ON THE LEGAL GEOGRAPHY OF ETHNOCRATIC SETTLER STATES: NOTES TOWARDS A RESEARCH AGENDA

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> Conquest gives a title which the Courts of the Conqueror cannot deny . . . The British government, . . . whose rights have passed to the United States, asserted a title to all the lands occupied by Indians. . . . These claims have been maintained and established . . . by the sword. It is not for the Courts of this country to question the validity of this title.
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> Chief Justice Marshall of the US Supreme Court, in *Johnson* v. *MacIntosh* (1823)[1]

> We understand and appreciate the human goal and wish of the District Court Judges . . . to recognize the rights of the [Palestinian] respondents to their property as equal citizens. . . . [However] as judges we are not free to refrain from rendering the correct interpretation of the law just because the result might seem to us unsatisfactory. . . . In light of the rule that an international treaty of the State as such is not subject to the jurisdiction of the Courts . . . [and] considering the finding that the respondents are absentees . . . we have no other way than to accept the [State's] appeal.
>
> Justice Berinzon, of the Israeli Supreme Court, in *The Custodian of Absentee Property* v. *Samara* (1956)[2]

Introduction

As the two opening quotations suggest, the 'Courts of the Conquerors' manifest a complex position toward the dispossession of native land. The purpose of this chapter is to introduce several preliminary observations and tentative assumptions on the role of law and Supreme Courts in

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[1] 21 US (8 Wheat) 543, 588.

[2] AC 25/55 *The CAP* v. *Abed El-Latif Samara and Others*, PD 10 1825, 1834 (decided in Dec. 1956, by Justice Berinzon, Hashin and Susman concurring).

establishing and sustaining settler societies' geographies of power. This chapter is part of a work in progress that investigates the legal geography of ethnocratic settler societies.[3] While the propositions presented in this chapter warrant more work, I hope to illustrate the interest of studying land regimes of settler societies, and contribute to the development of a research agenda on the legal geography of ethnocratic settler states.

In order to do so, I first introduce in a nutshell the concept of ethnocratic settler societies developed by political geographer Oren Yiftachel. The next section then shortly outlines the recent emergence of an academic Legal Geography discipline. It also highlights the critical outlook characterizing many legal geographers, and notes the influence of Critical Legal Studies (CLS) on Critical Legal Geography (CLG). The third section draws upon insights from the ethnocratic model as well as CLG and CLS to offer some preliminary assumptions on how law facilitates the creation and endurance of ethnocratic land regimes. The fourth section illustrates my argument by focusing on the Israeli legal system during the formation of the Israeli land regime. The fifth section is a short conclusion of the chapter.

Ethnocratic Settler Societies

The concept of ethnocratic societies was developed by the pioneering work of political geographer Oren Yiftachel.[4] For the last several years, Yiftachel and I have worked together on the legal and political geography of Israel and other ethnocratic societies. A central question we have investigated concerns the role of law in creating and enabling ethnocratic land regimes. Due to the relevance of the 'ethnocratic settler societies' model to my present argument, I will introduce here some of the key concepts formulated by Yiftachel.

As explained by Yiftachel, ethnocracy is a distinct regime type that facilitates the expansion of a dominant ethnic nation in a multi-ethnic territory. Within these regimes exists a constant tension between two opposing principles of political organization: the 'ethnos' (community of origin), and the 'demos' (residential community of a given territory). In the heydays of ethnocracies, the 'ethnos' enjoys clear legal and institutional prominence. Ethnicity, rather than citizenship, constitutes the main criterion for distributing power and resources.

The regime sub-type 'settling ethnocracy' stresses the ethnic settlement project as a constitutive element of the regime.[5] In the formative periods of settler societies such as Australia, Canada, New Zealand, and the United States, the state is usually deeply involved in a strategy of ethnic migration and settlement, which aims to alter the country's geographic and ethnic structure. As the charter group of settlers usually refrains from mixing with indigenous populations and 'inferior' groups, such societies are based on deeply ingrained patterns of segregation frequently resulting in three major ethno-classes: founders, immigrants, and indigenous.

