVID A. WESLEY & E. MARX, STATE PRACTICES AND ZIONIST IMAGES: SHAPING ECONOMIC DEVELOPMENT IN ARAB TOWNS IN ISRAEL 113–14 (2008); YIFAT HOLZMAN-GAZIT, LAND EXPROPRIATION IN ISRAEL: LAW, CULTURE AND SOCIETY 111–12 (2007).

<sup>61</sup> The Prescription Law, 5718-1958, SH No. 251, p. 112, 251.

<sup>62</sup>*Miri* land is the private land according to the Ottoman Land Code of 1858.

<sup>63</sup> According to the Ottoman Land Code, a person who cultivated *miri*land for a period of ten years was entitled to ownership. See KRETZMER, *supra* note 36 at 52.

<sup>64</sup> 5718-1958, SH No. 251, p. 112, § 29(b).

<sup>65</sup>KRETZMER, *supra* note 36 at 53.

<sup>66</sup> Mohsen Sabri is a scholar who wrote about the Prescription Law and land transfers from Arabs to the State of Israel. See Mohsen Sabri, *maamadam Hamishpati shel Arvee Yisrael [The Legal Status of Israel's Arabs]*, 2 IYUNEI MISHPAT 568 (1972).

<sup>67</sup>Mohsen Sabri, *The Legal Status of Israel's Arabs*, 2 IYUNEI MISHPAT 568, 569 (1972).

<sup>68</sup>ISSACHAR ROSEN-ZVI, TAKING SPACE SERIOUSLY: LAW, SPACE, AND SOCIETY IN CONTEMPORARY ISRAEL ch. 3 (2004).

needs, while preventing or reducing land for Arab use. Planning policy affected all Arab land dispossessions, but the Bedouin land in the Negev disproportionately so.<sup>69</sup>

While native Arabs have been pushed outside of the State's boundaries and their villages gone unrecognized within them, the State has distributed their lands to immigrant settlers who would be qualified as Jews under the Law of Return.<sup>70</sup> The fact that foreigners may be allowed to lease land in Israel if they show that they would qualify as Jews under the Law of Return,<sup>71</sup> while physically present Arab citizens cannot, emphasizes how land policy is used to perpetuate inequality within the State of Israel.

The judicial system played an additional role in Arab land dispossession. Courts subjugated the legal policy and interpretation of law to further Arab land dispossession. They narrowed the definition of Arabs' legal rights in order to deny them land ownership,<sup>72</sup> thus enabling the State to acquire the majority of the Arab land.<sup>73</sup> As part of this policy, the State has made it difficult for Arabs to win land cases in courts, as the law has made it nearly impossible to recognize Arab land rights.<sup>74</sup> Professor Alexander Kedar from the University of Haifa explains how Israeli law and the "legal activism" exercised by the courts<sup>75</sup> have eliminated any possibility for Arab claimants to win their land claims through the Israeli court system. Relying on several cases where courts interpreted the

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<sup>69</sup> Oren Yiftachel, *Land, Planning and Inequality: the Division of Space between Arabs and Jews in Israel*, (Heb) TEL-AVIV: ADVA CENTER (2000), <http://www.kibbutz.org.il/karka/igun/Mercaz-Adva.htm>.

<sup>70</sup> The Law of Return 5710 (1950) S.H. (Book of Laws) No. 51, 159. (Isr.).

<sup>71</sup>*Id.*

<sup>72</sup>KRETZMER, *supra* note 36 at 52–53.; George Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AMERICAN UNIVERSITY LAW REVIEW (1994), <http://digitalcommons.wcl.american.edu/aulr/vol43/iss2/3>.

<sup>73</sup>KRETZMER, *supra* note 36 at 52.

<sup>74</sup>Jamil Dakwar, *The Supreme Court and the Confiscation of Palestinian Lands: On the Politics of Legal Formalism*, 2 ADALAH'S REV. 14, 14–15 (2000).

<sup>75</sup> The legal activism regarding this subject began with case law originating in the 1950s and 60s and concluded with the 1996 decision in *Shibli* where the court restricted further interpretation of land cases, foreclosing Arab land recognition.

Ottoman laws to restrict and even deny Arab land rights,<sup>76</sup> Kedar shows that ideological reasoning is behind such policy. The connection between the Zionist ideology and the State's laws dictate court decisions. This "judicial activism" protects Jewish land and State land, and discriminates against Arabs.

In regard to Bedouin land in particular, the rules for court procedures established by the State were designed for the purpose of denying Bedouin land rights.<sup>77</sup> Professor Oren Yiftachel from Ben-Gurion University,<sup>78</sup> sheds light on the reality that the law has limited power when dominated by strong political forces that shape legal policy and even dictate court decisions. He notes that several petitions to the Supreme Court<sup>79</sup> regarding Jewish settlements in the occupied territories show a "legal backup – as well as a broad institutional and political legitimization to the Israeli-Jewish colonialism, and to a distinct and unequal definition of property rights of Palestinians and Jews . . . creating *de facto* a regime of apartheid."<sup>80</sup>

### **B. The Specific Dispossession of Bedouin's Land**

The dispossession of Bedouin land, as well, began before the establishment of the State of Israel in 1948, as part of the general Arab land dispossession. The desire of the Zionist movement's to establish a Jewish presence in the Negev in the 1930s so as to

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<sup>76</sup>Alexandre Kedar, *Minority Time, Majority Time: Land, Nation, and the Law of Adverse Possession in Israel*, 21 TEL AVIV U. L. REV. 665 (1998).

<sup>77</sup> Ronen Shamir, *Suspended in Space: Bedouins Under the Law of Israel*, 30 L. & SOC'Y REV. 231 (1996).

