THE LEGAL TRANSFORMATION OF ETHNIC GEOGRAPHY: ISRAELI LAW AND THE PALESTINIAN LANDHOLDER 1948-1967

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> Space, as we experience it, is in many ways the product, and not the fixed context, of social interactions, ideological conceptions, and of course, legal doctrine and public policy.
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> - Richard Thompson Ford[1]

> Space, like law . . . , has a direct bearing on the way power is deployed, and social life constructed. . . . [T]he geographies of law are not passive backdrops in the legal process, or of random import, but in combination with their implied claims concerning social life, can be powerful, even oppressive.
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> - Nicholas K. Blomley[2]

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1. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1859 (1994).

2. NICHOLAS K. BLOMLEY, LAW, SPACE AND THE GEOGRAPHIES OF POWER xii (1994).

I. INTRODUCTION

This article is part of a project that I undertook to investigate how the law shaped the development of Israeli social and political space and how the law, in turn, was shaped by these geographies of power.[3] It analyzes one aspect of Israeli legal geography: land possession. It focuses on the formative period of the Israeli land system from its creation after the Israeli War of Independence (1948) until its crystallization in the late 1960s.[4] It analyzes the role played by the Israeli legal system, which by transforming land possession rules in ways that undermined the possibilities of Arab landholders to maintain their possession, brought about the transference and registration of ownership of this land to the Jewish State.

The first part of the article offers a preliminary account of the role of legal systems in the creation and maintenance of land regimes in settler states. The second part gives a historical overview of the period that preceded the establishment of the State of Israel in 1948. It offers both an overview of land possession rules in the Ottoman and British Mandate periods and a brief historical examination of ideological and legal aspects of the Jewish-Arab conflict over land in Palestine.[5] Part III analyzes changes that took place in the laws regulating land possession in the context of land settlement in the "special area" of northern Galilee which included those Arab villages that were not vacated during the 1948 Israeli War of Independence. I show how legal tools were crafted and used to curtail Arab landholders from registering their land. Parallel to cases of natives and aliens in other settler societies, the in-

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3. The term "geographies of power" is coined from BLOMLEY, *id.* The legal geography of Israel is characterized by two major periods: the making of the Israeli land regime after the 1948 War of Independence and its transformation, which began in the 1990s. *See* Oren Yiftachel & Alexandre (Sandy) Kedar, *Al Otsmah ve-Adamah: Meeshtar ha-Mekarkeen ha-Yeesra'eleet* [*Landed Power: The Making of the Israeli Land Regime*], 16 TEORYAH VE-BEEKORET [THEORY AND CRITICISM] 68 (2000).

4. Though the Basic Law on Lands was passed in 1960, its most important by-law "Decision number one" was enacted in 1965. In 1967, Israel conquered the occupied territories, which added new land to Israeli control. I therefore chose 1967 as an ending period for this article. Basic Law: Israel Lands, 1960, Sefer HaHukim [S.H.] 56.

5. For the purposes of this article, "Palestine" will refer to all areas eventually incorporated into the territorial unit of British Mandatory Palestine in 1923, until 1948.

ability to obtain formal recognition from the State of their landholdings transformed many Arabs into trespassers on their own land. Part IV discusses the significance of these legal changes and briefly compares them to the laws and administrative practices that evolved to address the needs of landholders in other sectors of Israeli society.

A. *The Role of Legal Systems in Shaping Settler Societies' Land Regimes*

In recent times, the central role played by the legal system in the institutionalization of new land regimes in settler societies has come to the forefront of legal and academic debate.[6] As explained by political geographer Oren Yiftachel, settler societies pursue a deliberate strategy of ethnic migration and settlement that aims to alter the country's geographic and ethnic

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6. For example, in a fascinating article, Ronen Shamir claims that, "As in other colonial settings, a cultural vision complements the physical extraction of land and the domestication of the local labor force and again, not unlike other colonial settings, the law of the colonizers creates an infrastructure for the advancement of such goals." Ronen Shamir, *Suspended in Space: Bedouins Under the Law of Israel*, 30 LAW AND SOC'Y REV. 231, 232 (1996); *see also* Sally Engle Merry, *Law and Colonialism*, 25 LAW & SOC'Y REV. 889 (1991); LEGAL PLURALISM AND THE COLONIAL LEGACY: INDIGENOUS EXPERIENCES OF JUSTICE IN CANADA, AUSTRALIA AND NEW ZEALAND (Kayleen Hazlehurst ed., Avebury 1995); Elizabeth Colson, *The Impact of the Colonial Period on the Definition of Land Rights*, *in* 3 COLONIALISM IN AFRICA 193 (Victor Turner ed., 1971); Clement Ng'ong'ola, *The Post-Colonial Era in Relation to Land Expropriation Laws in Botswana, Malawi, Zambia and Zimbabwe*, 41 INT'L & COMP. L.Q. 117 (1992). As Leon Sheleff describes it, these questions have reached a "crescendo in the past few years, some of it in terms of revisionist reappraisals of history, as carried out in both academic research and investigative journalism, some of it as official pronouncements of governmental commissions or judicial precedents—and in the last decade, there have been some major developments." LEON SHELEFF, THE FUTURE OF TRADITION: CUSTOMARY LAW, COMMON LAW AND LEGAL PLURALISM 94 (1999). Sheleff argues:

> The nature of the title that indigenous groups hold . . . is in dire need of intense scrutiny and overall reassessment, including willingness to examine historical evidence, criticize mythical conceptions, nullify legal errors—and search for practical means of expressing positive partnership . . . . It was faulty or biased judicial interpretation, no less than commercial interests or political intrigues, that contributed to the harm inflicted; it is through judicious judicial intervention that some of this hurt may be assuaged."

Id. at 114.

structure.[7] Usually, ethnocratic settler societies contain three major social groups: a charter group of "founders," "immigrants," and "natives." How the land becomes distributed in this social stratification is especially conspicuous. Settling ethnocracies attempt to extend or preserve the control of the "founding" group over a contested multi-ethnic territory. Frequently, this charter group controls most of the land resource; immigrants usually receive only a small portion; and indigenous and alien groups, who often serve as the main contributors of land, generally are denied a fair share.[8]

Land regimes serve as a keystone in the creation and institutionalization of this stratification. The land regime of a country includes its system of land ownership, as well as the diverse state organs that shape its ethno-national geography. These organs direct the location and framework of industrial development, the urban and regional planning, prospects for state land use, the size and borders of municipalities, and the processes of spatial-related decisionmaking. Cultural biases contribute to the conceptual framework constructed to legitimize the various methods used to dispossess indigenous and other non-settler "alien" populations of their land, territory, and the resources.[9] While in most cases rights in land are acquired by force, they subsequently are translated into institu-

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7. The concept of ethnocratic settler states was developed by political geographer Oren Yiftachel. This paragraph is essentially based on his work. *See* Oren Yiftachel, *Israeli Society and Jewish-Palestinian Reconciliation: 'Ethnocracy' and Its Territorial Contradictions*, 51 MIDDLE E. J. 505, 512-16 (1997); FRONTIER DEVELOPMENT AND INDIGENOUS PEOPLES (Tovi Fenster & Oren Yiftachel eds., 1997); Yiftachel & Kedar, *supra* note 3, at 76; *see generally* Oren Yiftachel, *Nation-Building and the Social Division of Space: Ashkenazi Dominance in the Israeli 'Ethnocracy,'* 4 NATIONALISM & ETHNIC POL. 33 (1998); Oren Yiftachel, *'Ethnocracy': The Politics of Judaizing Israel/Palestine*, 6 CONSTELLATIONS 364 (1999). For the purpose of this paper, I will use the terms settler states, ethnocratic settler societies, and ethnocratic settling societies interchangeably. R

8. See WALKER CONNOR, ETHNONATIONALISM 146-62 (1994); John McGarry, *Demographic Engineering: The State-Directed Movement of Ethnic Groups as a Technique of Conflict Regulation*, 21 ETHNIC & RACIAL STUD. 613, 630-31 (1998); Oren Yiftachel, *The Internal Frontier: Territorial Control and Ethnic Relations in Israel*, 30 REGIONAL STUD. 493, 501-04 (1996).

9. On the dispossession of indigenous peoples, see Erica-Irene A. Daes, *Human Rights of Indigenous Peoples: Indigenous People and Their Relationship to Land* ¶ 21 (1999) (unpublished second progress report, available at U.N. web site, http://www.unhchr.ch/Huridocda/Huridoca.nsf/0811fcbd0b9f6b

tional arrangements that represent power dynamics among ethnic and social groups.

This article attempts to evaluate the way Israeli law interfered with Arab landholders and their possession of land after the creation of Israel in 1948. I believe that insights drawn from a selective comparison of legal practices in other settler states highlight important similarities in these dispossessing mechanisms.

There are several ways in which settlers' legal systems hamper the attempt by natives and other alien populations to claim and protect land in their possession. Often, the settlers' legal systems altogether deny any recognition of native land rights even when the native group has been in possession of the land since time immemorial. This denial is based partly on a "cultural clash of paradigms" in which the "modern Western" legal system does not recognize the ways locals organize their spatial relations to land as giving rise to property rights. Typically, settler states regard these native lands as public land, which can be disposed of by governments without the natives' approval or even knowledge. As a result, many natives have become trespassers on their own land. For example, the "indigenous peoples of the Philippines are squatters on their own lands" because the Philippine State claims ownership of some 62% of the country's territory. Even when states recognize native possession of land, this generally has been regarded as an act of grace. Thus, natives have been entitled to retain their land only with the consent of the authorities, and such consent often has been revoked. An additional, major problem encountered by natives attempting to retain their land has been the non-enforcement of laws and treatises working in their favor. Furthermore, dubious legal proceedings serve to acquire land possessed by natives without their genuine consent.[10]

Research in American legal history also points to the crucial role played by property law in "facilitating the dominance and exploitation by Northern European Caucasians of other

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10. *Id.* ¶ 33.

racial and ethnic groups."[11] As a leading American expert on the subject explains:

> [T]he greed for land . . . of the white settlers . . . created the popular will to confiscate Indian land. Unfortunately the United States Supreme Court gave its imprimatur to these takings. Judicial decisions legitimizing takings in turn permitted the citizenry to accept the results as fair. In other words, the words that have been the most effective in "conquering" the Indians are the words of the great legal decisions setting the premises of American Indian Law as it relates to land rights . . . .[12]

Similarly, Israeli law and British Mandatory law did not recognize land possession by Arabs when this possession did not conform to the exigencies of formal "Western" law.[13]

While playing a crucial role in facilitating the transfer of land from native populations to the control of the settlers, the legal system simultaneously conceals the dispossession and legitimates and de-politicizes the new land regime. The exercise of ethnic power through law to dispossess locals usually has "been cloaked with justificatory arguments."[14] Typically, the legal system attributes to the new land arrangement an aura of necessity and naturalness that protects the new status quo and prevents future redistribution.[15]

Often the legal system legitimizes the transfer of land from the original landholders to settlers through the use of formalistic tools. Ronen Shamir argues that the "conceptualist framework" of the modern Western legal system "renders it

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11. William W. Fisher III, *Property and Power in American Legal History*, *in* THE HISTORY OF LAW IN A MULTI-CULTURAL SOCIETY: ISRAEL 1917-1967, at 393, 393 (Ron Harris et al. eds., 2002) [hereinafter THE HISTORY OF LAW IN A MULTI-CULTURAL SOCIETY].

12. Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 461 (1994).

13. I will demonstrate this especially when I analyze the law concerning Mewat (dead) land below. Ronen Shamir has explored the topic in relation to a later period. *See* Shamir, *supra* note 6. While Shamir focuses on cases dealing with the Bedouins from the Negev area during the 1980s, my analysis will focus on the area of the Galilee in the north during the 1960s. R

14. *See* Fisher, *supra* note 11. R

15. *Cf.* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 548-50 (1986); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 236-38 (1997).

highly effective in denying counterclaims . . . [and t]he strict application of the rule of law permits judges to deny rights, history, culture, and context to a constructed other."[16] Much legitimization is effectuated through a heavy dose of technical, seemingly scientific language as well as through methods embedded in rules of procedure and evidence. The discrimination against the non-settlers often is masked by the construction of seemingly "neutral" legal categories. I will elaborate further on these points below.

Often the legal system imposes insurmountable procedural obstacles that prevent natives and other "outsiders" from effectively affirming and protecting their land rights. In this context, rules of evidence and presumptions serve as central instruments in defining and altering laws concerning native rights. This often works hand in hand with the creation of legal categories that are specific to native or "alien" land[17] and allows different rules to be applied against native landholders while claiming equal treatment of natives and settlers. They also have the advantage of altering legal rules while maintaining the semblance of continuity. As a result, settlers' courts could maintain that they were only applying existing law while they were in fact altering the rules to the detriment of non-settler landholders.[18] As I will show in this article, the Israeli legal system used procedural and evidentiary rules in ways that curtailed the chances of Arab landholders from retaining their land.[19] As a result, while Israeli rules of property were under-

16. Shamir, *supra* note 6, at 253. R

17. For example, the Israeli Court used legal conceptualization to define the Israeli Bedouins as rootless nomads, thereby imposing such "legal categories as a means of solving disputes across the indigenous/nonindigenous divide." *Id.*

18. For example, in the late 1980s, the U.S. Supreme Court shifted power from tribal governments to states in issues closely related to land because of the change in the balance of power within the Court in favor of those favoring limiting Indian reservation sovereignty. Deborah Geier argues that the balance of power in Indian country could thus "be shifted dramatically without explicit and reasoned justifications solely through switching the presumptions underlying the outcome." Deborah Geier, *Power and Presumptions; Rules and Rhetoric; Institutions and Indian Law*, BYU L. REV. 451, 453 (1994).

19. For a similar argument on the way that the Israeli Supreme Court devised rules and procedures that curtailed the possibility of Palestinian refugees to remain in Israel after the War of Independence, see generally Oren Bracha, *Safek Meeskeneem, Safek Mesookaneem: Ha-Meestaneneem, ha-Khok ve-Bet-*

going a transformation that facilitated the acquisition of land from Arab landholders, the legal system bestowed upon this transformation an aura of inevitability and naturalness.

The case of Mexican-Americans in the southwestern United States provides a relevant parallel to my narrative about the dispossession of Arab landholders. Following the Treaty of Guadalupe Hidalgo, Mexican-Americans lost most of their land even though the Treaty and the U.S. Constitution presumably protected their land rights.[20] As William Fisher explains:

> The federal government was ostensibly committed to the recognition and protection of the Mexicans' property rights but, in practice, failed to make good on that promise. Four features of the various administrative regimes . . . disadvantaged Hispano landowners. First, Mexican claimants typically bore the burden of proof; if they failed to convince the relevant tribunals of the legitimacy of their claims, the land passed into the public domain. Second, the system was exceedingly slow. Settlement of a claim took an average of seventeen years in California, much longer in New Mexico and Arizona. Third, claims settlement was complex and costly, enabling sharp lawyers to engross large tracts. Finally, American courts were skeptical of Spanish claims—either because they were poorly documented or because they were rooted in village or communal rights foreign to American land law. The new result was devastating. In New Mexico, for example, over 80% of the Mexican landowners lost their lands. Meanwhile, one Anglo lawyer accumulated over two million acres and part ownership of four million more.[21]

In this way, settler legal systems constructed a differential and even discriminating attitude of law towards indigenous land. As Joseph Singer argues, the Supreme Court

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ha-Meeshpat ha-Elyon [*Unfortunate or Perilous: The Infiltrators, the Law and the Supreme Court 1948-1954*], 21 TEL AVIV U. L. REV. (1998).

20. *See* Guadalupe T. Luna, *On the Complexities of Race: The Treaty of Guadalupe Hidalgo and* Dred Scott v. Sandford, 53 U. MIAMI L. REV. 691, 699-700 (1999).

21. Fisher, *supra* note 11, at 396. R

> has maintained a fundamental disjunction between legal treatment of Indian and non-Indian property. . . . The history of United States law, from the beginning of the nation to the present, is premised on the use of sovereign power to allocate property rights in ways that discriminated—and continue to discriminate—against the original inhabitants of the land.[22]

For example, settlers' law often facilitates relatively easy expropriation of native or indigenous land, while the expropriation of land belonging to other individuals and groups is usually much more difficult.[23]

Thus, channeling the legal treatment of indigenous landholders into the technical realms of procedural and evidentiary rules makes it possible to keep most of the issue outside the public debate and facilitates the legitimization of land dispossession and transfer. The combined application of these legal tropes silences the fundamental questions behind these methods and results in discussions that are seemingly technical, neutral, and void of political positions and biases. Placing natives and other non-settler local populations (such as Mexican-Americans in the example above) into specific legal cate-

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22. Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 3, 44-45 (1992).

23. Such treatment, which can be traced to the age of colonization, often continues for centuries and even to the present day. Commenting on a recent decision of the Vermont Supreme Court, Singer writes, "[i]t is a great deal more than merely unfortunate that the Vermont Supreme Court failed to accord its American Indian citizens the same level of protection for their property rights as it accords its non-Indian citizens. It is tragic that this disparity of treatment existed not only in the distant past but persists to this day." Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 482 (1994); *see also* Peter H. Russell, *High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence*, 61 SASK. L. REV. 247, 273-74 (1998). In 1955 the Supreme Court handed down its (in)famous decision in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), in which it refused to recognize Indians' rights in land as property absent a Congressional grant. The Supreme Court found that the United States could (with limited exceptions) take or confiscate the land or property of an Indian tribe without due process of law and without paying just compensation. *Id.* at 288-89. The Supreme Court held that "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law." *Id.* at 285.

gories, with their own distinct rules of procedure and evidence different from those applied to the property of settlers, masks the application of discriminating rules that create and support an ethnocratic land regime.

Such is the case in Israel vis-à-vis Arab landholders. The section below aims to illuminate the relationship between the Arab landholder and the Jewish State during the 1950s and 1960s by analyzing its ideological, political, and legal background.

II. Historical Background

A. *The Old [Dis-]Order: Land Possession and Registration During the Late Ottoman Period*

During the nineteenth century, the Ottoman government made a number of attempts to reform its system of land law and land registration, an area critical to the Ottoman authorities, as taxes on land constituted one of the Empire's primary sources of income.[24] In the course of this reorganization, the Ottoman government legislated the Ottoman Land Code (OLC) of 1858, which would serve for over a century as one of the cornerstones of the land system of Palestine and then Israel, until the legislation of the Israeli Land Law of 1969.[25] The OLC defined several categories of land, each with its own specific set of rules.[26] Full ownership of land (entitled Mulk)

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24. Eliezer Malchi, Toldot ha-Meeshpat be-Erets Yeesra'el [The History of the Law of Eretz-Israel] 54 (2d ed. 1953); Moses Douchan, Deeney Karka'ot be-Medeenat Yeesra'el [The Land Laws in the State of Israel] 25-38 (1952); Jacques Kano, Baayat ha-Karka be-Seekhsookh ha-Leoomee Beyn Yehoodeem le-Araveem [The Problem of Land Between Jews and Arabs] 15 (1992).

25. Pekoodat Hesder Zekhooyot be-Mekarkeeen (Nosakh Khadash) [Land Settlement Ordinance (new version)] (1969) (Isr.).

26. For an enumeration of the various categories of land, see Ottoman Land Code [OLC] art. 1 (1858). Unless otherwise indicated, references to the OLC are to the version in Shalom Cohen, Kovets ha-Khookeem ha-Otomaneeyeem, Kerekh Bet [Collection of Ottoman Laws, vol. 2] (Tute trans., 1954); *see also* Joshua Weisman, Deeney Keenyan [Law of Property] 189 (1993); Douchan, *supra* note 24, at 27-28; Aharon Ben Shemesh, Khookey ha-Karka'ot be-Medeenat Yeesra'el [The Land Laws in the State of Israel] 148 (1953); Kenneth W. Stein, Land Question in Palestine, 1917-1939, at 11-14 (1984); Raja Shehadeh, *The Land Law of Palestine: An Analysis of the Definition of State Lands*, 11 J. Palestine Stud. 82, 85-87 (1981). R

was rare, and usually found only at the center of towns and villages. The most common category of land found in populated areas was Miri, in which formal and ultimate ownership was held by the State, though a considerable degree of possession and use rights remained in the hands of the individual landholder.[27] Most uninhabited and uncultivated land was defined as Mewat (dead) land in which special—and facile—rules over acquisition prevailed.

In conjunction with the legislation of the OLC, efforts were made to institute a modern system of land registration.[28] Despite these efforts, the Ottoman government was unable to implement formally a precise system of land registration due to its inability to survey, map, or settle title.[29] Even when land actually was registered in the Ottoman land registry offices (*Tabu*), the verbal description of the parcel borders and other information frequently did not reflect the reality of the land in question. In addition, many peasants refrained from registering land transactions, fearing that such registration would attract the attention of tax collectors or be used as a mechanism for military conscription. Thus, the formal system of registration did not address the needs of those in possession of the land and only about five percent of the land in Palestine had been registered by the end of the Ottoman period.[30]

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27. LEAH DOUCHAN-LANDAU, HA-KHEVROT HA-TSEEYONEYOT LE-REKHEESHAT KARKA'OT BE-ERETS YEESRA'EL 1897-1914 [THE ZIONIST COMPANIES FOR THE LAND PURCHASE IN ERETZ-ISRAEL 1897-1914] 13 (1979).