(a) *The 'Founders'* (also termed the 'charter group')—this group achieves dominant status due to the high military, cultural, political, and economic standing established during the state's formative years. Furthermore, intergenerational mechanisms, such as the land regime, together with rules of inheritance and transfer of property rights reproduce over time the 'founders' privileged position in different societal realms.

(b) *The 'Immigrants'*—this group comes from a different ethnic background from the founders (and is often split into a number of sub-groups based on ethnic background and race). Formally, the immigrants are part of the new nation being built in the settler society. However, while they undergo a prolonged process of 'upward' assimilation into 'the founding group' they often remain in lower economic, geographical and political positions.

(c) *Indigenous or 'Foreign' People*—these groups, also termed 'aliens' or 'natives' or 'others', are characterized by long-term marginalization through the processes of nation- and state-building; they are generally isolated in the geographical, economic, and social periphery of the settler society. Such groups include for example indigenous peoples such as the Native Americans in nineteenth-century USA, the Inuit in Canada, the Aborigine in Australia, and the Maoris in New Zealand. They also include other 'alien' groups not fully included in the settling nation, such as the Chicanos in nineteenth-century southwestern USA,[6] the Tamils in Sri-Lanka,[7] or the Palestinians in Israel.[8]

[3] The work is done as part of a large research project I am conducting with political geographer Oren Yiftachel and financed by the Israeli Science Foundation (Grant No. 761/99).

[4] This part is essentially based on his work. See O. Yiftachel, 'Israeli Society and Jewish–Palestinian Reconciliation: "Ethnocracy" and its Territorial Contradictions' *Middle East Journal*, (1997) 51, 505; O. Yiftachel, 'Nation-Building and the Social Division of Space: Ashkenazi Dominance in the Israeli "Ethnocracy"', *Nationalism and Ethnic Politics*, (1998) 4, 33; O. Yiftachel, '"Ethnocracy": The Politics of Judaizing Israel/Palestine', *Constellations*, (1999) 6, 364; also in T. Fenster and O. Yiftachel (eds.), *Frontier Development and Indigenous Peoples* (Exeter, 1997). See also O. Yiftachel and A. Kedar, 'Landed Power: The Making of the Israeli Land Regime', *Theory and Criticism*, (2000) 16, 67 (Hebrew). For the purpose of this chap., I will use the terms settler states, ethnocratic settler societies, and ethnocratic settling societies interchangeably.

[5] For an expansion of the concept of ethnocratic societies generally, see Yiftachel's work, n. 4 above, and also Yiftachel and Kedar, n. 4 above.

[6] See G.T. Luna, 'Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of "Naked Knife"' (1998) 4 *Michigan J. of Race and Law* 39.

[7] Yiftachel and Kedar, n. 4 above, 74–5.

[8] Ibid., 75–85.

Antonio Gramsci's concept of hegemony serves as an important theoretical foundation for the ethnocratic approach.[9] In his 'Prison Notebooks' Gramsci showed how Italian elites constructed a hegemonic system in which certain 'truths' enjoyed complete precedence, thereby marginalizing and excluding ideas and movements that may challenge their dominance. The power of this 'hegemonic moment' is grounded in representing the national and capitalist agendas, which chiefly benefit the elites, as working for the benefit of the entire nation. Likewise, since their privileged position is often premissed on the continuing functioning of discriminatory principles and practices, the elites of the ethnocratic state generally attempt to prevent, silence, or deflect open debate about the nature of the ethnocratic system. The project of territorial expansion and domination is presented as something 'taken for granted' or as an ultimate 'truth' upon which society is built. This 'truth', backed up by the material and political clout of the elites, regularly infiltrates into various realms of society, hence reproducing its dominance as a main frame of reference. Such realms include the language of the media, subjects for academic research, political speeches, literary works, popular music, and also legal discourses and institutions.