<sup>78</sup> Professor Oren Yiftachel is one of the leading researchers on the Arab and Bedouin land rights in Israel, <sup>79</sup> HCJ114/78Burkanv. Minister of Finance32(2) PD 800 [1978] (Isr.) (Palestinian resident of Jerusalem appealing the ban on Arab purchases of housing in the Jewish Quarter); HCJ 390/79 Ka'adan v. Government of Israel Ld(1) PD 1 [1979] (Isr.) (known as the "Elon Moreh case" in which Palestinians appealed against establishing a settlement on their private lands); HCJ 2056/04 Beit Sourik Village Council v. Government of Israel 58(5) PD 807 [2004] (Isr.) (available at:[http://elyon1.court.gov.il/Files\\_ENG/04/560/020/A28/04020560.A28.pdf](http://elyon1.court.gov.il/Files_ENG/04/560/020/A28/04020560.A28.pdf)) (addressing a petition by Palestinians against the damage that was caused by the Separation Wall to Palestinian residents).

<sup>80</sup> Oren Yiftachel, *A Geographer in Legal Space: Teaching Legal Geography as a Journey in an Academic Frontier*, 2 DIN U'DVARIM 211, 217 (2005).

convince the League of Nations to annex the region to the Jewish State in the Partition Plan of Palestine.<sup>81</sup>

Ironically, similar to other indigenous peoples, the first Bedouin land dispossession was facilitated by the international community. In 1947, the United Nations' Partition Plan of Palestine granted approximately 2.7 million acres (11 million dunams) in the Negev to the Jewish State, ignoring the Bedouin presence and their land ownership.

In addition to the above land dispossession and the general land dispossession policies the State practiced against the entire Arab population, the Bedouin were subject to additional specific land dispossession policies that were performed using administrative, legislative, and judicial means to dispossess Bedouin land. The State first evicted and displaced the Bedouin from their traditional lands, forcing many of them to flee out to surrounding countries; after the War ended it refused to let them return; then, it concentrated the remaining Bedouin into a small area called the *Siyag*, placing them under a military rule and restricting their movements to that fraction of the Negev. At the same time, the State enacted several laws that further enabled Bedouin land dispossession by additional administrative and judicial means. Finally, courts followed the administrative and legislative branches to make sure the interpretation of the laws would correspond to the State's goals (and to legalize what needed legalization). These methods were very effective and granted the state a full control of the Bedouin lands. However, among the many acts, means, and methods that the State has utilized, the judiciary has been and continues to be the most important and effective one.

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<sup>81</sup>Chanina Porat, *Policy of Land Purchase and Settlement in the Negev before the War of Independence*, 62 CATHEDRA 123–154 (1991). (describing the Zionist movement and establishment of 35 Jewish settlements in the Negev, illustrating the Jewish existence in the Negev).

## Judicial Land Dispossession

After the State expropriated about 86%<sup>82</sup> of Bedouin lands using eviction, displacement, and legislative means, it turned to judicial means to expropriate the rest of the Bedouin lands. The judiciary was utilized not only to support the State's policy of Bedouin land dispossession but also to legitimized Bedouin land expropriation and prevented any attempts to challenge the State acts of dispossession. Therefore, the State enacted the Land Settlement Ordinance (1969). The Ordinance required the Bedouin to file land settlement claims and provide the evidence that supported their claims. After the Bedouin filed their land claims, the State disputed Bedouin customary land rights and refused to accept their ownership claims; it filed mass counterclaim lawsuits against all Bedouin claimants.<sup>83</sup> This action marked the beginning of the process of Bedouin land dispossession through the judiciary.<sup>84</sup>

At the beginning, during the early 1970s, only a few cases were adjudicated in courts, but recently, after the Negev Plan (2003), the judicial method has become the main tool for Bedouin land dispossession. During the early cases, the State based its argument on two premises. It argued that Bedouin land is *Mawat* land, and that the Bedouin were required to "revive"<sup>85</sup> the land but did not do so. Therefore, the State claimed that the land in question is State land and the Bedouin had no rights to it.

By filing counterclaims, the State turned Bedouin claims into "disputed claims,"<sup>86</sup> which required them to be forwarded to the court for adjudication.<sup>87</sup> In court, Bedouin claimants found (and continue to find) themselves in a labyrinthine process of trying to prove their land rights. Obstacles, include the obligation to follow the State's law and its

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<sup>82</sup>2.34 million acres of 2.7 million (9.5 million dunams, of 11 million).

<sup>83</sup>HUMAN RIGHTS WATCH, *supra* note 23 at 18; THE NEGEV COEXISTENCE FORUM FOR CIVIL EQUALITY, THE ARAB-BEDOUINS OF THE NAQAB- NEGEV DESERT IN ISRAEL (SHADOW REPORT 2006) 4.

<sup>84</sup> See CA 218/74 Salim El-Huashlla v. State of Israel 38(3) PD 141, 151 [1974] (Isr.).

<sup>85</sup> To revive *Mawat* land means to turn it into usable land, usually through consistent use.

<sup>86</sup> Land Rights Settlement Ordinance [Revised], 5729- 1969, 13 OSI 293, art. 43 (293) (Isr.).

<sup>87</sup> *Id.*

rules of evidence.<sup>88</sup> These rules, often, support the State's goal of Bedouin land dispossession. Under such rules, the Bedouin plaintiffs must carry the burden of proof; they must introduce sufficient evidence to prove their ownership of the land. This requirement may include providing official documents from the mid- and late-19<sup>th</sup> century to the beginning of the 20<sup>th</sup> century. Often, Bedouins have been unable to present this evidence in court.

### **The Denial of Bedouin Customary Law**

In addition, the State refuses to recognize the Bedouin's customary land rights.<sup>89</sup> The denial of Bedouin customary law and their indigenous culture is another method of land dispossession. Unlike the Ottoman and the British Mandate approach, courts in Israel followed a new approach, established under the Land Rights Settlement Ordinance and other subsequent laws and court decisions.<sup>90</sup> This approach disregarded Bedouin customs, laws, and evidence that could support the recognition of their land.

As several scholars have shown, the recognition of Bedouin tribal law, tribal courts, and tribal characteristics can be found in several levels of Israeli law, including State law, official documents, and case law of the Supreme Court of Israel.<sup>91</sup> One of the best examples of such recognition can be found in Article 45 of Palestine Order in Council 1922-1947, which recognizes tribal courts in the Negev (Beer Sheva) through the Tribal Court Regulation of 1937. The Order authorizes the State to establish tribal courts in the Negev and authorizes these courts to rule according to Bedouin tribal law.<sup>92</sup> Both the

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<sup>88</sup> Cf. The Canadian recognition of land rights where the court modified the rules of evidence and accepted evidence under specific rules according to Aboriginal needs and traditions.