28. DON GAVISH, KARKA VE-MAPAH: ME-HESDER KARKA'OT LE-MAPAT ERETS YEESRA'EL 1920-1948 [LAND AND MAP: FROM LAND SETTLEMENT TO MAPS OF ERETZ-ISRAEL 1920-1948] 32 (1992); DOUCHAN, *supra* note 24, at 27. R

29. GAVISH, *supra* note 28, at 32; Haim Zandberg, Hesder Zekhooyot be-Mekarkeeen be-Erets-Yeesra'el ve-be-Medeenat Yeesra'el [Land Title Settlement in Eretz-Israel and in the State of Israel] 102-32 (1999) (unpublished Ph.D. dissertation, Hebrew University of Jerusalem) (on file with author); Ruth Kark & Haim Garber, *Mapot-Reeshoom Karka'ot be-Erets Yeesra'el be-Tekoofat ha-Otomaneet* [*Registration Maps in Eretz-Israel in the Ottoman Period*], 22 CATHEDRA 113 (1982); Ya'akov Shechter, *Reeshoom ha-Karka'ot be-Erets Yeesra'el ba-Makhatseet ha-Shneeyah Shel ha-Me'ah ha-Yod-Tet* [*Land Registration in Eretz-Israel During the Second Half of the Nineteenth Century*], 45 CATHEDRA 147 (1987).

30. Avraham Halleli, *Ha-Zekhooyot be-Mekarke'een: Reka Heestoree-Klalee Shel Heetpat'khoot ha-Keenyan ba-Arets* [*The Rights in Land: General-Historic Background of Evolution of Property in Israel*], *in* ARTSOT HA-GALEEL [THE LANDS IN GALILEE] 575, 586 (Avshalom Shmuely et al. eds., 1983).

From a "modern" perspective, the system of land possession in Palestine during the Ottoman period can be described as unorganized and unclear. Still, as Carol Rose explains, "'acts of possession' are . . . a 'text'; and the common law rewards the author of that text."[31] Thus possession of land may in itself constitute a declaration on the part of the possessor as to a claim to the parcel in question. This concept contributes to an understanding of possession patterns that existed in the context of the Arab village. Such villages were usually small communities with a high degree of cohesiveness and familiar long-term relationships between community members where unofficial social arrangements for land possession, the terms of which were clearly understood by the participants, developed as alternatives to the official system of registration.[32]

In addition to these unofficial arrangements, Ottoman law included a number of background rules that provided legal support for the system of land possession practiced by the population. This article focuses on two major mechanisms and the changes they underwent from Ottoman rule through the British Mandatory governance to the early Israeli period.

The first mechanism concerned the treatment of Mewat land. Ottoman law granted the first person to revive dead land (Mewat) the rights to acquire that land.[33] According to

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31. Carol Rose, *Possession as the Origin of Property*, *in* PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP 11, 17 (1994).

32. Ya'akov Firestone, *The Land-Equalizing Mushā Village: A Reassessment*, *in* OTTOMAN PALESTINE 1800-1914, at 91 (Gad G. Gilbar ed., 1990); DOUCHAN, *supra* note 24, at 107-11. This is not unlike the way land is divided in Jewish *moshavim* to this very day. R

33. For reference to the Muslim origins of this rule, see MALCHI, *supra* note 24, at 54-56; ABRAHAM GRANOTT, THE LAND SYSTEM IN PALESTINE—HISTORY AND STRUCTURE 93 (M. Simon trans., Eyre & Spottiswoode 1952). Granott observes that "[t]he principle of 'reviving' the land is based on the proclamation of Mohammed the Prophet himself, that whoever opens up a plot of land which has no owners and settles there is at liberty to acquire it for himself." *Id.* In 17th century Palestine, the rule had been that the act of reclaiming Mewat conferred upon the reclaimer, whatever his religious belief, the right of absolute ownership. *See* Samir M. Seikaly, *Land Tenure in 17th Century Palestine: The Evidence From the* al-Fatawa al Khairiyya, *in* LAND TENURE AND SOCIAL TRANSFORMATION IN THE MIDDLE EAST, 397, 403 (Tarif Khalidi ed., 1984). According to the OLC, only Miri rights and not the unrestricted Mulk rights could be acquired in revived Mewat land. On Mewat, see also STEIN, *supra* note 26, at 12-13. R R

one definition, Mewat are "lands which have been uninhabited and uncultivated from time immemorial."[34] Only land sufficiently distant from and unused by a local community could qualify as Mewat.[35] According to Article 103 of the OLC, any person who "revived" Mewat land by transforming the uncultivable to agricultural land immediately acquired good title over the land. Even a person who adapted Mewat land for agriculture without official permission had the right to purchase it as Miri land.[36]

The second major mechanism consisted of rapid and easy acquisition of Miri land by adverse possession. Unlike the rules regarding Mewat, which addressed land relatively distant from any settlement, Miri land usually referred to agricultural land in the immediate vicinity of a settlement. According to Article 78 of the OLC, anyone who held and cultivated State land for a period of ten years acquired the right to register that land in his or her name as Miri land. In this way, Article 78 facilitated quick and simple acquisition of property rights to public land and served as a fundamental background rule that

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34. GRANOTT, *supra* note 33, at 92.

35. According to Article 6 of the OLC, Mewat land was land that was located "at such a distance from a village or town from which a loud human voice cannot make itself heard at the nearest point where there are inhabited places, that is a mile and a half, or about half an hour's distance from such." Likewise, Article 103 defined Mewat as "dead land . . . [meaning] vacant (khali) land, such as mountains, rocky places, stony fields, pernallik and grazing ground which is not in the possession of anyone by title-deed or assigned ab antiquo to the use of inhabitants of a town or village, and lies at such a distance from towns and villages from which a human voice cannot be heard at the nearest inhabited place." FREDERIC M. GOADBY & MOSES J. DOUKHAN, THE LAND LAW OF PALESTINE 44 (1935). Other translations of the OLC with slight variations in wording exist, but substantively they remain the same. *See* COHEN, *supra* note 26, at 13, 77. Likewise according to the Mejelle, "waste land [Mewat] was abandoned property, and any person could appropriate it." SHEMESH, *supra* note 26, at 148. R R

36. The person acquired the right to purchase it at its *Tabu* value, that is, its value as waste land before its improvement. The procedure for acquiring the rights to Mewat land under Article 103 of the OLC combined elements of both first possession and cultivation: "Anyone who is in need of [Mewat] land can with the leave of the Official, plough it up gratuitously and cultivate it on the condition that the legal ownership (raqabé) shall belong to the Treasury. . . . If a person cultivates Mewat without authorization he should pay the Tabu value and shall be given a Tabu grant." COHEN, *supra* note 26, at 77, except the last sentence which was omitted in Cohen, but included in DOUCHAN, *supra* note 24, at 46. R R

strengthened the practices of land possession in Arab villages.[37]

B. *Transformation and Continuity: The Mandate Period*

Since Great Britain was a colonial empire with a tradition of central rule, the British authorities found it difficult to accept the lack of formalized order that characterized the land system established during the Ottoman period. To the British, it was an obstacle both to bringing Western order to the colonies and controlling affairs related to land.[38] As a result, the British introduced several changes to the laws and practices of land possession. I will focus here on two of the major changes: the transformation of the rules concerning the acquisition of Mewat land and the introduction of a land settlement process. Both changes provided the authorities with greater control over the land in Palestine.

One of the first Mandatory amendments to the OLC was geared to obstruct the facility by which Mewat land could be acquired. The Mewat Land Ordinance (1921) repealed the last paragraph of Article 103 of the OLC, substituting the following in its stead: "Any person who without obtaining the consent of the Administration breaks up or cultivates any waste land shall obtain no right to a title-deed for such land and further, will be liable to be prosecuted for trespass."[39]

The legal implication of this section was potentially immense. Under Ottoman rule, any person who "revived" "dead" or "waste" land immediately acquired good title over it, even if he did not receive the authorities' permission. Under Mandatory rule, such a person became a trespasser no matter how long the person had been cultivating the land. There was one exception to the ordinance: Any person who had "broken" Mewat land before the enactment of the Ordinance was required to notify the Land Registrar within two months of the publication of the Ordinance, i.e., before April 18, 1921, and apply for a title deed. However, it became the practice of the Mandatory administration to recognize rights acquired in

37. Halleli, *supra* note 30, at 580. R

38. *See* Sally E. Merry, *Law and Colonialism*, 25 LAW & SOC'Y REV. 889, 912-15 (1991).

39. The Mewat Land Ordinance, 1921, 38 I.R. 5, (Mar. 1, 1921); GOADBY & DOUKHAN, *supra* note 35, at 46; SHEMESH, *supra* note 26, at 147. R

Mewat land before 1921 even if the holder did not register it within the prescribed period. Thus, any person proving he had "broken" Mewat land before the enactment of the Ordinance could register it in his name.[40]

During the first few years of their rule, the British attempted to stabilize the Ottoman system of land registration. However, these efforts were unsuccessful. In the same period, Zionist organizations exerted pressure on the British government to implement a comprehensive land survey in order to help locate fallow, abandoned State land on which Jews would be able to establish settlements in the spirit of the Balfour Declaration. They also supported the implementation of a process for settling title that would strengthen the reliability of property rights to help facilitate the purchase of privately held land. The combination of Jewish possession and undisputed ownership of land in expanding areas of Palestine was con-

40. GOADBY & DOUKHAN, *supra* note 35, at 47; *see also* Land Appeal (L.A.) 35/1927, Ghannameh v. The Attorney General, 1 P.L.R. 162. The Mandatory Supreme Court rejected a request of the appellant to register certain tracts of land on the claim that it was Mewat. The Court mentioned nevertheless that "the Lands Department, however, *ex gratia* did not resist the claim to the part adjudged by the Land Court." *Id.* For a criticism of the Mandatory administration's failure to protect state property, see GRANOTT, *supra* note 33, at 96-97. The Mandatory administration seems to have developed a similar attitude in Jordan: "While Jordanian law (and before it the British and Ottoman laws) recognized cultivators' claim to land, it did not recognize claims by pastoral communities. As a result . . . pastoral land was registered, for the most part, as state land. For several decades this did not create problems, as pastoral communities continued to use the land for residence and herding . . . ." Omar Razzaz, *Land Disputes in the Absence of Ownership Rights: Insights from Jordan*, *in* ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES 70 (Edesio Fernandes & Ann Varley eds., 1998). Furthermore, it seems that the Mandatory authorities developed a practice to register Mewat land as Miri registered in the name of the State. As explained in the report of the Survey of Palestine: "The Mewat lands are part of the public domain. When such lands are, during the course of operations of land settlement, found to be free from any private rights, they are registered as *Miri* in the name of Government. It is frequently difficult to assume that there was in the past no grant, and consequently it is not safe to assume that all empty lands south of Beersheba or east of Hebron, for instance, are *Mewat*." 1 SURVEY OF PALESTINE 256 (1946). I am grateful to Geremy Furman for the reference. R R

ceived as an important means of Zionist realization of Jewish sovereignty in Palestine.[41]

In light of their failure to stabilize the Ottoman land registration system and in response to requests by Zionist organizations, the British initiated a comprehensive process of land survey and the settlement of title in Palestine during the second half of the 1920s based on the Torrens system, first instituted in Australia. According to this system, originally intended to answer the needs of countries in the process of settling a population, land rights are recorded in State-administered registers in numbered blocs and parcels based on precise mapping. Legal rights to each parcel are then determined in a quasi-legislative process. The British in Palestine officially adopted a version of the Torrens system based on their Imperial experience in the Sudan, but specifically adapted to suit the conditions in Palestine and the legacy of the Ottoman land regime.[42] With a few changes, the Land (Settlement of Title) Ordinance (1928) has constituted the basis of Israel's legal system regarding land until the present day.

The 1928 Land Ordinance implemented a process for the settlement of title, including a judicial investigation of land rights for every parcel of land, in order to establish new registers that accurately reflected all the rights to land in Palestine.[43] Declaring a specific area a "settlement area" had far-reaching implications on issues of claim limitations, as the initiation of a settlement of title and the submission of claims were perceived as halting the passage of time for adverse possession purposes. After the settlement of a title, registration constituted a new beginning, nullifying every claim or right that contradicted the information in the new land registers.[44]

By the end of the Mandate period, the British achieved final settlement for approximately five million dunams (about

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41. Halleli, *supra* note 30, at 583; GAVISH, *supra* note 28, at 33-40; BARUCH KIMMERLING, ZIONISM AND TERRITORY 161 (1983). R

42. GAVISH, *supra* note 28, at 150-61; WEISMAN, *supra* note 26, at 290-96, 308; DOUCHAN, *supra* note 24, at 364-66, 390. R R

43. GAVISH, *supra* note 28, at 156-61; WEISMAN, *supra* note 26, at 307-08. R

44. Settlement of title was perceived as erasing practically all previously unregistered rights. *See* Ottoman Land Code arts. 65-66; C.A. 118/46, "Nahlat Jacob" Cooperative Society Ltd. (in Liquidation) v. Chaya Tabak, 13 P.L.R. 588; *see also* DOUCHAN, *supra* note 24, at 393-94; Shamir, *supra* note 6, at 243-44. R

one and a quarter million hectares), which constituted more than 20% of the territory of Mandate Palestine.[45] They selectively implemented the settlement of titles, focusing on areas that were officially declared "settlement areas" by the authorities. These designations applied mostly to Jewish areas or areas that were subject to dispute between Jews and Arabs but not in the Arab area of the Galilee or the Negev.[46] Most of the land that underwent settlement later was included in the territory incorporated into the State of Israel.[47]

In spite of the expropriation potential in the process of settling title, it did not significantly damage the rights of landpossessors based on Mewat or adverse possession and did not interfere with the tenets of Article 78 of the OLC.[48] The short period of time necessary to acquire land based on this Article, in conjunction with certain practices of land-settlement officials and Mandatory courts, gives the strong impression that the expropriation potential in the process of settling title was not actualized during the Mandate.

C. *Zionism and the Making of the Israeli Land Regime*

After the creation of Israel in 1948, the rules concerning Mewat and adverse possession underwent revolutionary changes. Like in other settler societies, one must look at the ideological, ethnic, and political roots of the transformation and not judge it only against the backdrop of Ottoman and Mandatory law, nor merely as internal legal "evolution." The changes in Mewat and adverse possession rules took place as part of the creation of a new land regime. The Israeli legal system enabled, legitimized, and preserved a radical reorder-

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45. The British settled 5,243,000 dunams in Palestine of which about five million were included in Israel. Zandberg, *supra* note 29, at 287; GAVISH, *supra* note 28, at 202. R R

46. DOUCHAN, *supra* note 24, at 391; Yitzhak Oded, *Land Losses Among Israel's Arab Villagers*, 7 NEW OUTLOOK 10, 13 (1964); Zandberg, *supra* note 29, at 288; *see generally* ELIYAHU COHEN, HEET'YASHNOOT VE-HESDER BE-MEKARKE'EEN [LIMITATION OF ACTION AND LAND SETTLEMENT] (1984). R R

47. Zandberg, *supra* note 29, at 287. R

48. It seems that the British desired to protect landholders even if they possessed the land without strong formal rights. See, for example, their attempts to protect Arab tenants in STEIN, *supra* note 26, at 65. Compare, however, the legislation of the Mewat Land Ordinance in 1921 in which they prevented the acquisition of dead land without formal permission. The Mewat Land Ordinance, 1921, 38 I.R. 5 (Mar. 1, 1921). R

ing of Israeli space that transferred land from Arab owners and possessors to the Jewish State.

The purpose of this section is to place the changes in Mewat and adverse possession rules in their wider context. First, within the context of the ethnic strife between Jews and Arabs, I discuss briefly the place of land in Palestine (referred to as *Eretz Yisrael*, or the Land of Israel), in Zionist ideology in general, and in the attitude of the *Yishuv* (Palestine's Jewish community) in particular. I then review the evolution of the State land regime following the major changes that took place during and immediately after Israel's War of Independence.

1. Eretz Yisrael *in Zionist Ideology and Practice Before 1948*

While the Zionist Movement and the *Yishuv* held no uniform perspective on land, land in *Eretz Yisrael* did occupy a central position in Zionist ideology and practice. The major schools of thought within the Zionist movement exhibited strong non-liberal or anti-liberal tendencies reflected in their positions regarding land in Palestine. These schools of thought regarded neither autonomy nor the will of the individual as the basis of their aims, but rather the interests of the collective.[49]

During the years preceding the establishment of the State, most political groups in the *Yishuv* understood the individual as possessing collective ideals and as the means for their actualization.[50] *Tnuat Ha'avoda*, the Workers' Movement, which

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49. As Assaf Likhovski correctly remarked, though the "First Aliya" (the first wave of modern Jewish immigration to Israel) favored private ownership of land, starting with the following waves of immigration, an attitude favoring collective ownership of land became dominant. *See* Gershon Shafir, *Karka, 'Avodah ve-Ookhlooseeyah be-Koloneez'tseeyah ha-Tseeyoneet: Hebeteem Klaleeyeem ve-Yeekhoodeeyeem* [*Land Work and Population in Zionist Colonization: General and Particularist Aspects*], *in* HA-KHEVRAH HA-YEESRA'ELEET: HEBETEEM BEEKORTEEYEEM [ISRAELI SOCIETY: CRITICAL PERSPECTIVES] 104-19 (Uri Ram ed., 1994).

50. DAN HOROWITZ & MOSHE LISSAK, ORIGINS OF THE ISRAELI POLITY: PALESTINE UNDER THE MANDATE 131 (1978) [hereinafter HOROWITZ & LISSAK, ORIGINS OF THE ISRAELI POLITY]; DAN HOROWITZ & MOSHE LISSAK, METSOOKOT BE-OTOPEEYAH YEESRA'EL KHEVAH BE-'OMES YETER [TROUBLES IN UTOPIA: THE OVERBURDENED POLITY IN ISRAEL] 153-54 (1990) [hereinafter HOROWITZ & LISSAK, TROUBLES IN UTOPIA]; *see generally* SHMUEL N. EISENSTADT, HA-KHEVRAH HA-YEESREELEET: REKA, HEETPATKHOOT VE-BA'AYOT [ISRAELI SOCIETY: BACKGROUND, DEVELOPMENT PROBLEMS] (1967); ITZHAK

was the dominant political group of the period, had strong socialist tendencies, at least on the level of rhetoric.[51] Parties and political groups affiliated with the Workers' Movement were suspicious of private ownership of the means of production, and especially of private ownership of land. The settlements and social institutions of the Workers' Movement (*kibbutzim* and, to a lesser degree, *moshavim* and the *Histadrut*) were based on the principle of collective ownership of the means of production and of land.[52] Religious elements that cited Biblical and other religious sources that sanctified the "Holy Land" had an impact not only on religious Zionists, but also on the Zionist movement as a whole. The fundamental concept of "redemption of the land," which suggested a complex system of relations among the Jewish people, the land of Israel, and God originated from religious sources.[53] The Jewish National Fund (JNF), which served as the central land acquisition organ of the Zionist movement and plays a central role in the Israeli land regime to this day, took as its motto the biblical verse, "and the land shall not be sold in perpetuity; for the land is Mine."[54] In its original context, the verse refers to God as the owner of the land; however, secular Zionists inter-

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GALNOOR, STEERING THE POLITY: COMMUNICATION & POLITICS IN ISRAEL (1982); NEW PERSPECTIVES ON ISRAELI HISTORY: THE EARLY YEARS OF THE STATE (Laurence J. Silberstein ed., 1991). For a critical history of Israeli society, see Uri Ram, *Ha-Khevrah ve-Mada ha-Khevrah: Sotsyologeeyah Meemsadeet ve-Sotsyologeeyah Beekoreteet be-Yeesra'el* [*The Society and the Social Science: Sociology of the Establishment and Critical Sociology in Israel*], *in* ISRAELI SOCIETY: CRITICAL PERSPECTIVES, *supra* note 49, at 7-39.

51. *See* ENCYCLOPEDIA OF ZIONISM AND ISRAEL 911-15 (Raphael Patai ed., 1994).