However, it is important to stress that, as in most political structures, especially in those based on exclusion, control, and inequality, the ethnocratic system is unstable in the long run.[10] While the ethnocratic structure is powerful, it also contains genuine internal tensions, such as between its professed commitment to the organizing principles of 'ethnos' (community of origin) and 'demos' (residential community of a given territory). The ethnocratic state strives to restrict its reliance on tangible force or unconcealed intimidation. Instead, it aspires to reinforce the hegemony of 'the founders' and convince—at least the 'founders' themselves and the 'immigrants'—of its legitimacy. Thus, while deep structures and 'truths' support a discriminatory regime, ethnocratic states contain meaningful democratic mechanisms such as free elections, separation of powers, independent media, and a partly autonomous judiciary professing a commitment to the 'rule of law' and 'equal justice under law'. In order to persuade a meaningful segment of the population, these and similar mechanisms must deliver some of their promises. Thus, tensions and contradictions resulting from the distortions of the 'hegemonic moment' have the potential to create counter-hegemonic challenges even within the existing structures.

[9] Gramsci shows how the northern Italian elite constructed its prominent position during the Italian nation-building project (the '*Risorgimento*') and the institutionalization of the capitalist regime.

[10] As I analyse here mainly the legal geography of ethnocratic settler states during the period of their creation, I will not expand this issue here.

Legal Geography

An Emerging Field

The intersection of law and geography has given birth to a new field of research, that of legal geography. Of course, there were antecedents to the research on the relationship between law and geography.[11] The term 'legal geography' itself appeared already in the 1920s in the work of German scholars.[12] Few articles on legal geography appeared in the 1980s.[13] However, as late as 1994 Nicholas Blomley opened his important book, *Law, Space, and the Geographies of Power*, by lamenting the scarcity of research on the subject.[14] It is only just now that this field begins to take shape as an academic discipline. A recent special issue of *Historical Geography* was devoted to 'Geography, Law and Legal Geographies'. The editor of the issue defines himself as a 'legal geographer' and proclaims 'the emergence of "Legal Geography"'.[15] In 2001, three of the leading scholars in the field, Nicholas Blomley, David Delaney, and Richard Ford, edited a legal geographies reader.[16] In July 2001, University College London hosted what is to my knowledge the first formal colloquium on Law and Geography.

[11] Montesquieu's *Esprit Des Lois* is a notable example: Montesquieu, *Esprit des lois* (Librairie Larousse, Paris, edition of 1934).

[12] W. Merk used the term '*Rechtsgeographie*' in 1926 and Langhans-Razeburg coined the term 'geojurisprudence' in 1928. See B. Grossfeld, 'Geography and Law' (1983) 82 *Michigan Law Rev.* 1510, 1512. As Blomley and Bakan argue, 'With a few notable exceptions, such as the work of comparative legal scholar John Wigmore, space appears to have been largely downplayed in legal theory': N. Blomley and J. Bakan, 'Spacing Out: Towards a Critical Geography of Law' (1992) 30 *Osgoode Hall Law Journal* 661, 664.

[13] Benjamin Forest traces the modern emergence of legal geography to a number of articles in the 1980s as well as the establishment of the 'Legal Geographies Series' in *Urban Geography* in 1993: B. Forest, 'Placing Law in Geography', *Historical Geography*, (2000) 28, 5, 12.

[14] 'This is a book about the geographies of law, a topic that has historically been both poorly documented and inadequately theorized': N. Blomley, *Law, Space, and the Geographies of Power* (New York, 1994), vii. A recent research in legal databases returned no more than 16 articles that used the terms 'legal geography' or 'law and geography'. A search in Lexis under 'legal geography' has returned only 12 articles, some of them dealing with the Internet, the term 'law and geography' has returned 13 articles (some are the same as in 'legal geography'). In the Index to Legal Periodicals a search of 'legal geography' resulted in 3 articles, and on 'law and geography' 4 articles. In legal tract 2 articles on legal geography and 6 on 'geography and law'. In Westlaw the term 'legal geography' returned 16 articles, most of them not really dealing with the subject. Search conducted on 14 April 2001. A research in Geobase returned 6 entries for 'legal geography' and 14 on 'law and geography'. The keyword 'law' itself returns only 79 entries, most of them not addressing issues of legal geography. Search done on 18 July 2001.

[15] Forest, n. 13 above, 6. The article reviews the emergence of Legal Geography, relating it to 'emerging concerns with power, control, and authority' as well as geographers' interest in the work of critical legal studies scholars: ibid., at 7.

[16] N.K. Blomley, D. Delaney and R.T. Ford (eds.), *The Legal Geographies Reader* (Oxford, 2001).