<sup>89</sup> Morad Elsana, *The Recognition of Indigenous People's Land: Application of the Customary Land Rights Model on the Arab-Bedouin Case in Israel*, 7 GEO. J. L. & MOD. CRITICAL RACE PERSP. 45–68, 51 (2015).

<sup>90</sup> *Id.* at 52.

<sup>91</sup> Eliakim Rubinstein, *From the Ancient East to the Middle East: legal dimensions of belonging and distinction between Israel and the neighboring countries*, <http://www.lifshiz.macam.ac.il/m/pages/m0581/m0581194a.html> (last visited Oct 16, 2012); see also Yiftachel, Kedar, and Amara, *supra* note 138.

<sup>92</sup> *Id.*

Palestine Order in Council and the Tribal Court Regulation were adopted into the State's laws. Although the Tribal Court Regulations were never applied in Israel, and Tribal Courts were never established, they continue to be valid laws since they were never nullified.<sup>93</sup> Elyakim Rubinstein, previously attorney general of the State of Israel, and former Supreme Court justice, argues that, theoretically, a Bedouin tribal court could convene and rule in Beer Sheva as per the Bedouin tribal law.<sup>94</sup>

In addition, on several occasions, both the State and the judicial system indirectly recognized elements of the unique characteristics of Bedouin in the Negev. For example, in the Supreme Court case of *Avitan v. Israel Land Authority*,<sup>95</sup> Avitan, a Jewish police officer, petitioned the Supreme Court against the ILA's decision that refused to sell him a building lot in the Bedouin town of Segev-Shalom at a subsidized price similar to the price it offered to Bedouin who were willing to move and live in the Bedouin recognized townships. Avitan claimed that the State discriminated against him based on his ethnicity.<sup>96</sup> The State argued against Avitan's request and claimed that it sells such subsidized residential building lots for Bedouin only as part of its efforts to encourage Bedouin to transfer from a nomadic way of life to a settled way of life in the designated townships. The State articulated that "Bedouin in Israel constitute an ethnic minority with character and uniqueness. Bedouin have an old culture and heritage derived from Arab tribes since before the advent of Islam. Since then until the first half of this century, only a few changes have occurred in the habits and customs of their lives."<sup>97</sup>

Further, in several official documents the State recognized the "special character" of the Bedouin society. In its response in the Avitan case, it stated, "Given its *special character and unique customs of the Bedouin society that were preserved . . . to a great extent even during the*

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> HCJ 528/88 Eliezer Avitan v. Israel Land Admin.43(4) PD 297 [1988] (Isr.). (Available at: <http://www.hamoked.org.il/files/2015/1159493.pdf>)

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

process of transition to permanent settlement there was a need to study and consider carefully the needs of the Bedouin society.”<sup>98</sup> In the same case, the State recognized the tribal nature of the Bedouin of the Negev when it indicated that “Bedouin towns were designed, in advance, for Bedouin tribes and certain factions, in light of Bedouin sensitivity to tribal, factions and family affiliations.”<sup>99</sup>

The unique tribal characteristic of the Bedouin of the Negev was also recognized in the Supreme Court decision in *Abu Ghanem v. Ministry of Education* case, in which Bedouin petitioned to the Supreme Court against the Ministry of Education, claiming that its policy discriminated against the Bedouin in budget allocation for educational drop-out officers.<sup>100</sup> In that case, the Court indicated again the uniqueness of the Bedouin of the Negev. The Court referred to the Bedouin as a unique population with a different character that deserved an affirmative action in that issue.<sup>101</sup>

However, despite the “recognition”<sup>102</sup> of Bedouin tribal courts, tribal law, and tribal characteristics, the executive, legislative, and judicial branches of the Israeli State refuse to recognize Bedouin tribal law with regard to land rights. On this issue, the executive and the legislative branches in Israel ignored Ottoman and British law, both of which recognized Bedouin land rights based on their customs and tribal law. The State also ignored the fact that both the Ottomans and British Mandate specifically separated the Bedouin and Bedouin land rights from other communities in Palestine.<sup>103</sup> In so doing,

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 302, 304.

<sup>100</sup> *See* HCJ 6671/03 Abu Ghanem v. Ministry of Ed. Nt (5) PD 577 [2003] (Isr.).

<sup>101</sup> *Id.*

<sup>102</sup> The existence of the Tribal Court Regulation of 5715, 1937, KT 483, 123 (Isr.).

<sup>103</sup> The British distinguished the Bedouins, politically and legally, on many occasions. Therefore, it is reasonable to recognize tribal law. GRANOTT, *supra* note 38 at 89.

the State ignored the Ottoman and British attitude that preserved the Bedouin's historic land rights that are defined by Bedouin laws and customs.<sup>104</sup>

Courts also ignores Bedouin customs regarding land rights.<sup>105</sup> They dismissed the fact that the Bedouin have different interpretations of the elements that would prove land rights. They ignored the fact that ideas such as “*revival*,” “*settlement*,” and “*use of the land*” are defined differently by the Bedouin.<sup>106</sup> Courts do not consider the Negev Bedouins' land features when interpreting legal concepts such as revival of lands, mainly the fact that their lands are desert, and thus by definition does not “change totally by seasonal cultivation”, as the courts demanded. Finally, courts deny Bedouin pastoralism as a legitimate land use for the sake of *Mawat* land revival.<sup>107</sup> Moreover, courts refuse to recognize Bedouin's traditional settlements (village, *dirab*) as settlements for the purpose of land recognition and land revival. As Rangwala states, the State refuses to “recognize tents as settlements and denied that pastoralism as practiced by the Bedouin constituted “working” the land.”<sup>108</sup>

### **Proving Land Rights in Israeli Court**

Overall, the system made it impossible for Bedouin to prove their land rights in courts. For example, typically in property cases to prove land ownership in court, a plaintiff introduces a title deed or other equivalent documents that proves his land ownership. However, because Bedouin do not have title deeds, they cannot prove their ownership in this way. Instead, they must provide evidence that proves their land rights through an alternative method. In fact, in a case of “unsettled” land like Bedouin lands, title deeds

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<sup>104</sup> See ORLYALMI, NO MAN'S LAND: HEALTH IN THE UNRECOGNIZED VILLAGES IN THE NEGEV 11 (July 2003), available at [http://www.phr.org.il/uploaded/articlefile\\_1163421247181.pdf](http://www.phr.org.il/uploaded/articlefile_1163421247181.pdf).