52. HOROWITZ & LISSAK, ORIGINS OF THE ISRAELI POLITY, *supra* note 50, at 142-45; HOROWITZ & LISSAK, TROUBLES IN UTOPIA, *supra* note 50, at 153-54; NOAH LUCAS, THE MODERN HISTORY OF ISRAEL 91 (1975); GERSHON SHAFIR, LAND, LABOR, AND THE ORIGINS OF THE ISRAELI-PALESTINIAN CONFLICT, 1882-1914, at 165-86 (1989); ENCYCLOPEDIA OF ZIONISM AND ISRAEL 803-07, 954-55. **R** **R**

53. KIMMERLING, *supra* note 41, at 8-9, 204-08; CHARLES S. LIEBMAN & ELIEZER DON-YEHIYA, CIVIL RELIGION IN ISRAEL 32-33 (1983); ZE'EV STERNHELL, BEENYAN OOMAH O TEEKOON KHEVRAH? [NATION-BUILDING OR A NEW SOCIETY?] 73-77, 417 (1986); *see generally* Erik Cohen, *Citizenship, Nationality and Religion in Israel and Thailand*, *in* THE ISRAELI STATE AND SOCIETY 66 (Baruch Kimmerling ed., 1989); GE'OOLAT HA-KARKA BE-ERETS YEESRA'EL; RA'YON VE-MA'ASEH [REDEMPTION OF THE LAND OF ERETZ-ISRAEL: IDEOLOGY AND PRACTICE] (Ruth Kark ed., 1990). **R**

54. *Leviticus* 25:23.

preted it to mean that the Jewish people as a whole were the owners of the Holy Land.[55]

As a nationalist movement that crystallized toward the end of the nineteenth century, Zionism aspired to reunite the Jewish Diaspora, revive the ancient nation, return to *Eretz Yisrael*, and establish a home there for the Jewish people.[56] At first, the Zionist leaders either were not aware of or did not take seriously the existence of a significant Arab population living in the new-ancient land.[57] At the end of the nineteenth century and the beginning of the twentieth century, when Zionist settlers began arriving in Palestine, they quickly understood that the Zionist slogans of "a land without a people for a people without a land" and "conquering the wilderness" were not at all compatible with the reality that met them.[58] Of the 300,000-500,000 inhabitants that lived in the territory that would later become known as Palestine during the second half of the nineteenth century, only seven percent were Jewish.[59]

Practically from the very beginning of Jewish settlement activity, the boundaries between the Jewish and Arab communities were drawn in a clear, decisive manner. As tension grew between the two communities, methods of land purchase, cultivation, and settlement were increasingly subordinated to the

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55. WALTER LEHN, THE JEWISH NATIONAL FUND 1 (1988). *See generally* ZVI SHILONY, HA-KEREN HA-KAYEMET LE-YEESRA'EL VE-HA-HEET'YASHVOOT HA-TSEEYONEET [THE JEWISH NATIONAL FUND AND SETTLEMENT IN ERETZ-ISRAEL 1903-1914] (1990); DOUCHAN-LANDAU, *supra* note 27, at 53-97. R

56. *See* HOROWITZ & LISSAK, ORIGINS OF THE ISRAELI POLITY, *supra* note 50, at 121-22; *see also* HOROWITZ & LISSAK, TROUBLES IN UTOPIA, *supra* note 50, at 160-66; STERNHELL, *supra* note 53, at 21-23. R R R

57. For various interpretations of the Zionist attitude to the Arab presence, see KIMMERLING, *supra* note 41, at 10; LEHN, *supra* note 55, at 12-13; Shamir, *supra* note 6, at 240; ANITA SHAPIRA, LAND AND POWER 40-52 (William Templer trans., 1992); *see generally* YOSEF GORNI, HA-SHE'ELAH HA-ARAVEET VE-HA-BA'YAH HA-YEHOODEET [THE ARAB QUESTION AND THE JEWISH PROBLEM] (1985). R R

58. *See* ARYEH AVNERI, THE CLAIM OF DISPOSSESSION: JEWISH LAND-SETTLEMENT AND THE ARABS 1878-1948, at 61 (1982); *see also* Lionel Feitelberg, *Jewish Settlement in Israel*, 4 PALESTINE Y.B. & ISR. ANN. 365, 379 (1948-1949), *quoted in* George Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467, 486 (1994); DEBORAH GERNER, ONE LAND, TWO PEOPLES: THE CONFLICT OVER PALESTINE 13-18 (1991).

59. Janet L. Abu-Lughod, *The Demographic Transformation of Palestine*, *in* THE TRANSFORMATION OF PALESTINE 140 (Ibrahim Abu-Lughod ed., 1971); KIMMERLING, *supra* note 41, at 10. R

security and national interests of the Jewish people. Especially after the Holocaust when the demand for the establishment of an independent Jewish state in the territory of Palestine gained strength, the *Yishuv* developed the ideology and practice of "conquering the land" as a means by which to achieve Jewish sovereignty in Palestine.[60]

Three fundamental assumptions characterized Zionist ideology near the end of the Mandate: 1) land belongs to the collective and not to individuals; 2) this collective has a special connection (symbolic, at least) to the Jewish people as a whole; and 3) this collective does not include all inhabitants of Palestine, but rather the Jews alone. As I will show below, these elements of Zionist ideology and practice played an important role in the evolution of the land regime in Israel after the 1948 War of Independence.

2. *1948: Israel's War of Independence*

On November 29, 1947, the United Nations voted in favor of the partition of Palestine. The resolution was accepted by the Jews and rejected by the Arabs, and immediately following the end of the Mandate, the State of Israel was established. On the following day, seven Arab countries declared war on the State of Israel, joining the war that was already in progress between the Jewish and Arab communities.[61] The military conflict was concluded in a series of cease-fire agreements that divided Mandatory Palestine among Israel (holding most of the territory), Jordan, and Egypt.

During the War of Independence (referred to as *an-Nakba*, "the Catastrophe," in the Palestinian narrative) and immediately afterward, the area witnessed large-scale movements of population. Whereas before the war, 800,000-900,000 Arabs had lived in the territory incorporated into the State of Israel,

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60. HOROWITZ & LISSAK, ORIGINS OF THE ISRAELI POLITY, *supra* note 50, at 49-52; Yonathan Shapira, *Ha-Mekorot ha-Heestoreeyeem Shel ha-Demokratyah ha-Yeesra'eleet: Mapai ke-Meeflagah Domeenanteet* [*The Origins of the Israeli Democracy: Mapai as a Dominant Party*], *in* ISRAELI SOCIETY: CRITICAL PERSPECTIVES, *supra* note 49 at 141-78, 323, 345-46; KIMMERLING, *supra* note 41, at 1-30, 106-21; KANO, *supra* note 24, at 63-71. R R R

61. Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israel-Palestinian Settlement*, 89 AM. J. INT'L L. 295, 297 (1995); Bisharat, *supra* note 58, at 502 (quoting BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949, at 29 (1987)).

by the end of 1949, only about 160,000 remained.[62] Despite the intense historiographical debate taking place today regarding the exact causes of these movements, there is no doubt that the Israeli government blocked the return of the majority of the Palestinian Arab refugees.[63] The Israeli legal system played an important role in preventing refugees from returning to Israel.[64]

During the first three years of statehood, Israel's Jewish population swelled as the majority of Jews living in the Arab countries as well as the small number of Jews living in the areas of Palestine that came under Arab control moved to Israel (due, among other factors, to fear for their safety in countries that were at war with Israel). Most of these Jews left their possessions behind and became evacuees. During this period, survivors of the Holocaust from Europe also arrived in Israel.[65] The Israeli government adopted the position that the mass im-

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62. The estimates of the number of Arab refugees and of those who remained in Israel vary. *See* ENCYCLOPEDIA OF ZIONISM AND ISRAEL 72; LEHN, *supra* note 55, at 95; EDWARD W. SAID, THE QUESTION OF PALESTINE 14, 45 (1980); Abu-Lughod, *supra* note 59, at 153-61; BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949 (1987); *see also* Benny J. Morris, *The Origins of the Palestinian Refugee Problem*, *in* NEW PERSPECTIVES ON ISRAELI HISTORY 42-43 (Laurence Silberstein ed., 1991); Gad Gilbar, *Megamot be-Heetpatkhoot ha Demografyah Shel Arveeyee Erets-Yeesra'el, 1870-1948* [*Trends in the Demographic Development of the Arabs in Eretz-Israel, 1870-1948*], 45 CATHEDRA 43 (1988); JACOB M. LANDAU, THE ARABS IN ISRAEL: A POLITICAL STUDY 3-4 (1969); SABRI JIRYIS, THE ARABS IN ISRAEL 289 (1976); PALESTINE LIBERATION ORGANIZATION, DEPARTMENT OF REFUGEE AFFAIRS, THE PALESTINIAN REFUGEES 1948-2000 FACTFILE 5 (Ramallah & Jerusalem, 2000). R

63. For a review of the historiographical debate, see Laurence Silberstein, *Reading Perspectives/ Perspectives on Reading: An Introduction*, *in* NEW PERSPECTIVES ON ISRAELI HISTORY: THE EARLY YEARS OF THE STATE 3, 4-5 (Laurence Silberstein ed., 1991); for the Palestinian perspective, see NUR MASALHA, EXPULSION OF THE PALESTINIANS: THE CONCEPT OF 'TRANSFER' IN ZIONIST POLITICAL THOUGHT 1882-1948, at 175 (1992). For the view of an Israeli revisionist historian, see MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, *supra* note 62; for the Zionist perspective, see Shabtai Teveth, *Charging Israel with the Original Sin*, COMMENTARY 24-33 (1989). *See generally* TSEEYONOOT: POOLMOOS BEN ZMANAYNOO [ZIONISM: A CONTEMPORARY CONTROVERSY] (Pinhas Ginosar & Avi Bareli eds., 1996). For a recent book examining this and related controversies, see generally LAURENCE SILBERSTEIN, THE POST-ZIONISM DEBATES: KNOWLEDGE AND POWER IN ISRAELI CULTURE (1999). R R

64. *See generally* Bracha, *supra* note 19. R

65. *See* Benvenisti & Zamir, *supra* note 61, at 297. R

migration to Israel, in conjunction with the mass exit of Palestinian Arabs, constituted a de facto mutual population transfer. In its eyes, this population transfer was similar to what had taken place between India and Pakistan during the same period and earlier as a result of World War II and the war between Turkey and Greece.[66] In fact, as was the case with India and Pakistan and the war between Turkey and Greece, most of the new immigrants arriving in Israel during this period were settled on refugee land (in this case, Arab land).[67]

The mass arrival of Jewish immigrants and evacuees during the early years of Israel's existence and the remainder of a small Arab minority played a central role in shaping Israeli society's ethnic structure that crystallized into three major layers. With a degree of over-generalization, it is possible to apply the terminology of settling ethnocracy to Israel in the period immediately following the 1948 War of Independence. *Ashkenazim* constituted the dominant "charter" group ("founders"), while *Mizhrachi* Jews from Islamic countries made up the "immigrant" group. The third "native," "local," or "alien" group was the Arab citizens of Israel who were dispossessed from most of their land.[68] The new land regime created after the Israeli War of Independence enabled, assisted, and promoted the Zionist project of Judaization of Israeli space and society. This will be described in the next section.

3. *The Making of the Israeli Land Regime*

At the end of the war, Israel controlled an area covering approximately 20.6 million dunams (about five million hectares) of land, or 78% of British Mandate Palestine.[69] However, land officially owned by Jewish individuals and organiza-

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66. TOM SEGEV, 1949: THE FIRST ISRAELIS 81 (1986).

67. Bisharat, *supra* note 58, at 505; DON PERETZ, ISRAEL AND THE PALESTINE ARABS 143 (1958); Ghazi Falah, *The 1948 Israeli-Palestinian War and its Aftermath: The Transformation and De-Signification of Palestine's Cultural Landscape*, 86 ANNALS AM. ASS'N GEOGRAPHERS 256-85 (1996).

68. Yiftachel & Kedar, *supra* note 3, at 76; Sammy Smooha, *Shese'eem* **R**
Ma'amadeeyeem, Adateeyeem ve-Le'oomeeyeem ve-Demokratyah be-Yeesra'el [*Class, Communal and National Clefts and Democracy in Israel*], *in* ISRAELI SOCIETY: CRITICAL PERSPECTIVES, *supra* note 49, at 180-81, 185-88.

69. Ruth Kark, *Planning, Housing and Land Policy 1948-1952: The Formation of Concepts and Governmental Frameworks*, *in* ISRAEL: THE FIRST DECADE OF INDEPENDENCE 461, 478 (S. Ilan Troen & Noha Lucas eds., 1995).

tions only amounted to approximately 8.5% of the total area of the State. With the addition of land that was owned formerly by the British Mandatory government and thereby inherited by Israel, only about 13.5% (2.8 million dunams; 700,000 hectares) of Israeli territory was under State or Jewish ownership[70] Thus, a large discrepancy existed between the sovereignty and control of land by the Jewish State on one hand and its ownership and possession on the other. This discrepancy led to a radical transformation in the Zionist position toward land acquisition: During the Mandatory period, the Zionist movement acquired ownership and possession of land as a means to attain Jewish sovereignty.[71] However, after sovereignty over most of Palestine was achieved, the land itself was not in Jewish ownership or possession.[72]

To fulfill the ethnically-centered objective of ethnic-land control the Israeli State rapidly and efficiently increased the amount of land in its possession, transforming it into Jewish-Israeli land.[73] Like other settler states, Israel initiated a comprehensive land and settlement policy. This policy rested on new, powerful legislation that transferred public and Arab land into Jewish hands.[74] In addition to the massive transfer of land to Jewish possession and ownership, the spatial Judaization project involved the physical destruction of most of the now deserted Arab villages, towns, and neighborhoods.[75] It also involved intensive Jewish settlement, spatial restrictions on Arab settlement and development, transforming Arab place names into Hebrew, parallel development of Jewish urban and

70. *See* AVRAHAM GRANOTT, NETEEVOT VE-MEFALSEEM [VILLAGES AND KIBBUTZES] 133-34 (1952).

71. *See* KIMMERLING, *supra* note 41, at 19-48. R

72. DAVID KRETZMER, THE LEGAL STATUS OF THE ARABS IN ISRAEL 50 (1990).

73. Yiftachel & Kedar, *supra* note 3, at 78. R

74. Alexandre (Sandy) Kedar, *Zman shel Rov, Zman shel Mee'oot: Karka', Le'om, ve-Deeney ha-Heetyashnoot ha-Rokheshet be-Yeesra'el* [*Minority Time, Majority Time: Land, Nation, and the Law of Adverse Possession in Israel*], 21 TEL AVIV U. L. REV. 665, 681-82 (1998).

75. Yiftachel & Kedar, *supra* note 3, at 78; Miron Benvenisti, *Ha-Mapah ha-Eevreet* [*The Hebrew Map*], 11 TE'OREEYAH VE-BEEKORET [THEORY AND CRITICISM] 7-29 (1997). R

industrial centers, and the redrawing of municipal boundaries in ways that ensured all-encompassing Jewish control.[76]

The Israeli land regime was shaped as a national-collectivist regime that rapidly implemented the principles of ethnic territorial expansion and control. At the conclusion of this phase, approximately 93% of Israeli territory (within the pre-1967 borders) was owned, controlled, and managed by either the Israeli State or the Jewish nation (through the Jewish National Fund).[77]

The new land regime was based on 1) nationalization and Judaization of the land, 2) centralized control of this land by the State and Jewish institutions (mainly the JNF), and 3) selective and unequal allocation of possessory land rights to Jews in ways that mainly favored the "founders." I will focus here on the Nationalization and Judaization of the land. Roughly seventeen million dunams formally were transferred to and registered in the name of public Jewish-Israeli ownership, i.e., the State, the Development Authority, and the Jewish National Fund, which together formed "Israeli Land."[78] The following section discusses the means by which the nationalization and Judaization of the land was achieved.

a. Nationalization of Arab-Owned and Arab-Possessed Land Through the Military, Administrative, and Legal Sovereign Powers of the State

It is estimated that following the 1948 War of Independence, Palestinian Arabs abandoned between 4.2 and 5.8 million dunams of land in the territory of Israel.[79] The property of the Arab refugees who no longer resided in Israel was trans-

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76. *See generally* Adriana Kemp, Medabreem Gvoolot: Ha-Beenyatah shel Tereetoryah Poleeteet be-Yeesra'el 1957-1949 ["Talking Boundaries": The Making of Political Territory in Israel 1949-1957] (1997) (unpublished Ph.D. thesis, Tel Aviv University) (on file with the author).

77. This land regime developed during the first two decades and crystallized by the 1960s. It essentially remained in this form until the 1990s.

78. This included the transfer of much of the agricultural land to the Jewish National Fund (JNF). During the early 1950s, the JNF more than doubled the land registered in its name as the result of the transfer of Arab agricultural land. With this, the JNF became the owner of most agricultural land in Israel, and Arab citizens of Israel were precluded from owning it. Kedar, *supra* note 74, at 685; *see also* Basic Law: Israel Lands § 1 (1960).

79. Arnon Golan, *The Transfer to Jewish Control of Abandoned Arab Lands During the War of Independence*, *in* ISRAEL: THE FIRST DECADE OF INDEPENDENCE

ferred fully to State ownership. In addition, Arabs who remained in Israel and became citizens lost approximately 40-60% of the land they had possessed prior to 1948. The confiscation of Arab land began during the war, when land was seized either on the basis of temporary emergency regulations or with no legal justification whatsoever. After a short period, the Israeli legal system began to legalize this land transfer. Until the mid-1950s, this legal ordering was effected mainly through the Absentee Property Law (1950), the Land Acquisition Law (1953), administrative actions taken in conjunction with these statutes, and court decisions interpreting and implementing them.[80]

In the second half of the 1950s, based on "land settlement" or "settlement of title," a new phase of land transfer began. This process, together with additional legislation, deprived many Arab landholders of their right to retain their land, especially in the "frontier" areas of the Galilee and the Negev.[81]

b. Transfer and Registration of All Land Owned by the British Mandate in the Name of the State of Israel

The British Mandate formally claimed ownership over about one million dunams of land. During the process of "settlement of title," the Israeli State transferred many millions of dunams of land mainly in the Negev and the Galilee into its ownership as "state land."[82] Much of the land transferred to

403, 431 (S. Ilan Troen & Noah Lucas eds., 1995); Kark, *supra* note 69; Kedar, *supra* note 74, at 684.

80. Absentees' Property Law, 1950, S.H. 86; Land Acquisition (Validation of Acts and Compensation) Law, 1953, S.H. 58. Alexandre (Sandy) Kedar, Israeli Law and the Redemption of Arab Lands, 1948-1969 (May 1996) (unpublished SJD thesis, Harvard University Law School) (on file with the author); Kedar, *supra* note 74, at 684; KRETZMER, *supra* note 72; *see generally* IAN LUSTICK, ARABS IN THE JEWISH STATE: ISRAEL'S CONTROL OVER A NATIONAL MINORITY (1980); MENACHEM HOFNUNG, YEESRA'EL-BEETAKHON HA-MEDEENAH MOOL SHEELTON HA-KHOK [ISRAEL-SECURITY NEEDS VS. THE RULE OF LAW] (1991).

81. Shamir, *supra* note 6, at 243; Kedar, *supra* note 74, at 684, 687; *see generally* Yifat Holzman-Gazit, *Mass Immigration, Housing Supply and Supreme Court Jurisprudence of Land Expropriation in Early Statehood*, *in* THE HISTORY OF LAW IN A MULTI-CULTURAL SOCIETY, *supra* note 11, at 273. R

82. Kedar, *supra* note 74, at 685.

State ownership during this formal process of registration hitherto had been unregistered, and indeed belonged to the State. However, some of this land was transferred to the State as a result of the categorization of Bedouin-held land in the Negev and the Galilee as "Mewat" (dead land). In addition, land was registered in the name of the State as a result of crucial changes in adverse possession laws. This process, which I perceive as part of the nationalization of Arab land,[83] will be detailed below.

III. NATIONALIZATION OF ARAB LAND DURING THE SETTLEMENT PROCESS OF THE 1950S AND 1960S

A. *Settlement of Title During the First Years of Israeli Statehood*

During the first years of Israeli statehood, little was done in the area of settling land titles and the situation in the north did not change significantly from that of the Mandate period.[84] By the mid-1950s, the bulk of the massive land expropriation carried out during and after the War of Independence, based primarily on the Absentee Property Law (1950) and the Land Acquisition Law (1953), for the most part had been concluded. A considerable portion of the land remaining in Arab hands was concentrated in the Galilee in the possession of Arab citizens of Israel.[85] Since most of the land of the Arabs was located in areas that had not been surveyed yet, and in which the rights to the land were not established permanently yet, the Israeli government, according to Jiryis, "was searching for new categories of land to redeem."[86]

In July 1955 the government decided to speed up the process of settling title by allocating special funds to its implementation in extensive regions of the Galilee.[87] Nevertheless, set-

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83. Kedar, *supra* note 74, at 686; *see generally* Kedar, *supra* note 80; Shamir, *supra* note 6; KANO, *supra* note 24. R R

84. From the creation of Israel in 1948 until 1956, the Israeli authorities settled only 75,000 dunams. Zandberg, *supra* note 29, at 294; DEEN VE-KHESHBON 'AL PE'OOLOT MEENHAL MEKARKE'EY YEESRA'EL LEE-SHNAT 1965/66 [ISRAEL LAND ADMINISTRATION REPORT FOR THE YEARS 1965-1966], at 97 (Jerusalem, 1966) (summarizing early settlement activities). R

85. Another area with a significant concentration of Arab landholders was the Negev desert.

86. JIRYIS, *supra* note 62, at 111. R

87. By March 1957, final maps had been prepared for fewer than twenty thousand dunams. DEEN VE-KHESHBON SHNATEE MEESPAR 8 SHEL MEVAKER

tlement progressed slowly despite these steps. A 1957 State Comptroller's report was critical of the slow pace of settling land titles. The report stated that the absence of such a process meant that "there is a danger that illegal occupants of . . . [State land] are likely to acquire for themselves rights to this land through its cultivation under the Ottoman Land Code."[88]

This criticism and concern that landholders in the Galilee area soon would acquire land rights based on possession had a significant impact on decisionmakers. The State allocated funds and accelerated the pace of settlement of title in the Galilee, especially after the establishment of the Israel Lands Administration (ILA) in 1960.[89] During this period, the State carried out "[s]ettlement of title operations in the north [which] covered 42 villages and an area of approximately 702,000 dunams."[90]

At the end of the 1950s, accelerated settlement of title was implemented in the Arab villages of the Galilee in an attempt to prevent Arabs from acquiring property rights to these lands.[91] A simultaneous goal was to facilitate Jewish settlement in the areas occupied by Arabs. As explained by the head of the Registration and Settlement Department in 1959, "[t]he work today is not done for settlement of title purposes only . . . but especially for clarifying the prospects of [Jewish] settle-

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HA-MEDEENAH LEE-SHNAT HA-KESAFEEM 1956/57 [STATE COMPTROLLER'S REPORT NO. 8 FOR THE YEARS 1956-1957], at 29 (Jerusalem, 1958) [hereinafter STATE COMPTROLLER'S REPORT]; *see also* Zandberg, *supra* note 29, at 294-97. R

88. STATE COMPTROLLER'S REPORT, *supra* note 87, at 28. For additional sources explaining the need for immediate initialization of the settlement process in order to prevent acquisition of rights by Arab landholders, see Zandberg, *supra* note 29, at 294-95. R

89. Following years of negotiations between the State of Israel and the JNF, the administration and effective control of all JNF land was transferred to the ILA in 1960. Although it owned only about one-sixth of all lands in this new category, the JNF received equal representation on the Board of Directors of the ILA.