Until recently most work on 'legal geography' has geographically centred on North America, and topically on issues such as law and cities,[17] segregation,[18] globalization,[19] the environment, etc.[20] However, as the *Legal Geography Reader* and the UCL Colloquium demonstrate, both the geographical and the topical focus begin to expand. Questions such as land reform and restitution in post-communist countries, as well as law and informal settlements and indigenous land in Brazil, South Africa, New Zealand, Thailand, or Trinidad, are now being addressed.[21]

When one examines the emerging field of legal geography, it is important to differentiate between several outlooks. One stream, that I term 'Geography in Law',[22] has focused on how geography and social space affect law and legal development.[23] However, a second perspective asks not so much how geography (taken for granted) shapes or influences law and legal development, but also, as Edward Soja puts it, inversely, how law shapes geographies; how law contributes to the social production of space, what is the role of law in constructing, organizing and legitimating social spatiality?[24] This outlook could be termed 'Law in Geography'.

[17] G. Frug, 'The City as a Legal Concept' (1980) 93 *Harvard Law Review* 1057.

[18] See, e.g., R. Ford, 'Introduction—Local Racisms and the Law' in Blomley, Delaney, and Ford, n. 16 above, 52–3; D. Delaney, 'The Boundaries of Responsibility: Interpretation of Geography in School Desegregation Cases' in Blomley, Delaney, and Ford, n. 16 above, 54.

[19] See, e.g., D. Mitchell, 'The Annihilation of Space by Law: The Roots and Implications of Anti-homeless Law in the United States' in Blomley, Delaney, and Ford, n. 16 above, at 6.

[20] Robert Verchick argues that 'Legal scholars have come relatively late to the field, but have produced impressive insights about the law's use of frontiers and other political boundaries to shape society and the physical landscape. For our purposes, much of this work can be divided into three categories. The first category focuses on American urban law, examining issues related to segregation, poverty, and political power. The second category includes the work of environmental justice activists and scholars, who are forging connections between the geographic distribution of environmental harms and race, class, sex, and other characteristics. The last category concerns study issues of global trade, cyberspace, and international law, attempting to understand what political and cultural borders will mean in a world where technology and commerce appear to move at superluminous speeds. In different ways all of these scholars investigate how geography affects law or how law affects geography, or both': R. Verchick, 'Critical Space Theory: Keeping Local Geography in American and European Environmental Law' (1999) 73 *Tulane Law Review* 739, 744. For a similar assessment see Forest, n. 13 above, 7.

[21] In addition to the *Legal Geographies Reader* and the UCL conference see International Conference on Land Regimes and Domination, held at Harvard Law School on 3–4 March 2001 and also E. Fernandes and A. Varley (eds.), *Illegal Cities: Law and Urban Change in Developing Countries* (London, 1998).

[22] I am following here the terms used in the Law and Literature movement. I am grateful to Michael Birenhak for suggesting this terminology.

[23] As Soja puts it, 'As I think more about the relationship between law and geography there seem to be two different ways of looking at that relationship. One focuses on how geography or more broadly social space, social spatiality, affects law and legal development. . . . In this first mode, the question is how geography shapes or influences law and legal development': E. Soja, 'Symposium: Surveying Law and Borders, Afterward' (1996) 48 *Stanford Law Review* 1421, 1425.

Moreover, researchers of legal geography are now attempting further to integrate the study of law and space. Blomley, Delaney, and Ford argue that 'the legal and the spatial are, in significant ways, aspects of each other'.[25] Likewise, Soja proposes to move beyond the dual mode of thinking about law and geography, and opt for a third mode that draws upon both.[26] Blomley terms this integration 'splices'.[27] I would suggest coining a special designation, such as 'jurispacedence'.

As Blomley's choice of book title—*Law, Space and the Geographies of Power*—indicates, the emphasis on the interconnectedness of law and space often entails a critical exposition of their place in the production of oppressive power structures.