<sup>105</sup>CA (BS) 7161/06 Suleiman Aluqbi v. State of Israel (unpublished) [2012] (Isr.) (on file with author).

<sup>106</sup>Bisharat, *supra* note 73; Tawfiq S. Rangwala, *Inadequate Housing, Israel, and the Bedouin of the Negev*, 42 OSGOODE HALL L.J. 415 (2004) (refusing to recognize the Bedouin settlement as a village).

<sup>107</sup> Ham. (BS) El-Riati v. Batcha, PM 1983(1) 329, 332 (1993).

<sup>108</sup> Rangwala, *supra* note 108; Bisharat, *supra* note 73 at 482 Rangwala, *supra*; see also Professional Opinion submitted by Ruth Kark to District Court regarding CC 7161/06 Suleiman Aluqbi v. State of Israel.

do not exist at all since the lands are not “settled,” zoned, or registered, and for this kind of land the State has never issued title deeds. Therefore, the only available option to the Bedouin is litigation, in which they must introduce detailed evidence to satisfy many elements, including the source of their right (i.e. by purchase, inheritance, land revival, or long-time possession); the type of land (*Miri*, *Mulke*, *Waqf*, *Matruka*, or *Mawat*); and location, including the exact borders of the land and its neighbors, to prove their land rights. In *Mawat* land cases, claimants must prove another two elements: revival of the *Mawat* land, which means continuous land cultivation, and authorization or consent to revive the land, i.e. They have to prove that they had received consent from state authorities (Ottoman or British Mandate) to revive that land prior to 1921. Further, the fact that the State does not recognize Bedouin oral culture eliminates the possibility to prove their land rights in any other way.<sup>109</sup>

In order to streamline what evidence is needed to prove their rights, Bedouins usually try to prove one of two things: that they have been legally possessing *Miri* land for the prescription period, or that they have revived *Mawat* land.<sup>110</sup> Under the first option, claimants have to prove that their land is *Miri* land, rather than *Mawat* land, that they have legally acquired possession of it without violence or opposition from the previous owner, and that they have been in possession of the land since that time. The main obstacle with this option is proving that the land is *Miri* land, especially since the court decided in several cases, including *Albwashleh*, *Alasad*, *Alasibi*, and *Aloqbi case*, that all Bedouin lands are *Mawat* land because at the time the Ottoman Land Code was enacted in 1858 there were no permanent settlements in the Negev.<sup>111</sup>

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<sup>109</sup> See L.A. Roness & K. McNeil, *Legalizing Oral History: Proving Aboriginal Claims in Canadian Court*, 39 J. OF THE W. 66-74 (2000) (discussing oral history generally); Safa Abu Rabia, *Between Memory and Resistance, an Identity Shaped by Space: The Case of the Naqab Arab Bedouin*, 8 HAGAR STUD. IN CULTURE, POLITY AND IDENTITIES 93, 102, (2008) (discussing oral history among Bedouin of the Negev).

<sup>110</sup> Avraham Halima, *Negev lands from the Legal Perspective*, INSTITUTE FOR LAND POLICY AND LAND USE-DEPT. OF LAND POLICY 33 (1985).

<sup>111</sup> C.A. (BS) 7161/06 Suleiman Aluqbi et. al. v. State of Israel, (2012).

Under the second option, the *Mawat* option, claimants must prove that they have revived<sup>112</sup> *Mawat* land.<sup>113</sup> To prove revival of *Mawat* land cases, claimants must prove three elements: 1) the type of land they are claiming according to the Ottoman law;<sup>114</sup> 2) authorization to revive the land from the Ottomans or the British Mandate prior to 1921; and most importantly, 3) a persistent “use of land” (cultivation) with no interruption since before 1921. This “use of land” must show a *significant change* in the land as a result of that use.<sup>115</sup> The problem is that each one of these three elements is nearly impossible to prove, let alone all three together.<sup>116</sup>

In several cases, the court has demanded proof of land use according to non-Bedouin traditions, meaning use of the land according to an agricultural standard rather than a Bedouin-pastoral standard.<sup>117</sup> This requirement is problematic on both the practical and theoretical levels. On the practical level, it deprives the Bedouin of the right to recover land based on their pastoral culture and leads to the denial of Bedouin claims for pastoral land. On a theoretical level, pastoral land rights are the core issue of the nomadic peoples’ land rights problem. The basic Western theory of land rights rely on “effective occupation” proven by cultivation and agriculture tests.<sup>118</sup> The principle of “effective occupation” of the land has been the basic rule for land use and ownership. Major Western theorists such as Locke and Hegel described the “cultivation test” or “agricultural argument” as the basic way to prove occupation of land in order to prove possession and acquire land rights. “The ‘agricultural argument’ promotes the view that

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<sup>112</sup> See CA 218/74 Salim El-Huashlla v. State of Israel 38(3) PD 141, 151 [1974] (Isr.) (defining the concept “revival of *Mawat* land” according to article 1051 of the Ottoman Code where revival is improvement, i.e. preparing the land for agriculture).

<sup>113</sup> KRETZMER, *supra* note 36 at 52.

<sup>114</sup> Bisharat, *supra* note 73 (defining Miri, Mulk, Matruka, Waqf, and Mawat).

<sup>115</sup> Abraham Halima, *Negev lands from the Legal Perspective*, INSTITUTE FOR LAND POLICY AND LAND USE- DEPT. OF LAND POLICY (1985).

<sup>116</sup> *Id.*

<sup>117</sup> Rangwala, *supra* note 108 at 450.