90. ILA REPORT 1965-1966, at 97. Even though the government's plan was to settle about eighty Arab villages in both the Galilee and the "Triangle" areas, by 1960 only thirty-seven Arab villages had been settled. Zandberg, *supra* note 29, at 295, 298. R

91. Letter from the Director General of the Ministry of Justice, to the Minister of Justice § 74 (Aug. 11, 1961) (on file with the Israeli Central State Archive at 5733/C, 3520/9), *quoted in* Zandberg, *supra* note 29, at 295. R

ment in areas that are mainly inhabited by Arabs, mostly on land claimed by the State."[92]

In order to achieve these goals, a "Supreme Committee for Performing Land Settlement Operations" was created. To implement the policies drafted by this Committee, regional "Accomplishment Committees" were established for the Galilee and the Negev.[93] Yoseph Weitz, then still the head of the Land Department of the JNF and a member of the Galilee Committee, in the early phases of the operations explained that "[u]ntil now the goal of the work was to establish the ownership of the State on its land. The goal now is the Judaization of the Galilee."[94]

The initial phase of the settlement process was completed throughout the populated Arab villages of the Galilee by the end of the 1960s. The settlement of titles in the Galilee created endless judicial conflicts, eight thousand of which were decided by adjudication, most before settlement clerks, and some in regular courts. The primary focus of the adjudication was the confrontation between the Jewish State and Arab landholders who had remained in Israel after the 1948 War as part of a defeated minority living under military rule. Land rights in the area were for the most part unregistered. The land settlement process imposed the burden of proof on the land possessor who was claiming to possess or own the land. Because there was almost no other way to convince the settlement clerk

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92. Submission from the head of the Ownership and Registration Department in the ILA, to the Minister of Justice (Sept. 1, 1959) (on file with the Israeli Central State Archive), *quoted in* Zandberg, *supra* note 29, at 298. R

93. The members included the Head of the Registration and Settlement Department as well as representatives from the Treasury Office, the Military Governance, and the JNF, and the Advisor on Arab Affairs to the Prime Minister Zandberg, *supra* note 29, at 298. R

94. Protocol of the Committee for Land Settlement in the Galilee § 74 (May 8, 1957) (on file with the Israeli Central State Archive at 5733/C, 3520/4), *quoted in* Zandberg, *supra* note 29, at 299. Despite these and similar R quotes, Zandberg remains doubtful that the committees interfered with the objective administration of the settlement process. I have fewer doubts. While the settlement process was accomplished within the rule of law and was not entirely a process of expropriation, the definition of the settlement area itself as well as the results of this process lead to the conclusion that the settlement process was part of a process of land redemption. In addition, it is impossible to understand the impact the settlement process had on Arab landholders without taking into account the concomitant process of land allocation, from which Arabs were practically excluded.

to register the land in the name of the possessor, most of the litigation focused on the interpretation and utilization of Mewat rules and Article 78 of the OLC.[95] Despite "numerous problems due to the counter-claims of illegal occupants of state and absentee land," 85% of the cases were decided in favor of the ILA.[96] It has been estimated that, within the framework of this process, the State acquired hundreds of thousands of dunams of land from Arab possessions.[97]

The litigation in the settlement process centered on two major geographical areas. The first related to the outer perimeters of a village and related to the rights and definitions connected to Mewat land. The second focused mainly on land nearer to the village, usually categorized as Miri, in which issues of adverse possession arose. In the next section, I will describe the litigation over Mewat land with regard to adverse possession.

B. *Dead Land Walking: Mewat Jurisprudence*

While the general legal framework concerning Mewat was set up by the Ottomans and subsequently transformed by the British, the Mandatory Supreme Court did not adjudicate many Mewat cases.[98] On the other hand, the Israeli Supreme Court encountered an increasing number of Mewat cases stemming from land settlement in the Galilee. Lacking a solid line of Mandatory precedents, the Court had to elaborate and interpret the Mewat rules itself.

During the settlement process of the late 1950s and 1960s, the Ottoman and Mandatory legislation concerning Mewat became the source of intense litigation between the State of Israel and long-term Arab land possessors, and the Supreme Court was called upon to hear appeals on the decisions of settlement officials. While according to the original Ottoman

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95. JIRYIS, *supra* note 62, at 116; *see also* Zandberg, *supra* note 29, at 302. R

96. DEEN VE-KHESHBON 'AL PE'OOLOT MEENHAL MEKARKE'EY YEESRA'EL LEE-SHNAT 1965/66 [ISRAEL LAND ADMINISTRATION REPORT FOR THE YEARS 1964-1965], at 66-67 (Jerusalem, 1965) [hereinafter ILA REPORT 1964-1965].

97. KRETZMER, *supra* note 72, at 53.

98. This tends to strengthen the impression that the potential for expropriation by the Mandatory Supreme Court never was realized during the Mandatory period. It seems that the Mandatory authorities tended to refrain from interfering with Bedouin land possession. *See* Shamir, *supra* note 6, at 239-40. R

legislation categorizing a land as Mewat immediately entitled a person to proprietary rights over it upon cultivation, after 1921, land categorized as Mewat and cultivated without official permission remained State property regardless of the length of time its possessor had cultivated it.

On the other hand, according to Article 78 of the OLC, after a relatively short period of cultivation, a person potentially could acquire a prescriptive right in Miri land—a standard category for village land. Thus, an Arab landholder wishing to register land under Article 78, though facing momentous hurdles, had a chance to do so, whereas under the Israeli application of Ottoman and Mandatory legislation, categorizing a particular tract of land as Mewat conclusively ended the debate by establishing the land as State property. As a result, a person cultivating land without an official sanction now had to convince the court that the land was not Mewat but Miri.

The Supreme Court's adjudication reveals a consistent judicial relaxation in the definition of Mewat while maintaining rigid standards toward defining the term Miri and the ability to prove the category as applicable. Like courts in other settler societies, the Israeli Court applied the law in ways that restricted the scope of legal recognition of "borderline" land possessed by Arabs.[99] Supreme Court decisions in these instances lacked rhetoric concerning rights of long-term possessors and cultivators. In the overwhelming majority of cases, the Supreme Court established that however long a person had possessed and cultivated a tract of land outside the immediate vicinity of a recognized town or village, ownership and possession would be attributed to the State.

1. *The Construction of Mewat Rules by the Israeli Supreme Court*

In adjudicating Mewat cases, the Israeli Supreme Court introduced several rules that resulted in expanding the category of Mewat and restricted the ability of Arab land possessors to acquire prescriptive rights to land that they had at times

99. Compare the non-recognition of native property as detailed above. As in the case of native land, we face a clash of paradigms. The settler system in both cases refused to recognize the land possessed by the holders as rightfully in their possession. The result of such refusal is the dispossession of the possessors.

cultivated for several generations. Concurrently, the Court often expressed its regret that the adjudication would result in the removal of the land possessors, but maintained that its decisions were "objective" and "modern." The Court's clear demarcation of the boundaries between Mewat and other categories of land facilitated the planning of Jewish settlements outside the immediate boundaries of Arab villages. Thus, like courts in other settler societies, the Israeli Court contributed to the transfer of land from Arab possessors to the Jewish State and to Jewish settlers and promoted the legitimization of this transfer by presenting it as objective and neutral registration of State land. I now will turn to these rules.

a. The Contest Between the Distance by Measurement and the Distance by Hearing: "Objective" Demarcation of Mewat

Article 6 of the OLC defined Mewat as land that met one of three stipulations: being "at such a distance from a village or town that [1] a loud human voice cannot make itself heard at the nearest inhabited place to it, that is [2] a mile and a half, or [3] about half an hour's distance from it." In cases in which the land in question did not meet all three of the above stipulations, a decision had to be made as to which of the three should prevail. To all appearances, Ottoman legislation gave precedence to the range of the human voice as a unit of measurement.[100] In an agrarian society that lacked any "modern" means of communication or measurement, what mattered most was whether the land was situated within hearing distance that determined the boundaries of a communal settlement, and the exact distance in miles was less significant.

The first time the Supreme Court referred to the question, in *Hussein Abed v. The State of Israel*, the Court confirmed that there was no dispute that the land was Mewat since it lay at a distance between an hour and an hour and fifteen minutes walking, a loud voice standing at the edge of the nearest

100. R. C. TUTE, in his book THE OTTOMAN LAND LAWS WITH A COMMENTARY ON THE OTTOMAN LAND CODE (1927), comments on the choice of voice as the leading measurement: "In the absence of any natural or artificial boundaries, and in the absence of a cadastral survey, it is difficult to see how this quaint definition could have been improved upon." *Id.* at 97.

village could not be heard on the tract, and it lay at a distance greater than three kilometers from the nearest village.[101]

However, when Arab litigants in the leading Mewat case, *The State of Israel v. Tzalach Badaran*,[102] attempted to use the voice measurement method to prove that their land lay within the boundaries of a settlement and should therefore not be qualified a Mewat, the Supreme Court rejected their argument. The parties agreed that the disputed land lay at a distance greater than a mile and a half from the Arab village of Ba'ana. The Arab landholders succeeded in proving that a person could hear the loud cry of a man standing at the edge of the village on the land in question. Therefore, they argued that the land did not qualify as Mewat. "This argument," explained Justice Berinson in *Badaran*, "cannot be accepted. Such a definition of Mewat land is far from being a clear and exact legal definition . . . in the contest between the distance by measurement and the distance by hearing, the distance by measurement wins and is the determining one."[103] Berinson chose the one and a half mile measurement standard, which was seemingly scientific and objective, to distinguish between Mewat and other categories of land.[104]

After *Badaran*, the mile and a half criterion became the exclusive criterion employed by the Supreme Court to demarcate the boundaries of Mewat. Thus, as a rule, all land situated outside the mile and a half perimeter was determined to be Mewat land and therefore State property.[105] The adoption of

101. C.A. 216/55, Hussein Abed v. The State of Israel, 11(1) P.D. 37, 38.

102. C.A. 518/61, The State of Israel v. Tzalach Badaran, 16(3) P.D. 1717.

103. *Id.*

104. In an article analyzing Mewat decisions of the Israeli Supreme Court in a later period, Ronen Shamir emphasizes modern law's "commitment to stability through schematization and planning" and its desire to "single out the clearest and most distinct elements that constitute a given phenomenon." Shamir, *supra* note 6, at 233. Undoubtedly, the Supreme Court jurisprudence concerning Mewat reflected a desire to demarcate the boundaries defining Mewat, and thereby state land, as clearly and objectively as possible, *id.* R

105. For similar use of the mile and a half criterion, see, for example, C.A. 274/62, The State of Israel v. Hussein Ali Suead, 16(3) P.D. 1946, 1947; C.A. 55/63, Kasem Suead v. The State of Israel, 20(2) P.D. 3, 4; C.A. 298/66, Asa'ad Kasis v. The State of Israel, 21(1) P.D. 372, 374. In C.A. 26/62, The State of Israel v. Tzalach Nazel, 16(3) P.D. 1722, the Court nevertheless decided that once a holder proved that part of his land lay at a distance of less

this measurement permitted the State to consider all land situated outside the radius of a mile and a half as being available for the planning and development of Jewish settlements. As it will now be demonstrated, the Court introduced additional requirements that greatly hampered the attempts by Arab landholders to prove that the land in their possession was not Mewat land.

b. Imposition of Evidentiary Onuses on Possessors

Settler courts often use procedural and evidentiary tools to curtail the possibilities of native possessors retaining the land they occupy. Similarly, Israeli jurisprudence imposed heavy evidentiary onuses on the possessors. This suited the demand for "modern" and written evidence, a particularly forbidding requirement for the typical Bedouin landholder.[106]

The Israeli Supreme Court imposed upon possessors of contested land the burden of proof of showing that the land under dispute was situated less than a mile and a half from a town or village and therefore not Mewat, but Miri.[107] Evidence that a neighboring tract had been recognized as Miri did not convince the Court that a specific tract should not be categorized as Mewat. In *The State of Israel v. Diba Diab*, the respondent argued that his land was Miri, and proved that the disputed tract had been part of two other tracts which were registered as Miri. The Court reversed the lower court's decision and decided that the fact that neighboring tracts were

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than a mile and a half, his entire land would not be qualified as Mewat, even though it consisted of three distinct tracts, and two lay at a distance of more than a mile and a half. The separation of the land into three different tracts, which was done for administrative purposes, should not hurt the landholder who had cultivated the land for generations.

106. For a similar argument, see Shamir, *supra* note 6, at 241. R

107. While this imposition was, to some extent, grounded in Section 29 of the amended Land (Settlement of Title) Ordinance, the Court interpreted this requirement stringently. The amendment stated that "all rights to land which are not established by any claimant shall be registered in the name of the High Commissioner in trust for the government of Palestine." In 1961, in C.A. 472/59, Al-Gadir v. The State of Israel, 15(1) P.D. 648, 650, Justice Landau stated that, "The burden of proof as to the category of land which is claimed in a land settlement process by an individual lays on him." This requirement can be found in almost all Mewat cases.

registered as Miri was not sufficient proof that land situated at more than a mile and a half from a village was also Miri.[108]

The same was the case in *The State of Israel v. Hussein Suead*. Judge Yedid-Halevi of the lower court had categorized a certain tract as Miri on the basis that neighboring tracts were registered as Miri, and that the area generally was not waste but settled and cultivated. Chief Justice Olshan reversed the decision as contrary to law and precedent, explaining that one should take into account only the tract itself because otherwise, if before 1921 a large area was Mewat, and different persons vivified it and settled it without permission, then any suit against any one of them would fail since he would be able to show that the area was settled. This was unacceptable to Olshan and the fact that it corresponded with the rationale of the Ottoman legislation was irrelevant.[109]

The Court also rigidly imposed upon Arab landholders the burden to prove that they had registered the land before 1921, as demanded by the Mandatory Mewat Ordinance. Though the British Mewat Land Ordinance required that Mewat land "revived" before 1921 be registered within two months of the enactment of the ordinance, the Mandatory authorities did not implement this requirement rigorously. Instead, they allowed people who could prove that they had revived the land prior to the enactment of the Ordinance to register the land even after 1921. The Israeli Supreme Court, on the other hand, implemented this Mandatory requirement stringently and demanded proof (some forty years later) that the Mewat land had been registered prior to April 18, 1921. Failure to prove that the land was registered prior to this criti-

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108. C.A. 25/62, The State of Israel v. Diba Diab, 16 P.D. 1485.

109. C.A. 342/61, The State of Israel v. Hussein Suead, 15(3) P.D. 2469, 2475. *But cf.* C.A. 452/59, Geris Daoud v. Chana Musa Al Sha'ar, 15(2) P.D. 1392, 1395. This case involved a private dispute between two Arab litigants over a tract of land. The land was bequeathed by its previous landholder to the respondent. The appellant claimed that since the land was Miri, its holder could not bequeath it and that according to the set rules of inheritance he was entitled to it. The appellant argued that the land was Mulk, and therefore could be bequeathed. The appellant proved that adjoining tracts officially were registered as Miri land. Justice Cohn decided that although this did not amount to a conclusive proof of the disputed tract, nevertheless, "when there are doubts as to the category of a certain tract, it is permitted to use also evidence concerning similar tracts in the vicinity." *Id.*

cal date—and most indeed failed—led to the automatic registration of the land in the name of the State.[110]

Landholders carried the burden of proving not only that they had "broken" or "revived" the dead land before 1921, but also that they had continued to cultivate it from then on. In *Machmud Al-Habab v. The State of Israel*, the Court decided that the Arab appellants had to prove that they revived the land before 1921 and that they had continued holding the land "alive" until the date they filed their claim.[111]

Likewise, in *Kasis*, thirty-three landholders who held and cultivated several hundred dunams of land produced the testimony of a ninety-two year old man who testified that the land had been tilled by the possessors and their forefathers for as long as he could remember. Although the lower court had accepted this testimony, the Court determined that the posses-

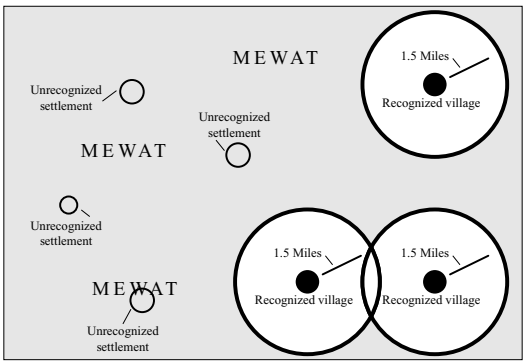
110. In *Badaran*, for example, Justice Berinson maintained that following the 1921 Ordinance, a person who revived land without leave from the authorities could be sued as a trespasser. Since Badaran had failed to prove that either he or his forefathers had notified the Registrar, he was a trespasser lacking any rights to the land. *Badaran*, 16(3) P.D. at 1720-22. For a description of a similar implementation of the rule on Bedouins, see Shamir, *supra* note 6, at 241-45. R

111. C.A. 40/50, Machmud Al-Habab v. The State of Israel, 7(1) P.D. 494. The Court referred to the Mandatory precedent, *Krikorian v. The Attorney General*, where the Mandatory Court ruled that "the term revivification should be understood as constant actual cultivation and revivification; the result must be an absolute change, permanent and continuous in the quality of the cultivated land." The Mandatory Court rejected the argument of the appellant that revival of Mewat land unaccompanied by any claim or request for a title deed automatically altered the category of that land to Miri, *id.* at 497. The same was true in *Machmud Nadim Habab v. The Government of Palestine*, where the Mandatory Supreme Court decided that the mere "revival" of Mewat did not confer the title to it or transform the land into Miri. The revival and cultivation had to be constant until its registration in the name of the reviver. Land where reclamation works had been instituted or which had been planted successfully with trees that were still in existence, could justify the categorization of Miri. Machmud Nadim Habbab v. Government of Palestine, 14 P.L.R. 337. In *Yusef Chavivi v. The Government of Palestine*, the Mandatory Supreme Court also decided that "in order to redeem land from the category of Mewat it is necessary for the claimant to prove revival—that is to say—conversion from unfruitful to the productive . . . ." C.A. 65/40, Yusef Chavivi v. Government of Palestine, 7 P.L.R. 289, 290; C.A. 226/42, Krikorian v. The Attorney General, 10 P.L.R. 302; C.A. 143/46, Machmud Nadim Habbab v. Government of Palestine, 14 P.L.R. 337; C.A. 65/40 Yusef Chavivi v. Government of Palestine, 7 P.L.R. 289, 290.

sors failed to prove their claim that their forefathers had cultivated the land before the enactment of the 1858 Land Law. The array of written and oral evidence produced by the appellants was rejected by the Court.[112]

The Supreme Court implemented and developed additional evidentiary rules that made it extremely difficult to define land as Miri in court. One of the reasons for this was that Ottoman law contained several inconsistent references to the type of settlement from which the distance of a mile and a half would classify land as Mewat. Articles 6 and 103 of the OLC referred to the distance from both "towns and villages" and from the "nearest inhabited place." Tute, the Ottoman land law scholar, was of the opinion that any "inhabited site," and not only established "towns and villages," should qualify as a point from which the mile and a half distance could be measured.[113] The Supreme Court Justices probably recognized that if any settlement could qualify as a legitimate point from which to measure the distance, the surface of Mewat, and thereby State land, would be reduced significantly (see Figure 1).

FIGURE 1: MEWAT LAND



112. *Kasis*, 21(1) P.D. at 374-75.