Critical Legal Geography (CLG) and Critical Legal Studies (CLS)

Hence, an influential stream within legal geography adopts a critical perspective.[28] Blomley recently noted the conditions for the emergence of a critical legal geography.[29] Critical Legal Geography stresses that, notwithstanding its natural, necessary, and neutral appearance, geography is not an inherent result of natural phenomena.[30] Legal decisions shape, demarcate, and mould human geographies and social space.[31] Critical legal geographers are concerned with 'social, economic, and

[24] 'The second mode of linking law and geography is in a sense a reverse of the first. It begins not by asking how geography shapes law but how law shapes geographies.' Here, legal understandings and knowledge of law are applied to help in understanding the social production of space, how social spatiality is constructed and organized and expressed. Ibid., at 1426.

[25] Blomley, Delaney, and Ford, 'Preface: Where is Law?' in n. 16 above, at p. xviii.

[26] Soja, n. 23 above, 1425.

[27] Blomley terms the simultaneous legal and spatial ordering 'splices', and emphasizes that in many cases it is impossible to differentiate between the two concepts. Is a prison a spatial or legal category he asks? See N. Blomley, 'From "What?" to "So What?": Law and Geography in Retrospect', in this vol. For a gripping description of the power of law over prisoners and their bodies see D. Delaney, 'Beyond the Word: Law as a Thing of This World', in this vol.

[28] See, e.g., D. Delaney, 'Of Minds and Bodies and the Legal-Spatial Constitution of Sanctuary', *Historical Geography*, (2000) 28, 25, 37 (explaining the importance of 'critical legal geography').

[29] See Blomley, n. 27 above.

[30] As Nicholas Blomley explains, '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': Blomley, n. 14 above, p. xii.

[31] Concurrently social spaces shape and demarcate social power relations. Richard Ford argues that while 'racially identified space both creates and perpetuates racial

political inequality and seek to demonstrate how legal institutions, conventions and practices reinforce hierarchical social relationships'.[32]

As critical legal geographers apply perspectives adopted from Critical Legal Studies (CLS), I will reiterate here several pertinent themes introduced by this influential movement.[33] Critical Legal Studies emerged in leading US law schools during the late 1970s and offered a trenchant left critique of liberal legalism.[34] In addition to its own radical explication of the existing legal order, CLS has deeply affected several turn-of-the-century critical legal movements, such as feminist legal theory, critical race theory, and recently also CLG.[35]

'Crits', scholars affiliated with the CLS movement, seek to explore how legal doctrine and institutions 'work to buttress and support a pervasive system of oppressive inegalitarian relations'.[36] An intimate commentator identified the core characteristic of early CLS work as: (1) an attempt to demonstrate the indeterminacy of legal doctrine, (2) an engagement in 'historical, socioeconomic analysis to identify how particular interest groups, social classes, or entrenched economic institutions benefit from legal decisions despite the indeterminacy of the legal doctrines', (3) an

segregation. . . . We imagine that the boundaries that define local governments and private concentrations of real property are a natural and inevitable function of geography': R. Ford, 'The Boundaries of Race: Political Geography in Legal Analysis' (1994) 107 *Harvard Law Review* 1843, 1846 , 1856. See also N. Blomley, 'Landscapes of Property' (1998) 32 *Law and Society* 569.

[32] Forest, n. 13 above, 9.

[33] Forest writes that 'Many of the geographers involved in this [law and geography] movement . . . drew parallels between their own research and the writing of legal scholars working under the umbrella of critical legal studies': Forest, n. 13 above, 9. See also N. Blomley and J. Bakan, 'Spacing Out: Towards a Critical Geography of Law' (1992) 30 *Osgoode Hall Law Journal* 661.

[34] The literature on CLS is legion. For brief introductions see D. Kairys (ed.), *The Politics of Law: A Progressive Critique* (3rd edn., New York, 1998); H. Davies and D. Holdcroft, *Jurisprudence: Texts and Commentary* (London, 1991), 471. As Jeremy Paul rightly notes, 'Despite premature reports of its death, CLS has achieved considerable and undeniable success and shows few signs of withering away': Symposium Critical Legal Studies (Début de Siècle): 'A Symposium on Duncan Kennedy's A Critique on Adjudication' (2000) 22 *Cardozo Law Review* 701, 702. See also R. Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57. D. Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685; D. Kennedy, 'Freedom and Constraints in Adjudication: A Critical Phenomenology' (1986) 36 *Journal of Legal Education* 518; D. Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge, Mass., 1997); M.J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York, 1992). For a recent evaluation of CLS generally, and Duncan Kennedy's *A Critique of Adjudication: Fin de Siècle*, see Symposium Critical Legal Studies (Début de Siècle), 'A Symposium on Duncan Kennedy's A Critique of Adjudication' (2000) 22 *Cardozo Law Review* 701.