<sup>118</sup> Jérémie Gilbert, *Nomadic Territories: A Human Rights Approach to Nomadic Peoples’ Land Rights*, 7 HUM. RTS. L. REV. 681, 685 (2007).

only cultivation of land can be regarded as a ‘proper’ occupation of land, and only agriculture can be regarded as a basis of a real land tenure system.”<sup>119</sup> According to Locke, “uncultivated land was not possessed closely enough to constitute property.”<sup>120</sup>

Therefore, according to the Western theory, pastoral culture is a problematic element for proving nomadic indigenous peoples' possession of land, including in the case of the Bedouin. As Jérémie Gilbert explains, “Nomadic peoples are not regarded as legal occupiers of any particular land as they do not have ‘a fixed abode and definite territory belonging to the people by whom it is occupied.’”<sup>121</sup> Thus, according to many scholars, Western legal theory discriminates against non-pastoral culture, like the Bedouin and their use of land on the same basis; therefore, the Western courts do not recognize Bedouin use of land as a kind of use that grants them land rights.<sup>122</sup>

Not surprisingly, the requirements for revival have been impossible to meet since they simply do not fit the Bedouin culture and way of life in the desert.<sup>123</sup> Additional obstacles such as language, lack of trust, and political hostility make the process very difficult. These arguments were tested for the first time in *Alhawashelah*, which began in the District Court of Beer Sheva and made its way to the Court of Appeals in 1984.

### **The Alhawashelah Case**

In 1969, as part of the land settlement process, members from the Alhawashelah tribe, who reside in Gaser-Asser Village in the southern part of the Negev, filed a land title settlement claim with the Land Settlement Officer asking him to approve their land claim and register their land in their name. However, the Land Settlement Officer rejected their application, so they appealed to the District Court of Beer Sheva. In July

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<sup>119</sup>*Id.*

<sup>120</sup>*Id.*

<sup>121</sup>*Id.*

<sup>122</sup>See generally Ronen Shamir, *Suspended in Space: Bedouins under the Law of Israel*, 30 LAW & SOCIETY REVIEW 231 (1996).

<sup>123</sup>*Id.*

1972, the District Court also rejected the Alhawashelah appeal thus rejecting their land ownership claims.<sup>124</sup>

Following the District Court's decision, three members of the Alhawashelah tribe appealed the District Court's decision to the Supreme Court of Justice in 1974.<sup>125</sup> The Alhawashelah tribe claimed that they owned the land and appealed to register it in their name. However, since their land had never been registered in a Land Registry, they had never possessed a title deed that would prove their ownership. The State, represented by Pleah Albeck, claimed that according to Articles 6 and 103 of the Ottoman Land Code, Bedouin land was *Mawat* land.<sup>126</sup> Articles 6 and 103 define *Mawat* land as: remote from an inhabited place, located in a deserted place, and not allocated to or possessed by anybody. Therefore, the State argued that according to Article 155 of the property law the land should be registered in the name of the State.<sup>127</sup> It also claimed that the appellants had no land ownership because they did not prove they had revived the land. The State argued that the appellants had not cultivated the land and had not registered the land under their name.

In response to the *Mawat* argument, the *Alhawashelah* members claimed that they had in fact revived the *Mawat* land. They claimed that they had possessed and cultivated the land since time immemorial, long before the British Ordinance of 1921, and that should be recognized as revival.<sup>128</sup> As mentioned, According to the law, a claimant who seeks to prove revival of *Mawat* land has to prove three elements: 1) that he possessed the land;

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<sup>124</sup> C.A. 218/74 Salim Alhawashelah v. State of Israel 38(3) PD 141, 143 [1974] (Isr.); SHLOMO SWIRSKI & YAEL HASSON, INVISIBLE CITIZENS: ISRAEL GOVERNMENT POLICY TOWARD THE NEGEV BEDOUIN 26 (2006).

<sup>125</sup> Rosen-Zvi, *supra* note 57, at 46.

<sup>126</sup> Rangwala, *supra* note 108 at 440–1.; *see also* The Land Rights Settlement Ordinance, *supra* note 129 (classifying all *Mawat* lands as State property, unless formal legal title could be produced).

<sup>127</sup> The Property Law, 5729 -1969, SH No. 575 p 259-283 (Isr.).

<sup>128</sup> C.A. 218/74 Salim Alhawashelah v. State of Israel 38(3) PD 141 [1974] (Isr.).

2) cultivated the land for a substantial amount of time;<sup>129</sup> and 3) that he or she has received authorization from the relevant authorities according to either the Ottoman Land Code of 1858 or the British Mandate Ordinance of 1921. This 1921 Ordinance was the last chance to get consent to revive *Mawat* land, because the British Mawat Land Ordinance of 1921 put an end to *Mawat* land acquisition through revival. Accordingly, in order to prevail, the Alhawashelah members had to prove that they had possessed the land, revived it, and acquired rights in the period preceding the Ordinance of 1921 or during the Ottoman rule, between 1858 and 1915, 60 years before their case had reached the court in Israel. In addition, the claimants also had to prove that they had obtained Ottoman or British Mandate authorization.<sup>130</sup>

Needless to say, the claimants could not meet this very heavy burden.<sup>131</sup> As a result, the Supreme Court dismissed the appeal, affirmed the State's position, and ordered the Alhawashelah members' land to be registered as State land. Justice Avraham Halima who delivered the decision stated that the claimed land was *Mawat* land. The Court rejected the Alhawashelah tribe's argument that they had "revived" the land and acquired ownership rights.<sup>132</sup> The Court adopted the State's policy and it became the legal precedent and the governing rule for all Bedouin land cases.

The *Alhawashelah* decision is considered a landmark decision for Bedouin land rights. It was the first Bedouin land case to reach the Supreme Court, producing a detailed decision on the merits. The decision defines Bedouin land as *Mawat* land and creates legal precedent for the dispossession of all Bedouin land in the Negev.<sup>133</sup> The decision sealed the fate of all Bedouin land claims, creating a situation where Bedouin land rights

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<sup>129</sup>For 15 years in settled land, and 25 in unsettled land. KRETZMER, *supra* note 36 at 53. (describing the legal status of the Arabs in Israel).