113. "Of late years the sites of many towns and villages have . . . been greatly extended, and new inhabited—sites have been formed. This means that the limits of the Mewat have retreated with the advance of habitation," TUTE, *supra* note 100, at 98. According to Granott, "the mean distance between the villages in Palestine is about 4 to 5 km, but the actual distances vary considerably. . . . If this were not so, there could be no *mewat* land in Palestine, because unless there were great variations in the distances between villages, territorial limits of villages would form a complete or overlapping mosaic." GRANOTT, *supra* note 33, at 106. R R

As early as 1956, in the *Chamda* case, the appellant admitted that his hundred-dunam tract of land was located more than a mile and a half from the nearest village but argued that it was located near several buildings that had been there for many years and therefore the land was not Mewat, but Miri. Since he had cultivated it for more than ten years, he acquired a right to it by prescription according to Article 78 of the Ottoman land code. Judge Landau rejected the argument:

> This argument seems to us to be without legal foundation. From Article 6 of the Ottoman Land Code . . . it is quite clear that the distance of a mile and a half is measured from the nearest point of settlement, which is at the edge of the built-up area of a city or village, and one does not take into consideration isolated buildings located outside the built-up area.[114]

In a later case, *Ali Suead*, the Court rejected the argument of the respondents that the distance should be measured from a concentration of members of the Areb-Asuad tribe who lived in a settlement which included houses and a school.[115]

In *Badaran*, the landholder argued that though his land was situated more than a mile and a half from the village of Ba'ana, it was less than that distance from the village of Areb-Asuad, and therefore should not be categorized as Mewat.[116] Justice Berinson, however, used two related justifications to reject this argument. He first decided that, "Areb-Asuad is neither a town nor a village." That is, Berinson chose to interpret Ottoman law as recognizing established towns and villages as the sole legitimate point from which to measure the required distance and to disregard those Ottoman provisions that referred to "inhabited places."

Second, Berinson imposed an additional condition not found in those articles of Ottoman and Mandatory law that regulated Mewat. He held that the respondent had failed to prove that Areb-Asuad had existed prior to the enactment of

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114. C.A. 323/54, Achmed Chamda v. Al Kuatli, 10(2) P.D. 853, 854.

115. C.A. 274/62, The State of Israel v. Hussein Ali Suead, 16(3) P.D. 1946, 1947.

116. *Badaran*, 16(3) P.D. at 1720.

the OLC in 1858.[117] This demand to prove that the settlement in question was established as a permanent village or town prior to 1858 was a momentous imposition on Arab landholders because it curtailed those categories of settlement that demarcated inner (non-Mewat) and outer (Mewat) lands and that could serve as legal points of measurement for the mile and a half perimeter. In *Badaran*, relating to Areb-Asuad, Justice Berinson explained:

> The tribe that dwells there includes only seven families that inhabit permanent buildings erected during the Mandate period. These are dispersed across such a wide area that one cannot consider it the built-up area of a town or a village from which it is possible to measure the distance to the said land. Furthermore, before the erection of the buildings, [the inhabitants] dwelt in tents, but no one testified that they had dwelt in this same place, and that it constituted a place of settlement in earlier days, that is *before the enactment of the Ottoman Land Code, which is the determining date for this matter.*[118]

The result of this condition was to restrict to a minimum those places that could qualify as legitimate settlements. Because this decision determined that all land situated in settlements established after 1858 automatically fell into the Mewat category, people who had possessed and cultivated the same tract of land for generations still lost ownership over their land. Berinson did not justify the imposition of this require-

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117. *Id.* In another case, the Court stated that "the evidence shows a general picture that the branch of the Areb-Asuad to which the appellants belonged, only gradually moved to permanent settlements during this century." *Kasem Suead*, 20(2) P.D. at 5.

118. *Badaran*, 16(3) P.D. at 1720 (emphasis added). The *Badaran* decision was well understood by the ILA. The Mewat jurisprudence of the Supreme Court led the ILA to argue that the Negev land should be qualified as Mewat as a means to defeat claims by Bedouins that they had acquired the land by adverse possession. The head of the Ownership and Registration Department in the ILA suggested (as indeed was done) that the Negev area "where there is concern that Bedouins will claim [the land], be claimed (as a test case) by the State as Mewat, on the basis of the Supreme Court Decision in C.A. 518/61, *Badaran* and C.A. 274/62, *Ali Suead.* Letter from the Head of the Ownership and Registration Department in the ILA, to Yoseph Weitz, then head of the ILA § 74 (May 29, 1964) (on file with the Israeli Central State Archive at 5733/C, 3520/11), *quoted in* Zandberg, *supra* note 29, at 300. R

ment with either relevant legislation or precedents.[119] What appears to be an innovation of the Israeli Supreme Court and a substantial contribution to the Zionist project of *geulat hakarka* (land redemption) received the immediate sanction of four Supreme Court Justices.[120]

Following *Badaran*, the Supreme Court consistently applied these two conditions and restricted the number of settlements qualifying as points from which the demarcation of Mewat and non-Mewat land could be measured. It defined legitimate settlement as towns and villages rather than as "inhabited places" in general. It also rejected any settlement that had not been established as a permanent village or town prior to 1858. Thus, settlements of Arab nomads who gradually moved into permanent dwellings at the end of the nineteenth and the beginning of the twentieth century did not qualify.[121] Unless

119. Douchan notes that one of the definitions of Mulk land in the OLC was land situated in cities, towns, and villages. This raised the question of what happens to Miri land in cities and villages established after the enactment of the OLC in 1858 or Miri land in areas of such settlements that expanded after 1858. According to Douchan, there were two views. One was that the Miri became Mulk land as the result of being in a settlement. The other was that Miri land in places that were settled after 1858 remained Miri. The latter could serve as an analogy for the Court in the case of Mewat. That is, only places of settlement established before 1858 would qualify as measuring points to decide whether land was Mewat or Miri. *Id.* at 39-41. In *Badaran*, the Court could have grounded its decision in this legal analogy (though it did not do so). However even within a formalistic legal framework, the Court was not compelled to decide that only settlements established before 1858 would qualify as measuring points. Sufficient leeway existed for an interpretation that would have recognized settlements established after 1858 as legitimate measuring points. DOUCHAN, *supra* note 24, at 56. R

120. Berinson, Cohn, Menny and Landau. The Supreme Court rejected a request for a further hearing in this matter, and affirmed Berinson's decision. Justice Landau confirmed the decision that since the houses in Areb-Asuad are "dispersed on a large area . . . they do not constitute a built-up area of a village," F.H. 17/62, Tzalach Badaran v. The State of Israel, 17(2) P.D. 1191, 1193.

121. During the 1960s, the government began to implement its Judaization of the Galilee, and its plan to settle Bedouin tribes. *See* JIRYIS, *supra* note 62, at 102-07. The first tribe chosen as candidate for the settlement was the Suead Bedouins, who lived in an area not far from the present location of the city of Carmiel. From early on, the Israeli authorities attempted to restrict the presence of the Arab Suead Bedouins in the area by defining the land as belonging to absentees, declaring the place a closed military area, and the like. Yet the Bedouins, who had already moved to permanent R

they had registered their land (which was a very rare occurrence), the land, including the settlement, became Mewat and State property.

In the *Kasem Suead* case, according to the testimonies before the Supreme Court, the Areb-Asuad tribe had moved to permanent dwellings only in the twentieth century. Justice Landau decided:

> [R]ural buildings erected after the beginning of the Ottoman Land Code, in 1858, will not be taken into consideration. . . . During the Ottoman period, the said settlement appears to have consisted of just two stone houses, one for human habitation, and the other for cattle. In addition to these, mud covered structures existed at a meaningful distance from each other. These did not converge into a continuous village area.[122]

Similarly, in the *Kasis* case, also decided by Justice Landau the following year, the appellants argued that the disputed land amounting to nine hundred dunams lay at a distance of less than a mile and a half from a settlement called Chirbat Ga'aton, and therefore was not Mewat. Justice Landau rejected the argument. Though Chirbat Ga'aton had existed during the Ottoman and Mandatory periods, it consisted only of one two-story building with a fence, in which twelve to fifteen tenant families from neighboring villages, who were cultivating lands in that vicinity, resided and a plot where they buried their dead. This was not a permanent settlement, since at the end of the tenancy period the residents returned to their villages. Landau therefore upheld the lower court decision to register the land as Mewat, on the grounds that this "isolated building" could not qualify as a legitimate point from which to measure the required mile and a half.[123]

The Court refused to recognize such settlements even when they included a school or a cemetery in which earlier generations were buried. The Court also did not recognize

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houses in the area, refused to move. *See id.* at 123-25. In 1964, the government campaign against the Suead and another tribe, the Na'im, increased, and about forty-five houses and huts and several wells were destroyed. Attempts to evacuate them were only partly successful.

122. *Kasem Suead*, 20(2) P.D. at 4-5.

123. C.A. 298/66, Asa'ad Kasis v. The State of Israel, 21(1) P.D. 372, 374.

chushot (typical mud houses) or any settlement that consisted of tents during the Ottoman period. No such settlements were recognized as legitimate, resulting in both the settlement itself and the land situated within a mile and a half radius of the settlement becoming Mewat and State property open to Jewish settlement.

2. *Constructing the Image of Inevitability and Modernism*

In his work on the Israeli Supreme Court's adjudication of Bedouin land claims, Ronen Shamir argues that the application of conceptual law in Mewat cases cannot be attributed exclusively to Zionism's thirst for land. He emphasizes that "the legacy that the Israeli legal system willingly inherited from former colonial powers (England in particular)—performs the crucial task of asserting Zionism's identity as a modern Western project that resists a backward-looking and chaotic East."[124]

He argues that Modern law "works by imposing a conceptual grid on space–expecting space to be divided, parceled, registered and bounded. It imposes a conceptual grid on time–treating time as a series of distinct moments, and refusing any notion of unbounded continuity."[125]

Indeed, the Supreme Court's elaboration of Mewat rules can be attributed partially to its tendencies towards formalism and conceptualism, its desire to impose Western order on the perceived chaotic state of Ottoman land laws, and its preference for "objective" and clear-cut rules over blurry standards.[126] One should point out that the contrast between "modern" English land law and "chaotic" Ottoman law drew

124. Shamir, *supra* note 6, at 237. R

125. *Id.* at 234.

126. The controversy between Shamir and myself is one of degree, not of kind. I agree with him that the "radical formalism" of the law contributed to the difficulties encountered by Bedouins. Shamir agrees that "land owned by Arabs had been appropriated on a mass basis in the early years of the State with the aid of a complex web of legal rules specifically designed for that end." *Id.* at 237-38. I maintain, however, that as in many other settler societies, the quest for land served as a major motivating force that influenced the law's development. I believe that my position is strengthened by examining the way Israeli law treated non-Bedouin Arab land possessors during the settlement process. These possessors were not nomads but cultivators, but they nevertheless received similar treatment by Israeli law.

much from oriental preconceptions. English land law at that period was probably as "chaotic" as Ottoman land law.[127] Like courts in other settler societies, the Israeli Court used formal tools to retain the semblance of naturalness and inevitability while it fostered the dispossession of "native" or "alien" land. This fact notwithstanding, some of the Court's rulings did stem from its search for stability and order. The decision to opt for the mile and a half measure can be attributed to such reasoning. Likewise, posting the 1921 British enactment of the Mewat Land Ordinance as the "crucial time barrier beyond which all memory became amnesia" can be explained similarly.[128]

However, it is more difficult to attribute this explanation to the increasingly difficult burden of evidence imposed on Arab landholders and even more difficult to see why the Supreme Court decided to accept only villages and towns established before 1858 as legitimate settlements for purposes of their inquiries. Furthermore, even if it is possible to justify such decisions as an attempt to standardize litigation, it is hard to believe that the Supreme Court was not aware of the effect of its rulings on the prospects of Arab landholders.

Thus, while the Supreme Court invariably presented its rulings as neutral implementations of positive law, it often simultaneously expressed its sympathy with the plight of the landholders. In the *Kasis* case, for example, having rejected the appellant's argument, Justice Landau concluded by stating:

> Nevertheless, there are clear signs in the evidence presented that these families have actually cultivated different land segments . . . for dozens of years, and they have undoubtedly invested in this cultivation both effort and money. It would be pleasing if a fair arrangement were to be found which would permit them to continue to cultivate areas of acceptable size

127. I am indebted to Ron Harris for this comment. For a similar comment on the construction of contrasts between Mexican and U.S. rules and demarcations, see Guadelupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a Naked Knife*, 4 MICH. J. RACE & L. 39, 113-19 (1998).

128. Shamir, *supra* note 6, at 243. **R**

> from these tracts, while fully safeguarding the State's property rights.[129]

In *Badaran*, Justice Berinson expressed a similar attitude. He concluded his decision in that case by stating that, "despite all our sympathy for the respondents [Badaran and the others], we could find no other legal way to decide the case."[130] In these and similar decisions, the Supreme Court, while sympathetic to the landholders' plight, was unable to offer judicial redress because of its duty to implement clear legal rules impartially. The total unanimity of these decisions, without any dissent, reinforced this professed inevitability.

In fact, legitimate alternative interpretations within the Israeli judicial system did exist. As we will see, while the Supreme Court was delivering these unanimous decisions and professing their inevitability, other Israeli judges were interpreting the law in ways that were less harmful to the Arab landholders of contested Mewat/Miri land.

Twelve Mewat cases were heard by the Supreme Court before 1967 (see Table 1). Table 1 includes the procedural history of all twelve published Supreme Court Mewat cases between 1948 and 1966.[131]

TABLE 1: MEWAT DECISIONS

Case	Supreme Court			District Court		Settlement Clerks	
Decision	Pro-State	Pro-Arab	Remanded	Pro-State	Pro-Arab	Pro-State	Pro-Arab
40/50	X					X	
323/54			X			X	
216/55			X			X	
472/59	X					X	
342/61	X				X (Halevi)		
518/61	X				X (Dori)		
25/62	X				X (Halevi)		
26/62		X			X (Halevi)		
102/62	X			X			
274/62	X				X (Halevi)		
55/63	X			X (Halevi)			
298/66	X			X			
Total	9	1	2	3	5	4	0

129. C.A. 298/66, Asa'ad Kasis v. The State of Israel, 21(1) P.D. 372, 382-83.

130. C.A. 518/61, The State of Israel v. Tzalach Badaran, 16(3) P.D. 1717, 1722.

131. I have located only twelve published cases. While this table has no statistical validity, I believe it shows that within the legal system itself there existed alternatives to the Supreme Court position. All cases have been referred to above, except C.A. 102/62, *Abed Calaila v. The State of Israel*, 16(4) P.D. 2796.

In ten of these cases, the Court decided in favor of the State (75%). On two other occasions, the Supreme Court returned cases to the lower court with instructions to hear further evidence before the final decision was delivered (17%). Only once did the Supreme Court accept an appeal from an Arab landholder on substantial grounds (8%). Yet, to represent the Supreme Court as functioning within the confines of insurmountable statutory constraints is somewhat misleading. Unlike the Supreme Court members and the settlement clerks, District Court judges adjudicating these cases did not find the legal setting as constraining. For example, in *Badaran*, Judge Dori of the Haifa District Court ruled in favor of Badaran, deciding that the 1958 Israeli Law of Limitation that established a fifteen-year limitation period with regard to land barred the State from reclaiming its possession. In an additional move, Dori applied section 54 of the Land (Settlement of Title) Ordinance, which instructed the settlement clerk to register, in the name of the holder, land held by a person for such a time and under such conditions as to prevent anyone from claiming it. Consequently, Judge Dori ordered that the title of the land be registered in Badaran's name. However, he ignored the last paragraph of the section, which stated that it did not apply to Mewat land. Justice Berinson reversed Dori's decision, correctly noting that section 54 explicitly excluded Mewat from its application, and registered the title to the land to the State. However, Berinson ignored Dori's interpretation, which ruled that the Law of Limitations procedurally barred the State from regaining its possession. Thus, his decision did not recognize an alternate and viable holding, which would have secured the rights and interests of long-term landholders like Badaran.[132]

The District Court Judges, and particularly Judge Yedid-Halevi of the Haifa District Court, found more often than not that the law favored Arab landholders. Indeed, unlike the high rate of pro-State decisions taken by the Supreme Court, only three out of eight cases heard by the District Courts were decided in favor of the State while five were decided in favor of the Arab possessors. In one case, Judge Yedid-Halevi ruled in favor of the Arab landholder and recognized Areb-Asuad as a

132. *Badaran*, 16(3) P.D. at 1721-22.

legitimate settlement from which one could measure the mile and a half distance. In delivering his decision he explained:

> In my opinion, the purpose of the Ottoman Land Code and of the legislator was chiefly to cause the wilderness to bloom [*lehafriach et hashmama*], and to settle agriculturists to cultivate the land and develop agriculture. The interpretation suggested by the State's representative [that Areb-Asuad did not qualify] does not suit the purpose of the legislator and the aim of the statute, and appears to me to be a conservative interpretation that does not do justice.[133]

Such opinions did not convince the Supreme Court. It reversed four of the five District Court pro-Arab decisions it heard. For example, in the *Hussein Suead* case, President Olshan rejected District Court Judge Yedid-Halevi's interpretation. Yedid-Halevi took into consideration that the general area was settled and therefore decided that the land would qualify as Miri although it lay at a distance greater than a mile and a half from a recognized village. Olshan commented, "The learned judge introduced to the definition of Mewat the nature of the area as an additional condition, which is not mentioned in the statutory definition. He did not bring any authority for this ruling."[134] Olshan ignored the fact that the Supreme Court, too, introduced conditions unstated in the statute, like the requirement that the settlement have existed before the enactment of the 1858 Land Code. The Supreme Court's conditions enlarged the scope of State land, a positive contribution to the Zionist project, while Yedid-Halevi's decisions threatened this project by favoring the recognition of the rights of long-term landholders. While the Supreme Court reversed four pro-Arab decisions, it upheld all pro-State decisions and affirmed only one pro-Arab decision (see Table 2).

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133. C.A. 274/62, The State of Israel v. Hussein Ali Suead, 16(3) P.D. 1946, 1948. As Assaf Likhovski mentioned, it is ironic that that Yedid-Halevi used the term *lehafriach et hashmama*—typical Zionist rhetoric—in this context and applied it to such a case.

134. *Hussein Suead*, 15(3) P.D. at 2475. It seems that Yedid-Halevi was unable to disregard the Supreme Court's ruling. In a later case, *Kasem Suead*, 20(2) P.D. 3, 4, he applied the Supreme Court ruling and decided that because there was no proof that a settlement existed before 1858, he could not recognize the settlement as a legitimate measuring point, and therefore the land was Mewat.

TABLE 2: SUPREME COURT INTERVENTION IN MEWAT CASES

	Affirmed	Reversed	Remanded	Total
Pro-State District Court Decisions	3 (100%)			3
Pro-Arab District Court Decisions	1 (20%)	4 (80%)		5
Pro-State Settlement Clerk Decisions	2 (50%)		2 (50%)	4
Total	6 (50%)	4 (33%)	2 (17%)	12

While I do not claim that this data is statistically significant, it indicates that there was an alternative to the Supreme Court's approach and interpretation.

In summary, an examination of the Supreme Court's Mewat jurisprudence shows that the Court consistently restricted the possession and ownership of land by Arabs to an enclave of a mile and a half radius from pre-1858 recognized towns and villages while relegating to the State all other land.[135] This permitted the State to regard all unregistered land outside the mile and a half radius as State land. Furthermore, the Court introduced stringent evidentiary requirements that almost entirely precluded the registration of such land in the name of the landholder, regardless of how long the land had been in his possession. Finally, by rigorously applying the Mandatory requirement to have rights in Mewat registered prior to April 18, 1921, the Court clearly established that all unregistered land outside the confines of the mile and a half radius belonged to the State.

As a result of the Court's adjudication, it was clearly in the interest of Arab landholders to argue that their land was not Mewat, but Miri, and that they acquired the land by force of Article 78 of the OLC. However, as the next section will show, this avenue, too, was curtailed seriously by Israeli law.

C. *The Decline and Fall of Adverse Possession Under Israeli Law*

As we have seen, the decision to implement settlement of title selectively in the "special region" of the Arab villages of the Galilee endangered the land possession of residents of

135. It is interesting to note that Bisharat, *supra* note 58, at 521, seems to characterize the State as possessing the initiative to use the Mewat classification while attributing to the Court a more passive role in its failure to protect Arab possessors sufficiently. However, it seems to me that the Court was an active participant in formulating this policy, probably in conjunction with a select number of administrators.

these villages. As a result of the development of Mewat jurisprudence, any person who possessed land outside the one and a half mile village perimeter lost any reasonable chance he had of retaining his land, but what about those lands cultivated within the vicinity of recognized villages?