<sup>130</sup>Alexandre (Sandy) Kedar, *Minority Time, Majority Time: Land, Nation, and the Law of Adverse Possession in Israel*, 21 TEL AVIV UNIVERSITY LAW REVIEW 665–746, 686 (1998).

<sup>131</sup>Halima, *supra* note 118 at 15.

<sup>132</sup>CA 218/74 Salim Alhawashelah v. State of Israel 38(3) PD 141 [1974] (Isr.).

<sup>133</sup>KRETZMER, *supra* note 36 at 49–50, 60.

cannot be legally disputed. In practice today, the State simply introduces *Alhawashelah* as precedent in response to Bedouin claims. It argues that Bedouin land is *Mawat* land, and thus claims should be dismissed under the same reasoning as *Alhawashelah*. The court in turn, relying on *Alhawashelah*, denies every Bedouin land claim without exception.<sup>134</sup> Not one Bedouin tribe or individual has ever succeeded in winning a land claim case.<sup>135</sup>

In a series of cases from 2004, the process of adjudicating Bedouin land cases introduced the simplicity of dismissing Bedouin land claims.<sup>136</sup> The court, the Bedouin, and the State know the result in advance of court rulings. Courts have been accepting the argument that Bedouin land is *Mawat* land as a fact, rather than a legal claim requiring proof. Therefore, in recent cases, courts have been using the same “decision form” for each individual decision, changing only the technical information, such as names, the size of the land claim, and the date.<sup>137</sup> By substituting its policy, the State has been ignoring centuries of Bedouin traditional land ownership, its characteristics, and their unique use of land.<sup>138</sup> Courts refuse to acknowledge that Bedouins have a different set of characteristics that require different approaches of investigation to determine ownership.<sup>139</sup>

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<sup>134</sup>Havatzelet Yahel, *Land Disputes between the Negev Bedouin and Israel*, 11 ISRAEL STUDIES 1–22, 13 (2006).

<sup>135</sup>Kelley, *supra* note 221.

<sup>136</sup>*See* CC (BS) 3347/04 Jadoa’ Alasad v. State of Israel, PM (2004) (Isr.) [Civil Case (BS) 3347/04 Jadoa’ Alasad v. State of Israel, (decision delivered Oct. 19, 2009). Tak-Mehozi 2009(4), 1232].

<sup>137</sup>*See id.* *See also* CC 3316/04EsaFarhoodAlasibi v. State of Israel PM (unpublished) (2009) (Isr.) (on file with author).

<sup>138</sup>Ignoring traditional law land characteristics and unique land use considerations was inconsistent with State policy and court attitudes which on some occasions acknowledged these unique characteristics of Bedouin culture, including their tribal law. *See e.g.*, Tribal Court Regulation of 5715, 1937, KT 483, 123 (Isr.).

<sup>139</sup>CA (BS) 7161/06 Suleiman Aluqbi et. al. v. State of Israel (unpublished) (2012) (Isr.).

### **The Albeck Committee, the Mawat Land Doctrine, and the Halt on Bedouin Land Settlement**

In 1975, while the *Alhawashelah* case was pending in the Supreme Court, the Government appointed a special committee from the Ministry of Justice, headed by Pleah Albeck, the State's attorney in the *Alhawashelah* case, to inquire into the legal status of Bedouin land rights. The committee became known as the Albeck Committee. In October 1975, still before the Supreme Court had issued its ruling in the *Alhawashelah* appeal, the Committee issued its report that stated three points: first, all lands of the Negev are *Mawat* lands because when the Ottoman Lands Code 1858 was published, there was no permanent settlement in the Negev; second, no Bedouin can acquire any land rights, even under possession and continuous cultivation; and third, all Bedouin land is State land.<sup>140</sup> The Committee also stated that it was unacceptable to evacuate the Bedouin without compensation after so many years of living in the area simply because there was no rural or urban settlement in 1858. Therefore, the Committee devised an arrangement “beyond the letter of the law” under which the State would compensate Bedouins in return for relinquishing the lands in their possession or that were in their possession in the past and to which they claim rights.<sup>141</sup> The Supreme Court's ruling in the *Alhawashelah* case, finally issued in 1984, was, perhaps unsurprisingly, in line with the points laid out by the State's attorney in that case, Albeck, in the findings of the committee she chaired while the Court deliberated.

According to Shlomo Swirski and Yael Hasson, the Albeck report summed up the three principles of the policy applicable to Bedouin land that the State follows to this day: first, non-recognition of ownership rights of the Bedouin to the lands based on the Ottoman and British land laws; second, compensation is “beyond the letter of the law;” and third, the evacuation principle, which makes compensation conditional upon leaving their land

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<sup>140</sup>SWIRSKI AND HASSON, *supra* note 129 at 20–21 (quoting the Albeck Report of 1975).

<sup>141</sup>*Id.* at 20–21.

and moving to one of the government-planned townships.<sup>142</sup> In accordance with the Committee's recommendations, the State brought very few additional Bedouin land claims to court.<sup>143</sup> The few cases that were adjudicated during this period only reached the court for a purpose other than the general process of land title settlement. For example, the State may have wished to put pressure on specific tribes to force them to settle their land or consent to the development of State projects on their land.<sup>144</sup>

Instead, it began a phase of bargaining. The State started to push the Bedouin to relinquish their lands by offering them compensation and convincing them to settle their land claims through different methods of pressure and negotiations outside of the court.<sup>145</sup>

### **Compensation**

The State offers compensation for Bedouin land that comes in the form of monetary compensation, land compensation, or a combination of the two.<sup>146</sup> The problem, however, is that the compensation offered by the State is extremely low and inadequate.<sup>147</sup> As a result, most Bedouin have rejected compensation offers for more than four decades.<sup>148</sup>

The land component of the compensation is limited and restricted to a small number of claimants based on the size of the claimant's land: only claimants with land claims over

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<sup>142</sup>*Id.* at 21.

<sup>143</sup>Thabet Abu Ras, *Land Disputes in Israel: The Case of the Bedouin of the Naqab*, 24 ADALAH'S NEWSLETTER, 5–6.

<sup>144</sup> See CC (BS) 1470/05 State of Israel v. Mohamad Abu Zayed PM (2008) (Isr.) (63) Dinim Shalom 1280 (addressing the issues of preventing State encroachment on Bedouin land and discussing Bedouin land ownership and designating Bedouin land as State land).

<sup>145</sup> See *id.* at 9–10.

<sup>146</sup> *Id.* at 11–12.

<sup>147</sup> HUMAN RIGHTS WATCH, *supra* note 23 at 19.

<sup>148</sup> SWIRSKI AND HASSON, *supra* note 129 at 44–45; HUMAN RIGHTS WATCH, *supra* note 23 at 66; THE NEGEV COEXISTENCE FORUM FOR CIVIL EQUALITY, *supra* note 85 at 25 (comparing Bedouin compensation with compensation paid to Jewish settlers in Sinai and Gaza).

99 acres (400 dunam) are eligible for 20% compensation in land. However, in many cases where the State has agreed to alternative land as part of the compensation, the State has failed to fulfill the agreements equitably. In several of these cases, the State promised to compensate Bedouins with land but never delivered the compensation.<sup>149</sup> In several other cases, the State agreed to offer Bedouin agricultural land as part of the compensation, but when they received the land, the State refused to provide a title deed and refused to register the land in the Bedouins' names.<sup>150</sup> In other instances, the State offered Bedouin land in deserted places that had a lower value than their original land and that was unsuitable for their needs. In other examples, the State simply claimed that it could not find land to offer to the Bedouin. In one particular case, members of the Alamor and Azabarga tribes agreed to leave their land in Tal Almalah in 1983. In exchange, the State promised to provide each father of the tribe 1.2 acres (5 dunams) of agriculture land, but for 18 years the State claimed that it could not find land to fit their needs. In 2001, they appealed to the Supreme Court but did not receive their promised land.<sup>151</sup>

The second component of the compensation is monetary compensation. The Land Acquisition Law in the Negev (Peace Treaty with Egypt) 1980 and ILA decisions define the eligibility and the amounts of the compensation.<sup>152</sup> Generally, the State pays Bedouin between 1100 to 3000 NIS (approximately \$300-800)<sup>153</sup> for each dunam of land.<sup>154</sup> Then, the State sells the same land for about \$80,000-\$150,000 for each dunam.<sup>155</sup> Bedouin

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<sup>149</sup> S.C. 3341/01 Suliman Hasan Alamor et.al v. Implementation Admin., (2001) HCJ. 4441/01 (Isr.) *dismissed* Feb 6, 2002. (unpublished) (copy on file with author).

<sup>150</sup> For example the Tal Almaleh people and Nassasrah and Alamour tribes.

<sup>151</sup> S.C. 3341/01 Suliman Hasan Alamor et.al v. Implementation Admin., [2001] (Isr.).

<sup>152</sup> *See* Israel Land Administration Council Decision 858 of May 3, 1999, *available at* <http://www.mmi.gov.il/MoatzaWeb/InterHachById.aspx?hachid=858>; Israel Land Administration Council Decision 1028 of May 2, 2005, *available at* <http://www.mmi.gov.il/MoatzaWeb/interHACHResults.aspx?all=true>.

<sup>153</sup> As of February 2013, one New Israeli Shekel (NIS) equals approximately US \$0.246.

<sup>154</sup> HUMAN RIGHTS WATCH, *supra* note 23 at 13.

<sup>155</sup> For example, Tarabin land near Omer.

relocation compensation compared to Jewish relocation compensation illustrates the gross disparity. A Jewish family evicted from the Gush-Katif settlement in Gaza received more than 1 million Shekels in compensation.<sup>156</sup> By comparison, a Bedouin family evicted from the Bedouin village of Tarabin received approximately 70,000-150,000 shekels, about 5 to 10 percent of the compensation received by a Jewish family.<sup>157</sup>

During this phase of land dispossession, the Bedouin continued to demand recognition of their land rights, but the State continued to refuse. Bedouin, who became aware of the consequences of the legal process, increasingly refused to bring their land claims to court. They appeared in courts only as a last resort to defend their land rights. Mainly, they sought judicial protection of their land against the State, hoping to prevent State acts of dispossession or expropriation, only to find that courts did not recognize their rights. In some cases, when Bedouins appealed to the court to protect their land, they were surprised to find out that not only did the courts fail to offer any protection but that in similar cases, the court had ruled against Bedouins and dispossessed their land.<sup>158</sup>

The State's refusal to proceed with adjudication of Bedouin counterclaims relieved the pressure on the Bedouin to try to settle their land claims in court.<sup>159</sup> However, unlike the State's expectation, only a small number of Bedouin agreed to settle their land claims in exchange for the monetary compensation offered.<sup>160</sup> Neither option—a dead-end court challenge or an unfair financial offer—held appeal for the Bedouin, and neither offered a solution to the ongoing problem.

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<sup>156</sup> This comparison should be taken in light of its context. The main difference between the situations arises from the international law perspective: while settlers in Gaza Strip violated international law, traditional Bedouin land rights are protected by international law.

<sup>157</sup> HUMAN RIGHTS WATCH, *supra* note 23 at 13.

<sup>158</sup> *Id.*

<sup>159</sup> Halima, *supra* note 118 at 1.

<sup>160</sup> *Id.* at 24.

## Counterclaims

In 2004, as part of the Negev Plan—in a step designed to put additional pressure on Bedouin to coerce them to settle—the State renewed the adjudication of Bedouin land claims and started to submit counterclaims against Bedouin claims. The State vowed to adjudicate all Bedouin land claims and to quickly put an end to the Bedouin land problems. To make the plan more effective and assertive, it allocated special budgets and hired a special team of lawyers and experts to complete the task as soon as possible.<sup>161</sup>

These counterclaims compel the Bedouin to either settle their land claims or appear in court for adjudication. If claimants do not appear in court to adjudicate their claims, the court dismisses their claim.<sup>162</sup> The government also raised the compensation offer, for a limited time of three years, in order to speed up the process, and also increased the land component compensation from 20 percent to 30 percent.<sup>163</sup> At the same time, it warned that those who refused to settle their land claims would be deprived of both their land and compensation.