Article 78 of the OLC facilitated quick and simple acquisition of property rights for public land with the fulfillment of three cumulative conditions: 1) the elapse of a period of ten years, 2) possession, and 3) cultivation.[136] This legal recognition alarmed the authorities. Much of the motivation for speeding up the settlement process in the north was the fear that Arab landholders would acquire rights in the land. The ILA explained:

> In the north, there was a danger of limitation based on the Law of Limitation (1958) regarding all lands of the State, the Custodian of Absentee Property and the Development Authority, *especially regarding minority areas*. Various parties had started to illegally occupy such lands belonging to the State and the Development Authority, and there was concern that this land would be removed from ILA possession and transferred to the ownership of trespassers.[137]

Despite the view of the ILA, it is apparent that in many cases, land could not be simply "removed from ILA possession." The ILA's sweeping classification as "tresspassers" of the Arab landholders whose claims were rejected is also problematic. Together with the settlement of title process in the Galilee, adverse possession law was redesigned during the 1950s and 1960s and applied retroactively. The evolution of adverse possession law took place within a context of litigation that, in the overwhelming majority of cases, was between Arab landholders and the State. As a result, legislation and decisions on the subject should be regarded as having emerged from a framework that makes clear ethnic distinctions. Evidence presented before the Supreme Court reveals that, until the redesigning of these laws, many of the landholders had held land legitimately and legally for long periods of time. The major changes in the law related to the three conditions in Article

136. Ottoman Land Code art. 78; *see also* COHEN, *supra* note 26. **R**

137. ILA REPORT 1964-1965, at 66.

78 of the OLC. First, the Law of Limitation (1958) extended the time period. Second, the possibility to use land possession as evidence of ownership declined. Finally, rules of evidence and procedure shaped by the Supreme Court made it increasingly difficult for occupants to prove that they had cultivated the land for the time required. I will now review the major changes that took place in adverse possession law in conjunction with the settlement process.[138]

1. *A Leap in Time: The Law of Limitation (1958) and the Extension of the Period of Adverse Possession*

A principal motivation for land settlement in the Galilee was the fear that Arab landholders in the "special area" covering over 700,000 dunams and including the forty-two Arab villages in the Galilee would secure rights to the land they possessed on the basis of Article 78 of the OLC. One way to curtail this possibility was the enactment of the Law of Limitation in 1958, which introduced several changes that were seemingly technical, but which had far-reaching implications for Arab landholders. One such change was the retroactive extension of the limitation period from ten to fifteen, or in some cases, twenty years. The Law of Limitation resulted in landholders, who had fulfilled all the requirements under Article 78 and had acquired property rights to the land, losing their rights due to the retroactive extension of the period.[139] In practice, this meant the expropriation of rights of landholders who had acquired definite property rights to the land that they had possessed and cultivated for a period of ten years based on Article 78. Kretzmer explains that "a person who already acquired title through possession . . . could be deprived of that title by the extension in the prescription period and its application even if the original period had expired."[140] As a result, a person unable to prove that he continually possessed and cultivated the land for a period beginning before 1943 now had to prove that he had possessed and cultivated the land for a period of at least *twenty years*, that is, until at least 1963.[141]

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138. For extensive treatment of this subject, see Kedar, *supra* note 74.

139. *See id.* at 692-95.

140. KRETZMER, *supra* note 72, at 58-59.

141. Thus in fact doubling the limitation period while applying it retroactively.

However, the classification of the special area of the Galilee as a "settlement area," which took place in the late 1950s, halted in an act of legal magic the passage of time and prevented the landholders from fulfilling the new period of twenty years required to acquire title by adverse possession.[142] The extension of the limitation period was planned by the Justice Ministry to ensure that the State had sufficient time to begin the settlement process and initiate claims so that it would be possible to stop the maturation of adverse possession. In a report of a meeting that took place before the legislation on the Law of Limitation, the Minister of Justice and his Director General asked the head of the Settlement Department in the North: "What is the limitation period needed in order to prevent the encroachment by Arabs on land destined to be State land on the basis of the argument that they continuously cultivated the land?" The answer was that it should be at least fourteen years, to facilitate the use of British aerial photographs.[143]

It should be noted that during the Knesset debates on the legislation of the Law of Limitation, serious criticism was expressed against the retroactive lengthening of the limitation period. Some Knesset members argued that this amounted to a massive expropriation of Arab land and to "ethnic discrimination."[144] To counter the criticism, the Minister of Agriculture promised that landholders who lost their land rights due

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142. *See* JIRYIS, *supra* note 62, at 114. Section 29 of the Land (Settlement of Title) Ordinance (1928) was interpreted by the courts in such a way that the mere initiation of the process of settlement of title functioned as a claim, halting the passage of time for the purpose of limitation in all the Arab Galilee villages in which settlement of title operations had been declared. *See* DOUCHAN, *supra* note 24, at 392; Halleli, *supra* note 30, at 584. For detailed references, see Kedar, *supra* note 74, at 697-98. The ILA explained how the extension of the limitation period and especially the halting of the limitation between 1958 and 1963 (section 22) worked concurrently with the initiation of the settlement process: "In order to stop the process of limitation, settlement of title in this region was an urgent necessity, in order to claim land of the State, the Custodian of Absentee Property and the Development Authority. [This had to be achieved] before the conclusion of the process of limitation, or before 3 January 1963, as the submission of a claim nullified the pretext of limitation." ILA REPORT 1964-1965, at 66. R R

143. *See* Report by the head of the Settlement Department in the North, to the legislation of the Limitation Law § 74 (on file with the Israeli Central State Archive at 5733/C, 3520/5), *quoted in* Zandberg, *supra* note 29, at 311. R

144. One of these was Moshe Sneh, of Maki (the Communist party), Divrei HaKnesset [D.K.] (1958) 1618.

to this law would be awarded either the right to cultivate the same land or the right to cultivate other land through long-term leases.[145] Despite the assurances and the legislation of a land leasing statute that was supposed partly to fulfill these promises, very few landholders who lost their land actually received leases in exchange.[146]

It has been estimated that the extension of the limitation period by the Law of Limitation resulted in the expropriation of more than 200,000 dunams of land from Arab possession.[147] An inquiry with the ILA revealed a huge gap between the aim of the land leasing law and its implementation. In actuality, very few contracts based on this land leasing statute were ever granted.[148]

Despite the far-reaching implications of the Law of Limitation on the rights of landholders, the Israeli Supreme Court implemented these changes without reservation.[149] As we will see, the retroactive extension of the limitation period worked hand-in-hand with the judicial development of evidentiary rules that further curtailed a landholder's chance to register his land.

2. *God is in the Details: The Israeli Supreme Court and Conflicts over Adverse Possession*

a. Decline in the Use of Land Possession as Evidence of Ownership

One of the primary justifications for the existence of the institution of limitation, in general, and limitation in terms of land, in particular, relates to the provision of evidence. The desire to end intricate conflicts and to strengthen security in property along with the difficulties involved in safeguarding documentation and evidence over long periods of time moti-

145. *See id.* at 1695-96.

146. The statute was the Leasing of Land (Temporary Provisions) Law, 1959, S.H. 196, 290.

147. Sabri Machsan, *Ma'amadam ha-Meeshpatee Shel Arveeyey Yeesra'el* [*The Legal Status of Israeli Arabs*], 3 TEL AVIV U. L. REV. 558, 569 (1973), *quoted in* KRETZMER, *supra* note 72, at 53. Kretzmer himself raises doubts as to the exact amount of land expropriated. *See id.*

148. *See* Interview with the spokesperson of the ILA (June 15, 1997).

149. *See, e.g.*, C.A. 80/58, Al-Tabash v. The Attorney General, 12(3) P.D. 2006; C.A. 482/59, Baduan v. The State of Israel, 15(1) P.D. 906; C.A. 276/60, Bashir v. The State of Israel, 15(3) P.D. 2145.

vates the legal system to accept, after a certain period of time, the mere possession of land as evidence of a lost claim of ownership. This approach is expressed in English and U.S. law by the "Lost Grant" doctrine. According to this doctrine, which lies between factual presumption and irrefutable presumption, the law grants ownership to a person who has been in possession of land for a long period of time on the premise (or the fiction) that the occupant's possession of the land originally was based on a grant by the authorities or on a private transaction, all evidence of which has been lost.[150]

As most land in Palestine was never registered, it was difficult for a landholder to show the legal source for his possession. In the absence of registration, many landholders used possession as proof of their right to hold the land. Article 78 of the OLC served as a central means to do so. However, its "cultivation" requirement prevented landholders that built houses or performed other acts that did not qualify as "cultivation" from acquiring a property right on the basis of Article 78. The Lost Grant doctrine allowed holders of such lands to secure their possessions.[151]

b. The Early Position of Israeli Law—Possession as Evidence of Ownership

Mandatory courts adopted a non-formalist approach that gave increasing evidentiary weight to actual possession of land as proof of unregistered title. Possession in this case was not perceived as a means to acquire title, but as convincing evidence of unregistered ownership of land. Mandatory courts believed that this was the "only fair course" in Palestine where land disputes often occurred over unregistered land.[152] Nevertheless, toward the end of the Mandatory period, the Mandatory Supreme Court ruled that the doctrine of Lost

150. *See* KENT MCNEIL, COMMON LAW ABORIGINAL TITLE (1989); 3 AM. JUR. 2D § 5 (1986).

151. As an illustrative example, see L.A. (Land Appeal) 13/34, Achmad Issa v. Shechadeh, 2 P.L.R. 352; C.A. 195/37, Abu Chusha v. Achmad Abu Sweireh, 4 P.L.R. 369; C.A. 238/37, Khalil v. Mohammad, 5 P.L.R. 37.

152. C.A. 42/40, Ali Ahmad Hamdan v. Mohammad Al Haj Saleh, A.S.K. 97.

Grant did not apply to disputes between private litigants and the State.[153]

Israeli courts initially adopted the Lost Grant doctrine and went even further than the Mandatory Supreme Court. The Israeli approach enabled landholders to rely on their possession of land in order to prove ownership even in conflicts with the State. Thus, in *Sharif Al-Kassem Al-Muchamad v. The Attorney General*, which addressed the conflict between Arab landholders and the State over a quarry, Justice Witkon determined that possession "can serve as evidence that occupants possess the land as owners."[154] Judge Binyamin Cohen employed a similar approach in the District Court, ruling that "in the case of unregistered land, the court is authorized to determine ownership based on the circumstances of possession. There are many precedents for this."[155] Cohen invoked the Lost Grant doctrine, explaining that under the current circumstances in Israel, it would be unjust to limit the provision of evidence for purposes of ownership only to registered rights. In the absence of registration, ownership could be determined by the circumstances surrounding possession based on "an ancient grant, the duration of which cannot be traced back to its original source."[156] Thus, during the first years of statehood, Israeli courts adopted the position that possession of land for a long period of time constituted significant evidence of an unrecorded right of ownership, a premise that was deemed valid in legal conflicts between private landholders and the State.

c. The Mid-1950s: The Channeling of Litigation to Article 78 and the "Objectification" of "Agricultural Cultivation"

The Israeli courts' support of the Lost Grant doctrine during the first few years of statehood made it easier for Arab

153. C.A. 71/46, Hilmi Hassan Bakkar v. The Government of Palestine, 13 P.L.R. 651.

154. C.A. 272/53, Sharif Al-Kassem Al-Muchamad v. The Attorney General, 9(2) P.D. 1095, 1097. The final decision in the case was in favor of the State, but on other grounds. *See* C.A. 24/56, Sharif Al-Kassem Al-Muchamad v. The Attorney General, 11(2) P.D. 827.

155. C.A. (T.A.) 1067/55, Chamis Ibrahim Dabub Karkar v. Custodian of Absentee Property, 1956(11) P.M. 332, 333.

156. *Id.* at 335.

landholders to acquire land rights by permitting them to acquire title even without proof that they had fulfilled the "cultivation" requirement of Article 78 of the OLC. Clearly, this ran against the new, evolving government policy aimed at preventing landholding Galilee Arabs from formally exercising their land rights.

In the mid-1950s, the Supreme Court adopted a new principle that ran completely counter to its earlier doctrine. Ironically, the 1956 decision that considerably lessened the chances of a person acquiring land rights over unregistered land through possession involved a Jewish landholder. In his decision, Justice Cheshin clearly stated that his intention was to reduce the application of the principle that had been implemented widely up until that point. The Court decided that, in order to acquire title in unregistered land, the possessor must prove "both possession and cultivation . . . [and] possession alone is not sufficient."[157]

This decision had far-reaching implications for people in possession of land. Now, in every case addressing the settlement of a title the landholder would be forced to comply with Article 78; that is, he would bear the burden of proving that he not only had possessed the land, but also had cultivated it.[158] However, the ability of landholders to prove "cultivation," the third major condition of Article 78, also was minimized through Supreme Court decisions. This will be discussed below.

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157. C.A. 182/52, The CAP v. Zalman David, 10(1) P.D. 776, 782.

158. After the *Zalman David* case, a number of judges continued to recognize the principle of possession as proof of ownership, but the application of this principle was minimized practically to the point of non-existence. For examples of cases using the application of this principle, see C.A. 540/59, Al-Rachman Farchat v. The State of Israel, 15(1) P.D. 248; C.A. 238/63, Chisui v. State of Israel, 18(2) P.D. 41; C.A. 525/73, Suliman Abdalla Issa's Legacy v. The State of Israel, 29(1) P.D. 729; C.A. (T.A.) 1679/91, Israel Lands Administration v. Inheritor of the Rest Rian, 93(1) T.M. 667; C.A. 567/83 Abas v. The State of Israel, 41(3) P.D. 741. Justice Agranat was the only Supreme Court Justice who did not adopt this approach, continuing to assign importance to the possession of land as a factor in and of itself. *See* C.A. 472/60, The State of Israel v. Salame Yunes, 15(2) P.D. 1495, 1506.

(i) Cultivation as a Necessary Condition for Land Acquisition

The rejection of the Lost Grant doctrine channeled the legal debate in such cases into litigation over Article 78, especially its "cultivation" requirement. This requirement itself is not foreign to the standard justifications for recognizing adverse possession, and it also reflects the application of the labor theory and even some elements of the personality theory. Long-term cultivation of a piece of land is regarded as constituting a public counterclaim against the claim of the owner who has done nothing with the land. The requirement of cultivation clearly suited the Ottoman practice of quickly granting land rights to people who cultivated hitherto unexploited lands in order to encourage the development of land so that the landowners might function as additional sources of income through taxation.[159] Mandatory courts emphasized a number of times that claimants relying on Article 78 of the OLC were required to demonstrate cultivation as well as possession.[160] Mandatory common law did not insist upon the actual planting of agricultural crops. Plowing or even fencing sufficed for the fulfillment of the "cultivation" requirement.[161] However, Mandatory courts ruled that "cultivation" must be based on continuous, regular agricultural activity as permitted by soil quality and crop suitability.[162] Grazing and wood cutting, for example, did not fulfill the cultivation requirement of Article 78.[163] The Mandatory Supreme Court decided that land that was never cultivated or could not be cultivated, like mountain land, which was used solely for grazing, could not be

159. *See* Leah Douchan-Landau, *Vacant (State) Lands and the Rights of the Cultivator*, 4 ISR. L. REV. 665 (1966); *see also* Yisrael Gilad, *Ve-Hadrat Peney Zaken* [*Honor the Aged*], 22 MISHPATIM 233, 235 (1993).

160. *See* C.A. 57/40, The Attorney General v. Chasan Yusuf Fityan, 7 P.L.R. 173; C.A. 65/40, Yusef Chabibi v. The Government of Palestine, 7 P.L.R. 288, 289-90; C.A. 21/43, Afu Shuqeiri v. The Attorney General, 1 A.L.R 331; SHEMESH, *supra* note 26, at 133. R

161. *See* C.A. 23/39, Weinberg v. Palestine Jewish Colonization Association, 6 P.L.R. 206, 211.

162. *See* DOUCHAN, *supra* note 24, at 316-17; SHEMESH, *supra* note 26, at 133; *see also Chabibi*, 7 P.L.R. at 290-91. R

163. C.A. 125/40, Village Settlement Committee of Arab en Nuffei'at v. Aharon Samsonov, 8 P.L.R. 165, 166.

acquired by prescription.[164] In the case of mountainous or rocky land, scattered cultivation between stones sufficed to fulfill the cultivation requirement.[165] Thus, Mandatory courts emphasized that the concept of "cultivation" should be interpreted insofar "as is reasonably possible, having regard to the nature of the land and the crops for which it is suitable."[166] The small number of judgments on the subject indicates that the concept indeed was applied according to the nature of the land and its agricultural potential. However, no specific Mandatory precedent addressed the amount of cultivated land needed to fulfill the "cultivation" requirement.

(ii) Israeli Law: Constructing the 50% Cultivation Requirement

The Israeli Supreme Court interpreted the concept of "cultivation" strictly. It repeatedly ruled that a person attempting to use Article 78 was obligated to demonstrate both possession and cultivation during the entire limitation period and rejected all claims of adverse possession that were not based on full, continuous agricultural cultivation.[167] In addition, the courts developed formal, "objective" criteria for what amounted to cultivation that made it much more difficult for the Arab landholders of the Galilee to fulfill the cultivation

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164. C.A. 230/45, Al-Madi v. The Government of Palestine, 1 A.L.R. 12; C.A. 356/45, Said Darwish v. Dalal, 1 A.L.R. 199.

165. Avraham Suchovolsky interprets the British ruling in this way. AVRAHAM SUCHOVOLSKY, YEEHODAH VE-SHOMRON-ZEKHOOYOT BE-MEKARKE'EEN VE-HA-DEEN BE-YEESRA'EL [JUDEA AND SAMAREA: RIGHTS IN LAND AND THE LAW IN ISRAEL] 29 (1986); *see also* SHEMESH, *supra* note 26, at 133; DOUCHAN, *supra* note 24, at 317; *Afu Shuqeiri*, 1 A.L.R. at 331; *Al-Madi*, 1 A.L.R. at 12; L.A. 35/27, Kalthoun Bint Muchammad Banat Ghannameh v. The Attorney-General, 3 K.P.D. 1093. R R

166. *Chabibi*, 7 P.L.R. at 288; DOUCHAN, *supra* note 24, at 317. R

167. *See* C.A. 453/61, Ralia v. The State of Israel, 16(2) P.D. 909; C.A. 472/59, Al-Gadir v. The State of Israel, 15(1) P.D. 648, 651; C.A. 145/54, Abu-Za'arut v. Israel Land Department, 9(3) P.D. 1756, 1757; *see also* C.A. 77/54, Daud v. Israel Land Department, 9(2) P.D. 1948; C.A. 276/60, Bashir v. The State of Israel, 15(3) P.D. 2145, 2147-48; C.A. 525/73, Suliman Abdalla Issa's Legacy v. The State of Israel, 29(1) P.D. 729, 732-33; C.A. 56/82, The State of Israel v. Rest Rachal's Legacy, 40(4) P.D. 29, 36; C.A. 218/74, Al-Hawashla v. The State of Israel, 38(3) P.D. 141, 153; C.A. 265/83, Shabib Chamza v. The State of Israel, 39(4) P.D. 53, 55; C.A. 149/81, Salach v. The State of Israel, 38(3) P.D. 374, 378, 382; C.A. 567/83, Abas v. The State of Israel, 41(3) P.D. 741, 741.

requirement and acquire rights to the land that they had been cultivating for so many years. In many cases, the condition of land in the Galilee allowed only partial cultivation.[168]

During a period of roughly two years beginning in 1961, the Israeli Supreme Court formulated a doctrine that narrowed the concept of "cultivation" and set a minimum level of "cultivation" for each parcel of land taking into account neither the parcel's agricultural potential nor investments made by the landholder. The first indication of this doctrine appeared in *Baduan v. The State of Israel* in April 1961.[169] Justice Cohn ruled that since only 20% of the land had been cultivated in 1945, the "cultivation" requirement had not been fulfilled during the entire limitation period.[170] In a judgment in December of the same year, *Al-Omar v. The State of Israel*, the appellant invoked the Mandatory doctrine that the cultivation requirement must be interpreted "having regard to the nature of the land and the crops for which it is suitable."[171] Chief Justice Olshan recognized this principle, but at the same time invoked the Mandatory doctrine that completely uncultivable land could not be acquired by virtue of Article 78. Olshan asserted that the simultaneous existence of both of these principles raised the question, "What is the law in the relatively common instance of rocky land in different parcels that also include areas that are cultivable and cultivated?"[172] Though aware that land conditions in many cases made full cultivation of the entire parcel impossible, Olshan began to formulate an "objective" criterion of "ratio"—proportionality—that disregarded the particular circumstances of every parcel.

According to Olshan's criterion, "cultivation" for the purpose of Article 78 was not determined by the degree to which land had been cultivated based on the parcel's agricultural potential, rather, it was determined formally, by assessing "the ratio of the cultivated to the uncultivated [area]."[173] As it had already been established that most of the disputed parcel was rocky and uncultivated, Olshan endorsed the District Court's

168. JIRYIS, *supra* note 62, at 115. R

169. C.A. 482/59, Baduan v. The State of Israel, 15(1) P.D. 906, 911.

170. *Id.* The evidence was based on aerial photography.

171. C.A. 423/61, Al-Omar v. The State of Israel, 15(3) P.D. 2552, 2553.

172. *Id.*

173. *Id.* at 2553-54.

decision to register the parcel in the name of the State without taking into account whether the appellant had cultivated the parcel to its fullest agricultural potential. A few months later, Justice Cohn explained the principle in detail, establishing that in order to fulfill the "cultivation" requirement of Article 78, the claimant must "prove that he had cultivated the parcel, or at least most of the parcel," for the period of limitation.[174]

This doctrine continued to develop rapidly, and a few months after Justice Cohn's ruling, Olshan clarified the principle further.[175] Judge Yedid-Halevi had ruled in the District Court that, despite the fact that 70% of the land in the parcel was rocky and only 30%—scattered between rocks throughout the parcel—was cultivated, this was sufficient for acquisition of the parcel as a whole. This interpretation of granting land rights for cultivating a parcel to its fullest agricultural potential was in line with the aim of the original law which was intended to encourage people possessing land to cultivate it. Olshan rejected this interpretation, returning the decision to the District Court with instructions to assess whether it was possible to find "a portion in which the percentage of scattered cultivated land was greater than 50%, or at least equal to 50%, in relation to the uncultivated land in the [same] portion."[176]

Thus, within a few months the new doctrine had evolved to require proof of cultivation of at least 50% of a parcel in order to acquire land rights by virtue of Article 78, regardless of the land's agricultural potential. If a landholder failed to prove positively that he had cultivated more than 50% of the parcel during the entire limitation period, the whole parcel would be registered in the name of the State. Along with the 50% rule, the doctrine also determined that when a given parcel of land included a few continuous dunams that were more than 50% cultivated, this portion could be separated from the rest of the parcel. Known as the "rule of separation," this portion of the parcel would be registered in the name of the cultivator, and the remainder of the parcel would be registered in

174. C.A. 314/61, Al-Katib v. The State of Israel, 16(2) P.D. 837, 838.

175. C.A. 148/62, The State of Israel v. Tzalach, 16(2) P.D. 1446, 1447-48.

176. *Id.* at 1448. If such an area is not found in the parcel, the whole parcel should be registered in the name of the State. If such an area is found, it alone is registered in the name of the possessor.

the name of the State.[177] In 1963, less than two years after the first ruling on the issue, the courts already regarded these decisions as an established precedent: "the ruling . . . is that Section 78 of the Ottoman Land Law should be applied only to that section of the land in which at least 50% of the area is cultivated, and which can be separated from the entire tract."[178]

Application of this doctrine clearly increased the area of land transferred to State ownership.[179] This doctrine, in conjunction with new instruments and new procedural and evidentiary rules, made it easier for the State to prove its claims and more difficult for the landholders to prove theirs.