The results have been devastating for Bedouin land rights. Shortly after 2004, the State brought more than 130 claims and won 40 rulings relating to about 6177 acres (25,000 dunams) that were registered in the name of the State.<sup>164</sup> As of April 2016, Bedouin have lost every land case brought and tried in court. Bedouin claimants continue to be summoned to the Land Settlement Office one by one, or tribe by tribe, to settle their land claims—or being brought to court via counterclaims, only to lose their land.

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<sup>161</sup> ADALAH, NOMADS AGAINST THEIR WILL 10, <https://www.adalah.org/uploads/oldfiles/eng/publications/Nomads%20Against%20their%20Will%20English%20pdf%20final.pdf> (last visited Sep 24, 2016).

<sup>162</sup> See generally THE NEGEV COEXISTENCE FORUM FOR CIVIL EQUALITY, *supra* note 85 at 11–12.

<sup>163</sup> *Decisions of the Council at its Meeting on 04/03/04*, ISRAEL LANDS ADMINISTRATION, [http://www.mmi.gov.il/hodaotmmiint/show\\_h.asp?key=525&CodeMaarecet=1](http://www.mmi.gov.il/hodaotmmiint/show_h.asp?key=525&CodeMaarecet=1) (last visited Feb. 5, 2013) (outlining compensation land prices and construction fields regarding the Negev Bedouin).

<sup>164</sup> Yahel, *supra* note 147 at 13.

### **The Litigation Option, the Final Option**

The option of litigation remains a second formal option for Bedouin who chose not to accept the inequitable compensation offered by the State for their land. In such cases, the State forwards Bedouin land claims to the court, where the Bedouin have two options: They may either appear in court to present their arguments and evidence in order to adjudicate their land claim, or they may choose not to appear in court. All Bedouin who have appeared in court have lost their land claims. Recently, some Bedouin started to boycott the legal process and not appear in court in protest against the injustice of the legal process. This latter option results in an “absence ruling,” a decision that accepts the State’s claim and declares their land as State land.<sup>165</sup> The results are devastating and regarded as a “total loss” of the Bedouin land claim. In such cases, the State deprives the Bedouin of their land but also any compensation they could have received if they would have agreed to settle the land with the State.

Nevertheless, the results of both options appear to be the same. Claimants who choose to appear in court lose their land claim and, as a consequence, lose their land rights; claimants who do not appear in court receive an “absence decision” and lose their land rights as well. Therefore, many Bedouins are forced to “choose” to settle their land claims only to avoid losing absolutely everything. In effect, “the State submits counterclaims and the Bedouin settle their land claims.”<sup>166</sup> At the same time, according to Bedouin activist Dr. Amer Alhuzayel, many other Bedouin continue to resist the State’s plan to dispossess them of their land. They do not attend court, as they prefer to lose “in absence” than to appear before a court they do not trust, believing that appearing in court could give legitimacy to the State's action.<sup>167</sup>

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<sup>165</sup> SWIRSKI AND HASSON, *supra* note 129 at 30.

<sup>166</sup> Noam Sharvit, *Hamdenab tovaat habedouim metpasbrim [The State Sues Bedouin Compromise]*, GLOBES (Jan. 21, 2007), <http://www.globes.co.il/news/article.aspx?did=1000174638>.

<sup>167</sup> SWIRSKI AND HASSON, *supra* note 129 at 13.

In the case of *Aluqbi*, (2012)<sup>168</sup> where serious efforts of research and legal advocacy were applied trying to convince the court to recognize Bedouin land rights, the case ended up with yet another decision similar to the *Alhawashelah* decision, another decision that denied Bedouin land rights. The decision further proves that courts are so wed to the legal precedent of the *Mawat* doctrine that the Bedouin have no chance in local courts.

### **III. CONCLUSION**

The case of Bedouin land dispossession is no different than the many typical stories of indigenous peoples' land dispossession around the world, in which colonial states dispossess indigenous peoples' lands through invasion, occupation, removal, concentration, enacting special legislation, and adjudication of their land cases in courts. In the past, these countries also enjoyed the approval of international law that facilitated their land dispossession.

Like many indigenous groups, the Bedouin have been stripped of their land rights by methods on both national and international levels. On the national level, Bedouin have endured colonial invasion, settlement, occupation, eviction, and concentration. The State has employed many typical methods to dispossess the Bedouin of their land, including administrative, legislative, and judicial methods.

While the other methods are considered out of date, the judiciary route has been proved the most effective and maneuverable one. It follows the state's traditional goal of land dispossession, but also legitimizes the state's acts of dispossession under the cover of "courts of justice". As part of the judiciary technique, many colonizing courts have relied on notorious legal doctrines, such as the Doctrine of *Terra Nullius* and the Doctrine of Discovery to justify the dispossession of indigenous peoples' lands. These courts disregard indigenous peoples' customary laws and turned a blind eye to the many

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<sup>168</sup> File No. 12-21-306 Civil Appeals, Suleiman Aluqbi v. State of Israel (Mar. 15, 2012), Pador Legal Database (by subscription) (Isr.).

impediments that prevent fair adjudication, thus undermining their ability to defend their land rights.

The article also shows that the Israeli judicial system not only fails to properly defend and recognize Bedouin traditional land rights, but instead plays a major role in supporting the State policy of land dispossession. Likewise, this article shows that the judiciary in Israel has been the most effective in expropriating the rest of Bedouin land. It follows the State's ideological and political goals to possess and control all the land in the State. It also adds its stamp of legitimacy on the acts of the State. Like many colonizing states, Israel has adopted the doctrine of *Mawat* land to declare Bedouin land as State-owned land. Most importantly, as part of these methods, the State actively disregards Bedouin customary law, oral culture, pastoral economy, customary rights of ownership. In doing so, the State, with the judiciary providing its final stamp of approval, has effectively foreclosed any option for the Bedouin to legally defend their traditional lands.