(a) "Freezing Time": Aerial Photography as Decisive Evidence

The courts regularly determined whether a possessor of unregistered land had cultivated at least 50% of a given parcel by using as evidence British aerial photographs. In 1945, as part of the overall survey of the country, the Mandate authorities initiated a project of mapping all of Palestine based on aerial photographs. Ironically, one of the aims of this mapping project, referred to as the "PS Series," was that it would contribute to the rehabilitation and development of Arab villages (the Mandate Government's "Village Development Scheme").[180] Referred to in the *Rachal* decision as "freezing

177. *See Tzalach*, 16(2) P.D. at 1448; C.A. 151/62, The State of Israel v. Tarables, 16(2) P.D. 1451, 1452; C.A. 619/61, Said v. The State of Israel, 16(2) P.D. 1473, 1474-76; C.A. 423/61, Al-Omar v. The State of Israel, 15(3) P.D. 2552, 2554; *see also* C.A. 540/59, Al-Rachman Farchat v. State of Israel, 15(1) P.D. 248, 250; C.A. 472/59, Al-Gadir v. The State of Israel, 15(1) P.D. 648, 652; C.A. 276/60, Bashir v. The State of Israel, 15(3) P.D. 2145, 2148-49.

178. C.A. 479/62, The State of Israel v. Salach Kir, Inheritor, 17(1) P.D. 631, 633.

179. Zandberg, *supra* note 29, at 235 n.31, questions my interpretation that the shift in doctrine is related to "land redemption." He points to the fact that even the Mandatory Court did not recognize the application of the doctrine in disputes between the State and individuals. However, the lack of precedents strengthens the belief that the British did not stringently implement the cultivation requirement of Section 78. *See, e.g.*, AVRAHAM GRANOVSKI, HA-MEESHTAR HA-KARKA'EE BE-ERETS YEESRA'EL [THE LAND REGIME IN ERETZ-ISRAEL] 30-41, 49-72 (1949); DOUCHAN, *supra* note 24, at 27-29, 35-37, 39-46. R

180. GAVISH, *supra* note 28, at 248-49; *Bashir*, 15(3) P.D. at 2148. R

time," these aerial photographs became one of the primary instruments of the "redemption" of unregistered Arab lands.[181] Their regular use made it extremely difficult for landholders to prove that they had fulfilled the condition of cultivating 50% of their land before 1943. When expert testimony based on analysis of aerial photographs indicated that 50% of the land had not been cultivated in 1945, the landholder was obliged to prove possession and cultivation for a period of twenty years. This was impossible because the initiation of the settlement proceeding in the late 1950s halted the maturation of the limitation period. Thus, all the State needed to do was to provide expert testimony based on the 1945 aerial photographs for the court to rule in favor of the State. If the State was able to prove that less than 50% of the parcel was cultivated in 1945 or that a house or some other structure had stood on the land in question, it succeeded in justifying its claims and thereby acquired the land.[182] In this way, many conflicts over adverse possession of land were decided by aerial photographs.

(b) Rejection of Tax Records as Possible Evidence of Cultivation

The acceptance and use of aerial photographs conflicts with the exclusion of tax records as evidence. During the Mandatory period, registration in the *Wergo* (land tax) books served as evidence that a person possessed a parcel of land on the date of registration.[183] Toward the end of the Mandatory

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181. C.A. 56/82, The State of Israel v. Rest Rachal's Legacy, 40(4) P.D. 29, 37.

182. The court ruled that aerial photographs are objective evidence that do not lie. *See* C.A. 574/81, Al-Riati v. Bitha Moshav Ovdim, 39(2) P.D. 181, 188; *see also Al-Rachman Farchat*, 15(1) P.D. at 250; C.A. 482/59, Baduan v. The State of Israel, 15(1) P.D. 906, 911; C.A. 314/61, Al-Katib v. The State of Israel, 16(2) P.D. 837, 838; C.A. 163/62, The State of Israel v. Chabke, 16(3) P.D. 1697, 1698; *Abdo*, 16(3) P.D. at 1701; *Rest Rachal's Legacy*, 40(4) P.D. at 37; *Salach*, 38(3) P.D. at 381; C.A. (T.A.) 1679/91, Israel Lands Administration v. Inheritor of the Rest Rian, 93(1) T.M. 667, 667; C.A. 458/84, Rest Mu'adi's Legacy v. The State of Israel, 41(2) P.D. 381, 387; AVRAHAM CHALIMA, KHAZAKAH VE-HEET'YASHNOOT BE-MEKARKE'EEN VE-PEKOODAT HESDER HA-KARKA'OT [RIGHT OF POSSESSION AND LIMITATION IN LAND AND LAND SETTLEMENT ORDINANCE] 39 (1987).

183. *See* L.A. 13/34, Achmad Issa v. Shechadeh, 2 P.L.R. 352, 352; C.A. 239/37, Machmoud Al Mochammad v. Kibran Fuad Sa'ad, C.L.R. 48.

period, ordinances were enacted proclaiming that tax records could not be used against the Government of Palestine.[184] Yet, even after the enactment of the ordinances, the Mandatory Supreme Court accepted the use of tax records as evidence and decided that, while record of tax payment did not serve as conclusive evidence, it nevertheless could be used in cases involving the Government to prove that the landholder both had possessed and cultivated the land.[185]

When Arab possessors attempted to rely on tax records demonstrating that they paid agricultural taxes to prove that the land had been under cultivation, the Israeli Supreme Court rejected these attempts. Sanctioned by statute, it became the rule that tax records could not be used at all in set-

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184. Section 27A of the Mandatory Urban Property Tax Ordinance, amended in 1944, stated that "[w]here urban property tax is owed . . . the registration of a person in the tax record or any other record as the known owner of that property . . . or the payment of any such tax by that person . . . would not be seen as injuring the rights of the Government of Palestine, or as evidence to the rights of any person . . . against the Government of Palestine, concerning that property." Laws of Palestine, Supplement No. 1, 21. Similarly, Section 43 of the Rural Tax Ordinance, 1942, stated:

> Where rural property tax is payable upon any land, or where it is not payable upon any land by reason of the land being of a category upon which no such tax is payable under the provisions of the schedule to this Ordinance, the payment or non-payment (as the case may be) of such tax in respect of such land shall not be deemed to affect, or to be evidence of, the rights of the Government of Palestine, or of any person as against the Government of Palestine, in respect to the land.

Id. at 11.

185. Thus, in C.A. 143/46, Machmud Nadim Habbab v. Government of Palestine, 14 P.L.R. 337, 346, a landholder claimed that he had acquired a certain Mewat tract by "reviving" it. Among other claims, he argued that since he was registered in the Rural Property Tax record, this should convince the Court that he had indeed cultivated the land. The Mandatory Court accepted this contention. The Court ruled that "although [the Tax records] do not constitute complete and irrefutable proof in favor of the appellants, . . . it should be borne in mind that they supplied the basis on which tax has been paid by the appellants, and must be given due consideration unless it is clear that they are absolutely unreliable or fraudulent." *But see* C.A. 226/42, Krikorian v. The Attorney General, 10 P.L.R. 302, 304, (deciding that "payment of tithes can in no way be conclusive as to any matter, except perhaps to show, at the most, that the appellants, or some of them, may have been in possession of part of this land").

tlement proceedings involving the State.[186] In 1961, a new property tax law was enacted that replaced and invalidated the Mandatory Ordinances.[187] The new statute—probably due to an oversight of the drafters—lacked any clause preventing the use of tax records against the State and therefore should have opened the door to the use of tax records as proof of cultivation in Article 78 cases. Yet, the Supreme Court continued to refer to the Mandatory Ordinances (legally no longer in force) as a justification for rejecting tax records of payment by landholders as evidence of cultivation.[188] Thus, during the critical years of the land settlement process, Arab land-possessors were prevented, without legal grounding, from using the most "reliable," "modern," and "Western" evidentiary tool in their possession.[189]

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186. C.A. 182/54, The CAP v. Zalman David, 10(1) P.D. 776, 781. Whereas in *Zalman David* the dispute concerned urban land, the Supreme Court subsequently applied an anlogous rule to disputes over agricultural land. *See* C.A. 298/61, The State of Israel v. Hussein, 15(3) P.D. 1923, 1924; *Al-Rachman Farchat*, 15(1) P.D. at 250; C.A. 396/61, Daraweshe v. The State of Israel, 16(1) P.D. 761, 765; C.A. 102/60, The Metulim of Wakf Sheich Muchamad Al-Asdi v. The State of Israel, 15(1) P.D. 123, 127-28.

187. Property Tax and Compensation Fund Law, 1961, S.H. 112, arts. 67, 69.

188. *See* C.A. 276/60, Bashir v. The State of Israel, 15(3) P.D. 2145, 2148; *Daraweshe*, 16(1) P.D. at 765; *see also* C.A. 336/61, Lutf Wachsan Hussein v. The State of Israel, 16(1) P.D. 561, 562-63; C.A. 588/73, The Local Council Gush Chalb v. the State of Israel, 29(2) P.D. 501, 504; C.A. 218/74, Al-Hawashla v. The State of Israel, 38(3) P.D. 141, 154; C.A. 56/82, The State of Israel v. Rest Rachal's Legacy, 40(4) P.D. 29, 42; C.A. 525/73, Suliman Abdalla Issa's Legacy v. The State of Israel, 29(1) P.D. 729, 731.

189. Within three years, the Property Tax and Compensation Fund Law was amended in a way that retroactively applied a clause similar to the one existing in the cancelled Mandatory Ordinances. Article 40 of the Property Tax and Compensation Fund Law (Amendment), 1964, S.H. 91, stated that "the registration of a person as a property owner in any record . . . for the purposes of this statute, and payment of the tax due on such property that was paid by a person, will not hamper the rights of the State, nor be used as evidence of that person's rights against the State in said property." Article 41 applied the provision retroactively to the date of the enactment of the Property Tax and the Compensation Fund Law itself. In the Knesset debates concerning these statutes, there was no debate on this amendment, and it was accepted without reservation. *See* 23 Proceedings of the Knesset, D.K. (1964) 1552.

3. *Constructing the Image of Neutrality and Non-Interference*

In many cases, Arab landholders were unable to register land they possessed because the lower instances, settlement clerks, and District Court judges did not believe the allegations of the landholders, accept the evidence they produced to prove that they had cultivated the land for the required period, or believe that they had acquired the land through unregistered transactions. In such cases, the Supreme Court usually upheld the findings of the lower instances, stating that it would intervene only in exceptional circumstances in decisions regarding evidence.[190] The overall picture, however, reveals a clear difference in the degree of Supreme Court interference depending on who the decision favored: the Supreme Court rarely intervened in the decisions of lower instances when they found in favor of the State, but did so much more often when the lower instances found in favor of the landholders. Table 3 gives an overview of Article 78 decisions between 1953 and 1965.[191] The picture that arises from Table 3 is very similar to the situation presented above in the Mewat cases (see Tables 1 and 2, above). The Supreme Court overwhelmingly found for the State (twenty decisions, compared to six for the possessors and eight remanded).

Like in the Mewat cases, an alternative vision existed in Article 78 cases within the legal system itself. Table 3 shows that of the eight Article 78 cases District Court Judge Yedid-Halevi heard, he decided seven in favor of the landholders. In one of the cases, he decided that although only 30% of a tract of land had been cultivated, because the remaining 70% was

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190. *See* C.A. 132/58, Machmad Hussein v. The Attorney General, 13(1) P.D. 759; *Al-Rachman Farchat*, 15(1) P.D. at 248; C.A. 272/53, Sharif Al-Kassem Al-Muchamad v. The Attorney General, 9(2) P.D. 1095, 1095; C.A. 24/56, Sharif Al-Kassem Al-Muchamad v. The Attorney General, 11(2) P.D. 827, 827; C.A. 145/54, Abu-Za'arut v. Israel Land Department, 9(3) P.D. 1756, 1756; C.A. 482/59, Baduan v. The State of Israel, 15(1) P.D. 906, 906.

191. All cases have been mentioned above, with the exception of C.A. 75/54, Ya'akub Ashkar Arashid v. The CAP, 9(3) P.D. 1890; C.A. 35/56, Chasan Otman v. The Attorney General, 11(1) P.D. 355; C.A. 441/60, Al-Dabach v. The State of Israel, 15(3) P.D. 1950; C.A. 138/62, The CAP v. Obeid, 16(4) P.D. 2694; C.A. 262/62, Daraweshe v. The State of Israel, 17(1) P.D. 113; C.A. 504/62, Geris Suliman Geris Zureik v. The State of Israel, 18(4) P.D. 617; F.H.C. 13/64, Abdalla Asad Shibli v. The State of Israel, 19(1) P.D. 53; C.A. 65/64, Abdalla Asad Shibli v. The State of Israel, 18(4) P.D. 766; C.A. 199/65, The State of Israel v. Chury, 19(4) P.D. 243.

rocky, this sufficed to fulfill the cultivation requirement.[192] Indeed, if one understands that the purpose of the Ottoman legislature in enacting Article 78 was to promote agricultural cultivation and produce a tax base, it seems that the maximum possible cultivation of a certain tract should suffice since the landholder utilized the tract to its full agricultural capacity. The Supreme Court clearly objected to this attitude and upheld only two of the seven pro-landholder cases decided by Yedid-Halevi, overruled two, and remanded three. In the cases it remanded, the Court instructed Yedid-Halevi to apply the 50% rule and adjust his findings accordingly.

TABLE 3: ARTICLE 78 DECISIONS

Case	Supreme Court			District Court		Settlement Clerks	
Decision	Pro-State	Pro-Arab	Remanded	Pro-State	Pro-Arab	Pro-State	Pro-Arab
272/53			X	X			
75/54		X				X	
77/54		X				X	
145/54	X					X	
35/56			X			X	
80/58	X			X (Vinogradov)			
132/58	X					X	
472/59	X					X	
482/59	X					X	
524/59		X					X
540/59	X					X	
276/60	X					X	
441/60			X	X (Dori)			
472/60		X			X (Dori)		
298/61	X				X (Dori)		
314/61	X			X (Friedman)			
336/61	X			X			
396/61			X	X (Dori)			
423/61	X			X (Dori)			
453/61	X			X (Dori)			
619/61	X			X (Dori)			
138/62	X				X (Halevi)		
148/62			X		X (Halevi)		
151/62			X		X (Halevi)		
163/62	X				X (Halevi)		
169/62			X		X (Halevi)		
262/62	X			X (Dori)			
479/62		X			X (Halevi)		
504/62	X			X (Dori)			
44/63			X	X (Dori)			
238/63	X			X (Halevi)			
505/63	X			X (Dori)			
65/64	X			X (Dori)			
199/65		X			X (Halevi)		
Total	20	6	8	15	9	9	1

192. C.A. 148/62, The State of Israel v. Tzalach, 16(2) P.D. 1446, 1447-48.

Table 4, below, shows the intervention of the Supreme Court in the decisions of lower instances. An examination of these cases shows that the Supreme Court intervened in 27% of pro-State District Court decisions and in 33% of pro-State settlement clerk decisions, while its intervention in pro-Arab District Court decisions was much higher, at 66%. The Supreme Court affirmed 73% of the pro-State decisions by the District Courts and 67% of the pro-State decisions by the settlement clerks (reversing none, remanding the rest). In contrast, it affirmed only 33% of the pro-Arab District Court decisions as well as the only pro-Arab settlement clerk decision.

TABLE 4: SUPREME COURT INTERVENTION IN ARTICLE 78 CASES

	Affirmed	Reversed	Remanded	Total
Pro-State District Court Decisions	11 (73%)	0 (0%)	4 (27%)	15
Pro-Arab District Court Decisions	3 (33.3%)	3 (33.3%)	3 (33.3%)	9
Pro-State Settlement Clerk Decisions	6 (67%)	2 (22%)	1 (11%)	9
Pro-Arab Settlement Clerk Decisions	1 (100%)	—	—	1
Total	21 (61.7%)	5 (14.7%)	8 (23.5%)	34

In the case of Article 78 cases, the alternative voice came not only from the District Court, but also from the core of the system—Agranat, the Chief Justice of the Supreme Court. In the *Chury* case, Chief Justice Agranat adopted an interpretation that was favorable to Arab cultivators.[193] Chury, the respondent in the case, possessed a 2.3 dunam tract in the village of Arabe but had cultivated less than 50% of it. In his decision, while acknowledging the doctrine requiring that the possessor prove that he had cultivated at least 50% of the tract for the duration of the prescriptive period, Agranat decided to register the tract in the name of the possessor for two related reasons. First, Chury also possessed and cultivated the neighboring tract, and together they constituted one single piece of land of which more than 50% was cultivated. Second, though less than 50% of the disputed smaller tract actually was cultivated, if one discounted a rocky patch situated on its edge, in fact, more than 50% of the cultivable portion of the tract was cultivated.[194] Reference to the "cultivability" of a tract as a factor favoring its registration in the cultivator's name was an innovation that ran contrary to precedent, which had examined

193. *Chury*, 19(4) P.D. at 244-46.
194. *See id.* at 249.

whether the land was actually cultivated, rather than potentially cultivatable. Thus, unlike the other judges, Agranat decided that to register the land in the possessor's name, it was sufficient that more than 50% of the portion of the tract that had agricultural potential was cultivated. Furthermore, though one witness testified that he had visited the tract and found it not cultivated, Agranat ruled that it was possible that at the time of the visit, the land had been purposely left fallow and thus this testimony should not serve as a decisive factor against Chury. This view, which stressed the potential for cultivation, clearly differed from that of the other judges who ruled on the issue and even contradicted the logic of the rule itself, which was geared to promote cultivation. In this, Agranat's examination of the facts of the case and of the relevant precedents revealed a different tone that was more attuned with the landholder's expectations.

Just as in the Mewat cases, the rulings of Agranat and Yedid-Halevi indicate that not only in retrospect, but also at the time, a different interpretation that would have eased the burden of the landholders of unregistered land existed within the legal system. However, the majority of decisions concerning Article 78 limited the chances of long-term holders to acquire the land they possessed. It is difficult to accept a formalistic explanation that views the evolution of the 50% rule as a judicial necessity. The Supreme Court functioned within a specific social and ideological context, to which concepts like "redemption of the land" were central. Therefore, the 50% rule should be regarded as an element in a process of judicial "redemption of the land."

IV. A Glance at Licensee Laws

Settler legal systems tend to construct legal categories that conceal discriminating rules that favor settlers over non-settlers in relation to land. Channeling non-settler local populations into specific legal categories where distinct rules of procedure and evidence are applied to them and not to settlers masks the application of such discriminating rules and creates and supports an ethnocratic land regime. Thus, in the case of Mexican-Americans, it was argued that "a number of key rulings varied the standard of proof in claims of ownership status

depending on whether the grantee was a non-Chicana/o" in ways that discriminated against Mexican-Americans.[195]

Indeed, while they rigidly applied those rules that curtailed Arab landholders' potential for protecting their land, Israeli courts often relaxed rigid laws and constructed legal rules that protected informal property arrangements. Many land possession practices in Israel were based on informal arrangements, expectations, and understandings. Outside of the context of the Jewish-Arab conflict, the Israeli legal system often crafted rules and practices that went beyond the formal letter of the law.[196]

Concurrently with the eradication of adverse possession rules, the Israeli legal and administrative systems expanded the rules that protected licensees.[197] In order to understand this development, it is important to examine not only the process of land expropriation, but also the allocation of nationalized land. In the land regime established after 1948, Arab land served as a major reservoir for public land. Many landholders in the Arab sector who could not meet the formal requirements of "land settlement" were deprived of their land, which was labeled and commandeered as State land. Those holders fortunate enough not to be physically removed were

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195. Luna, *supra* note 20, at 705.

196. It thus employed judicial legislation to recognize considerable property rights of married spouses based on their relationship with one another, disregarding formal, registered arrangements. *See* ARIEL ROZEN-ZVI, YAKHASEY MAMON BEN BENEY ZOOG [PROPERTY RELATIONSHIP BETWEEN SPOUSES] 212-98 (1983); MIGUEL DEUTCH, KEENYAN [PROPERTY] 126, 633-48 (1997). *See also* WEISMAN, *supra* note 26, at 177-204; C.A. 1915/91, Ya'akoby v. Ya'akoby 49(3) P.D. 529; Ron Harris, Ha-'Asor ha-Shenee ha-Meeshpat ha-Yeesre'lee Darkhey Heetmodedooto 'Eem Meetkhey Yesod be-Khevrah ha-Yeesre'leet [The Law: Reflecting and Transforming in the Second Decade] 142-46 (2000) (unpublished manuscript, on file with the author). Similarly, despite the fact that long-term leasing contracts grant the right to evict the occupants of apartments located on public land [Mekarkey Yisrael] with the conclusion of the contract, it is generally clear that this right will not be exercised. Rather, it is understood that a way will be found to ensure that the occupants' expectations regarding "their apartment" will be honored, and that they will be able to remain in possession of it. *See* WEISMAN, *supra* note 26, at 255-57; *see also* REPORT OF THE COMMITTEE FOR REFORM IN ISRAEL LANDS POLICY (RONEN COMMITTEE REPORT) 17-20 (1997). R R

197. For a general review of licensee law in Israel, see Nina Zaltzman, *Reeshyon be-Mekarke'een* [*License in Land*], 42 HAPRAKLIT 24 (1995).

categorized as illegal trespassers.[198] While their land was expropriated and transferred to public dominion, Arab citizens of Israel remained almost totally excluded from the allocation of public land.[199] This land was allocated selectively within the Jewish population. Such allocation differentiated between Jews and Arabs and permitted the creation of distinctive legal categories of land possession through the crafting of laws and administrative practices that defined distinct, unequal arrangements for different groups. While these arrangements were formulated in seemingly neutral language, the spatial/legal categories to which they were applied usually denoted distinctive social groups.

Most nationalized agricultural land was transferred to *moshavim* and *kibbutzim* in legal arrangements that, de facto though not always de jure, gave them much more security in their tenure. Much of the land was transferred to these founding groups through licenses to dwell on and cultivate the land.[200]

As scholars have noticed, the institutions of adverse possession and licenses are very similar. The theoretical basis of the institution of licenses is remarkably similar to some of the justifications for the institution of adverse possession. The rationale behind both of these institutions is that the official landowner, after a certain period of time, cannot invalidate the possession of the occupant for reasons of justice, dependence, development of expectations, and financial and per-

198. For example, residents of the "unrecognized" Bedouin villages.

199. As late as 1995, Arabs were allocated only about 0.25% of all public land. *See* HERBERT LAW YONE & RACHEL KALLUS, HOUSING IN ISRAEL: POLICY AND INEQUALITY 10-19 (1994); Oren Yiftachel, *Beenooy Oomah ve-Khalookat ha-Merkav be-Etnokratyah ha-Yeesra'eleet: Heet'yashvoot, Karka'ot ve-Pe'areem 'Adateeryeem* [*Nation-Building and the Division of Space in the Israeli 'Ethnocracy': Settlement Land and Ethnic Disparities*], 21 TEL AVIV U. L. REV. 647 (1998). For details on the discriminating nature of this allocation, see Yiftachel & Kedar, *supra* note 3, at 81-85. R

200. *See* Yiftachel & Kedar, *supra* note 3, at 83, 86; ALEXANDRE (SANDY) KEDAR & OREN YIFTACHEL, HA-KARKA'OT HA-KHAKLA'EEYOOT BE-YEESRA'EL LEEKRAT SOF HA-ELEF: HEBETEEM HEESTOREEYEEM, MEESHPATEEYEEM VE-KHAVRATEEYEEM [AGRICULTURAL LANDS IN ISRAEL TOWARDS THE END OF THE MILLENNIUM: HISTORICAL, LEGAL AND SOCIAL ASPECTS] 9 (1999); GIDEON WITKON, HAZEHUYOT BE KARKA HAKLAIT [RIGHTS IN AGRICULTURAL LAND] 282-87 (1996). There were several other arrangements, including short and long-term leases, a topic outside the scope of this paper. R

sonal investment.[201] The similarity between the two is especially discernible when comparing the status of implied licenses and adverse possession.[202] Israeli judges developed a doctrine that made it difficult to vacate such "implied licensees." Thus, in 1962 (the year he delivered his *Baduan* decision), Justice Cohn rejected an attempt to remove Jewish possessors from land that until 1948 had constituted an Arab village. "This is an attempt to dispossess persons from their homes in which they have dwelled by permission and not fraudulently for approximately fourteen years," explained Cohn, as he refused to allow their removal.[203] Furthermore, in certain circumstances, the Israeli Supreme Court disregarded formal differences among Jewish settlers and prevented the eviction of settlers who did not fulfill even the formal criteria of licensees.

Thus, in the *Eizman* case, several Jewish residents were ordered to vacate land they were occupying in a settlement erected on the remains of Balad-a-Sheich, an Arab village near Haifa.[204] The Jewish Agency settled most of these residents after the Israeli War of Independence in 1948. In 1958, the authorities instituted legal action to evict seven residents. The lower court agreed and ordered their eviction. In the appeal, the District Court distinguished between two kinds of residents: the original residents, who had been settled by the Jewish Agency, and the others, including Eizman, who came on their own initiative and had not received formal permission to reside there. The District Court recognized the first group as licensees, explaining that

> "the settlers believed . . . that they occupied their land by license of the Jewish Agency . . . and on the basis of this belief invested money and labor in building and developing their farms. The fact that since

201. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 671 (1988); Zaltzman, *supra* note 197, at 25-33; DEUTCH, *supra* note 196, at 123; *see also* C.A. 87/62, Badichi v. Badichi, 16(4) P.D. 2901, 2905-06; C.A. 346/62, Rechter v. Legacy Tax Manager, Jerusalem, 17(2) P.D. 701; C.A. 588/81, Tzizik v. Horwitz, 40(1) P.D. 321, 324-25. **R**

202. *See* Zaltzman, *supra* note 197, at 57-60. **R**

203. C.A. 160/62, Ovadia Levy v. The Mayor of the City Tel Aviv-Jaffa, 16(3) P.D. 1773, 1777.

204. C.A. 290/67, Eizman v. The Development Authority, 22(1) P.D. 16, 18-19.

> 1948 . . . and until the initiation of the lawsuit, nearly ten years, they were permitted to stay on the land clearly proves that they received retroactive license to do so."[205]

However, the court did not recognize Eizman as a licensee, and because the Jewish Agency had not settled him there, the District Court ordered Eizman to vacate the land. Eizman appealed to the Supreme Court. In an unanimous decision delivered by Justice Berinson, the Court accepted the appeal:

> What is the difference between the appellant who stands before us and all the others that all the other original settlers came to the place on the initiative of the Jewish Agency, and he came on his own initiative. Is this difference alone sufficient to justify the conclusion that his status is different from the others? Our opinion is that this difference is not sufficient. . . . He, like the other original settlers, was a new immigrant and was worthy of the same help and received it. . . . In our opinion, he, like the others, is entitled to be recognized as a licensee on the land he has possessed since then and to this very day.[206]

This case, which is typical of the non-formalist licensee adjudication of the Supreme Court during that period, shows that when it chose to, the Supreme Court was not restricted to formal concepts and categories. Of course, one could ask the Court whether the Arab landholders who lost their land during the settlement of title process had not invested "money and labor in building and developing their farms." However, unlike Eizman and his neighbors, the Arab possessors were not new immigrants and therefore apparently were not "worthy of the same help" as the "original" settlers. The Arabs belonged to the category of outsiders and aliens. As Justice Berinson said in his opinion in *Eizman*: "The War of Independence brought about a decisive transformation in the character of the village of Balad-a-Sheich. Its Arab residents abandoned it and in their place came new residents."[207] This is the only time that the history of other "original" residents of the village is mentioned. While a few years earlier, in his *Badaran* deci-

205. *Id.*
206. *Id.*
207. *Id.*

sion, Berinson expressed sympathy for the respondents, he explained that he found "no other legal way to decide the case." In the case of Eizman, the Court managed to find another legal way.

V. Summary and Conclusion

Following the Israeli War of Independence in 1948, with the flight and removal of most Palestinian Arabs and the doubling of the Jewish population due to massive immigration, a new social and political regime in Israel—a settling ethnocracy—was created. A crucial component of this regime was a novel land system that can be called a *national-collectivist land regime*. Nationalization of land held by Palestinian Arabs before the establishment of the State of Israel served as a major source for the creation of this regime. The expropriation of Arab land during and immediately following the War of Independence was carried out without formal legal basis and was later based on legislation that was clearly geared directly toward expropriation.[208]

In contrast, the transfer of land affected by the settlement of title process initiated in the Galilee region in the mid-1950s was accomplished through more subtle legal tools. The various branches of Israeli law gradually limited the scope of legal possibilities and the effectiveness of the mechanisms by which landholders officially could acquire title to the land they possessed. The government decision to implement settlement of title selectively in the "special region" of the Arab villages of the Galilee that was not vacated during the War clearly stemmed from a desire to "redeem the land" and to place it at the disposal of the Jewish settlers and the State. Within the settlement of title process, the burden of proof lay on the Arab possessors to prove that they were entitled to possess the land, a heavy burden which many could not carry. This stemmed not only from the difficulties of an essentially traditional society which rarely registered land rights, but also from subtle but meaningful changes in the background rules concerning land possession.

Thus, like in other settler states, the Israeli legal system played an important role in the creation and legitimization of

208. *See, e.g.*, The Absentees' Property Law; The Land Acquisition Law.

the new land regime. It developed statutes and doctrines that allowed the authorities to deny the local population recognition of land rights even when it had held the land for long periods of time. Without acknowledging it, and under the guise of a settlement of title process, large amounts of land were transferred from Arab landholders to the Jewish State. The process was carried out chiefly through formal measures, such as by developing stricter evidentiary rules and other such procedural changes. As a result, Arab landholders, many of them Bedouins, were unable to possess and cultivate land they had often held for dozens and sometime hundreds of years due to a selective interpretation of the rules concerning Mewat land. Building upon Ottoman and British Mandatory statutes, the Israeli Supreme Court chose interpretations that clearly expanded the State's domain and made it almost impossible for the possessors of the land to prove that they were entitled to it. As a result, most of the land was registered in the name of the State, and its possessors became trespassers on the land they had possessed for generations. The Court, which phrased its decisions in seemingly "objective," clear, and "modern" language, often expressed its regret that the result of its adjudication would be the removal of the possessors. Nevertheless, there were judges during that very period who interpreted Mewat rules in ways that were much more supportive of landholders. Thus, the Court decisions cannot be attributed only to a formal or "modern" implementation of the law. They should be viewed, at least up to a point, as part of the nationalization of Arab lands.

Those landholders whose land was situated within a radius of a mile and a half of their villages and whose possessions were therefore not Mewat, but Miri, faced additional obstacles. According to Article 78 of the OLC, any person who proved that he had possessed and cultivated such land for a period exceeding ten years acquired a right to continue to cultivate that land. Efforts to rely on Article 78 resulted in a massive amount of adjudication. As almost all claimants were Arab citizens, law on this subject evolved in a distinctly ethnic context. Within this ethnic context, rules that had existed in the past underwent seemingly marginal changes and were carried out through formal measures. Rules of procedure and especially rules of evidence were modified in a way that minimized the ability of the landholder to prove his right to the land.

During the 1950s and 1960s, adverse possession law was redesigned in a way that made it increasingly difficult for landholders to acquire title to the land they possessed. First, the limitation period required for the acquisition of land through Article 78 was extended retroactively. Second, the courts ceased to apply the Lost Grant doctrine. Third, rules of evidence and procedure shaped by the Israeli Supreme Court made it increasingly difficult for occupants to prove that they had cultivated the land for the new time period required for the maturation of adverse possession. The Supreme Court established an "objective" rule that held that the landholder had to prove cultivation of at least 50% of the land in his possession, regardless of the nature of the parcel. The use of British aerial photographs from 1945 enabled the State to prove with relative ease that landholders of a considerable number of parcels in the rocky, mountainous Galilee had not cultivated at least 50% of their land for the entire period of limitation. As a result, such parcels were registered in the name of the State. Lastly, attempts by landholders to prove that they had fulfilled the possession and cultivation requirements of Article 78 by payment of agricultural property tax were blocked based on Mandatory legislation, judicial interpretation, and later, Israeli law.

After these changes in the adverse possession rules took effect, they set insurmountable "legal time barriers" upon many Arab land possessors.[209] As a result, Arab inhabitants of the Galilee—citizens of the Israeli State—lost vast tracts of land that they had cultivated for many years.

There is no doubt that the doctrines that evolved in connection with Mewat and adverse possession law can be partially

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209. The phrase is from Shamir, *supra* note 6, at 243. These changes in adverse possession law need to be understood in conjunction with one another. In order to acquire land by adverse possession, a person now had to prove that he had been cultivating the land for more than twenty years. However, the initiation of the settlement process in all Arab villages in the Galilee during the late 1950s, as well as a specific provision of the Law of Limitation, stopped the maturation of adverse possession by establishing the upper time limit. On the other hand, 1945 British aerial photographs were often used to show that the possessors had failed to cultivate more than 50% of the land parcel, thus establishing the lower time boundary. Arab possessors became trapped between these two time boundaries with no method to overcome these obstacles. R

explained as elements of "modernization." Similarly, Paul Gates and other American scholars attribute the loss of Mexican-American land in the southwestern United States to the procedural differences between the American and Mexican legal systems. They characterize Anglo-Saxon law as having been "exact, clear and precise," while claiming that Mexican legal institutions had employed "loose and careless methods." In addition, the "defects in the Spanish and Mexican records and titles rather that the unfair treatment of Mexican grantees, resulted in alienation."[210] In this vein, proponents of the Law of Limitation emphasized that the "archaic" nature of Ottoman land law was the motivational force behind some of the proposed changes.[211]

I believe, however, that like in other settlers' societies, greed for land was the crucial motivating force. Not all impositions of evidentiary burdens in Mewat rulings can be attributed to a search for order. In the case of the adverse possession rules, the overlap between the Zionist narrative and the modern desire to establish order in time and space is questionable. In contrast to the strict, orderly manner that is described as characteristic of modern law, the Law of Limitation actually emphasized the flexibility and cyclical nature of legal time. The Law of Limitation made use of the factor of time, the time of the majority, time that is aggressive, and time that can be changed and redefined. In rules governing adverse possession, legal time barriers actually functioned in the interest of those who had fulfilled the criteria of Article 78 of the OLC. In practice, the modern State of Israel prevented landholders from utilizing barriers that worked in their favor. The legal system pushed time forward, extending the limitation period for land from ten years, as set by Article 78, to fifteen or twenty years while simultaneously pushing time backwards, applying the extended period of limitation retroactively.[212] It also halted the passage of time for a period of five years, determin-

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210. Luna, *supra* note 127, at 46. **R**

211. D.K (1957) 2221. Similarly, Shamir attributes a number of similar practices vis-à-vis Bedouins in the Negev to "modernization" and "rationalization." Shamir argues that, aside from reflecting various political agendas, the construction of "objective" legal time barriers is characteristic of modern law methods, which seek to create "order" in contrast to "chaos." Shamir, *supra* note 6, at 236-37, 243. **R**

212. *See* C.A. 162/87, Amara v. Yusef, 45(5) P.D. 533, 549-51.

ing that if the possession of land began after 1 March 1943, "five years beginning with the institution of this law will not be figured into the calculation [of the limitation period]."[213] Modern law does in fact make use of legal time barriers; but when these barriers favored the Arab landholders by enabling them to establish property rights to their land, it turned out that time could be deconstructed and made fluid and cyclical.

The evolution of law that took place during the settlement of title operations in the Galilee not only was an issue of creating "order" in time and space, but also worked to reorder time and space in a manner that would greatly benefit the Zionist project of land redemption. During the settlement of title process in the Galilee, significant changes in Mewat and adverse possession law often were hidden from sight. The continuous erosion of procedural and evidentiary rules turned these rules into an empty shell that was inapplicable to the concrete instances that arose. Channeling the discussion into the realms of procedural and evidentiary rules and failing to focus on a person's rights to land in his possession made it possible to keep most of the issue outside the public debate and to entrust it entirely to the methods of settlement officials and the ILA.[214] Focusing the debate on procedure and evidence silenced the fundamental questions underlying these methods and resulted in discussions that were primarily technical and neutral in terms of political positions and biases. Marginalizing these issues facilitated the evolution of a legal narrative emphasizing that property law in Israel is based on liberal standards.[215]

The construction of such an image is facilitated not only by relegating the process of settlement of title to the periphery of the legal discussion, but also by establishing different categories of laws to be applied in a selective manner. In this, Israel is not unique. Guadalupe Luna argues that "[U.S.] legal and governmental actors extended favorable legal 'interpreta-

213. Law of Limitation art. 22.

214. Ron Harris argues that the imprisonment of debtors could continue to be practiced in Israel partly because of its marginal position and because it was conceived as a technical legal question. *See generally* Ron Harris, *Legitimising Imprisonment for Debt: Lawyers, Judges and Legislators*, *in* THE HISTORY OF LAW IN A MULTI-CULTURAL SOCIETY, *supra* note 11, at 217.

215. *Cf.* Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77-80 (1993).

tions' to the dominant population, denied analogous interpretations to Mexican fee holders, and ultimately that favoritism expedited dispossession."[216] During the settlement operations in the Galilee, mechanisms were devised that strengthened the position of Jewish landholders. This selectivity is also evident in the fact that while the laws applied to Arab farmers and their land in the Galilee were based on the rules that evolved in the context of the settlement of title process, the laws applied to Jewish farmers were based on the doctrine of licensee and the decisions of the ILA's Board of Directors. Though fundamentally the establishment of rights by virtue of adverse possession and the right of a licensee are extremely similar, there were significant differences in their application. In the first case, the law was changed and applied formally and inflexibly so as to weaken the rights of the Arab occupants. In the second case, the law was changed and applied generously so as to strengthen and expand the rights of Jewish occupants while transferring increasing control of the land and its intrinsic financial benefits to Jewish occupants.[217]

As Joseph Singer points out, legal realists have demonstrated that "property is a system of social relations between people," drawing our attention to the immense power granted by the legal system in defining certain people as owners. Singer also argues:

> [T]he failure to protect a set of interests as exclusive property rights leaves the people who assert those interests vulnerable to others. Both the creation and the failure to create a property right leaves people to harm, either at the hands of the state or at the hands of other persons. A central question, therefore, is how our legal system goes about defining and allocating property rights.[218]

The categorization of Arab farmers and Jewish farmers into two distinct legal domains has facilitated the application of different laws to the two sectors that represent the two parties to the Jewish-Arab conflict over land. Aside from distinctions based on ethnicity, it is extremely difficult to identify any significant difference between these two groups. Thus, Israeli

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216. Luna, *supra* note 127, at 49. **R**

217. *See* Yiftachel & Kedar, *supra* note 3, at 79, 81. **R**

218. Singer, *supra* note 22, at 41-42. **R**

law fostered the shaping of an ethnically divided space. It created a legal geography of power that contributed to the dispossession of Arab landholders while simultaneously masking and legitimating the reallocation of that land to the Jewish population.

Law has tremendous powers that can work in different directions. Recently, voices have been raised that demand to address Mexican-American rural poverty by facing past legal injustices in the land allocation in the southwestern United States.[219] Some courts in settler societies have begun to look afresh at past land policies in connection to native peoples. Thus, the Australian Supreme Court, which until the last decade refused to recognize the land rights of Aborigines, recently has begun to reframe the legal and political discourse in cases that recognized Aboriginal title.[220] In *Mabo v. Queensland*, the High Court of Australia rejected the legal doctrine of "terra nullius," which categorized Australia as an empty continent, and instead recognized Aboriginal title. "The nation as a whole would remain diminished until there is an acknowledgment of, and retreat from, those past injustices," explained the Court.[221] Similar moves can be observed in the courts of other settler societies such as New Zealand and Canada.[222] These legal decisions have been referred to as manifestations of a "jurisprudence of regret" and are an engaging attempt to acknowledge difficult past events while taking into account contemporary needs and constraints.[223] This raises hopes that a common and equitable future can be constructed in these divided societies. Recently, the Israeli Supreme Court delivered its decision in the *Kaadan v. Katzir* case in which it ruled for the first time that Israel could not discriminate between Arab and Jewish citizens in their access to public land.[224] This decision, though limited, may signal the beginning of a shift in

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219. *See* Luna, *supra* note 127, at 133-37. **R**

220. Mabo v. Queensland [No 2] (1992) 175 C.L.R. 1 (Austl.); The Wik Peoples v. Queensland (1996) 141 A.L.R. 129 (Austl.).

221. *Mabo*, 175 C.L.R. at 109.

222. *See* Russell, *supra* note 23, at 273-74. **R**

223. Jeremy Webber, *The Jurisprudence of Regret: The Search for Standard of Justice in* Mabo, 17 SYDNEY L. REV. 5 (1995).

224. H.C. 6698/95, Kaadan v. Minhal Mekarke'ey Yisrael, 54(1) P.D. 258. For an analysis of the case, see Sandy Kedar, *A First Step in a Difficult and Sensitive Road*, 16 BULL. ISR. STUD. 1, 3-11 (2000).

the attitude of Israeli law toward its Arab minority in connection to land rights. Whether the Israeli Supreme Court will take upon itself the difficult and critical task of restructuring Israeli space towards a more equal paradigm remains to be seen.