[35] See generally G. Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York, 1995).

[36] 'Statement of Critical Legal Studies Conference' in P. Fitzpatrick and A. Hunt (eds.), *Critical Legal Studies* (New York, 1987) quoted in Minda, n. 35 above, 106.

effort to 'expose how legal analysis and legal culture mystifies outsiders and legitimates its results'.[37] While oppressive circumstances present ample instances in which law is predominantly used as a direct and brutal tool of domination,[38] in this chapter, I am particularly interested in CLS's argument on the legitimating role of law.

Similarly to its impact on the ethnocratic model, Gramsci's notion of 'hegemony' influences CLS's notion of legitimation as well.[39] Crits argue that 'one of the main functions of law is to make the status quo seem acceptable and/or necessary (legitimation)'.[40] While the legal system privileges the interests and visions of powerful groups in society, it

[37] M. Minow, 'Law Turning Outward', *Telos*, (1986) 73, 79, 83–5 quoted in Minda, n. 35 above, at 108. A fourth characteristic has been CLS scholars' attempts to resurrect disfavoured social visions and make them part of the legal discourse. Schlag offers a similar characterization: P. Schlag, 'U.S. CLS' (1999) 10 *Law and Critique* 199, 201–2, 203.

[38] While CLS use of 'legitimation' often implies a rejection of Marxist notions of Law as a direct tool of domination, Robert Gordon rightly notes that sometimes, 'social structure, class and power—whose very existence much liberal legal writing seems so astonishingly to deny—do matter directly. Histories of legal oppressions—of slavery, Indian removal laws, Black Codes, labor injunctions—are indispensable reminders that there's often nothing subtle about the way the powerful deploy the legal system to keep themselves organized and their victims disorganized and scared': Gordon, n. 34 above, 75. In a tribute to E.P. Thompson, Gordon writes similarly that Thompson was 'well aware of the instrumental functions of law as a bag of weapons and tricks for the rich and powerful to use against the poor. . . . [and] the cynical manipulation and deployment of law by a ruling elite to maintain its privileges': R. Gordon, 'Tribute: E.P. Thompson's Legacies' (1994) 82 *Georgetown Law Journal* 2005, 2006. One should be aware that 'violence is *integral* to, not an adjunct to, western property law. Corporeal injurious violence . . . is present—whether implied or actualized—not only in extreme cases, such as the forcible eviction of squatters, or acts of colonial dispossession. It is also integral to the day-to-day reproduction of a property regime. . . . space gets produced, invoked, pulverized, and policed through forms of legal violence. Law's violence itself is expressed and legitimized, while perhaps also complicated, through such forms of spatialization': N. Blomley, '"Acts", "Deeds" and the Violence of Property', *Historical Geography*, (2000) 28, 86 at 89.

[39] For a general review see D. Litowitz, 'Gramsci, Hegemony, and the Law' [2000] *Brigham Young University Law Review* 515. For CLS's use of Gramsci, see ibid., at 532–3. According to Litowitz, 'Some important Critical Legal Studies articles dealing with hegemony include Peter Gable & Paul Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law" (1982) 11 *New York University Review of Law & Social Change* 369; Robert W. Gordon, "New Developments in Legal Theory"' in D. Kairys (ed.), n. 34 above, 281; Edward Greer, "Antonio Gramsci and 'Legal Hegemony'" in D. Kairys (ed.), n. 34 above, 304; Duncan Kennedy, "Antonio Gramsci and the Legal System" in 6 ALSA F. 32 (1982) and Karl E. Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–41' (1978) 62 *Minnesota Law Review* 265, 268. See also Davies and Holdcroft, n. 34 above, 482–3.

[40] Schlag, n. 37 above, 201–2, 203. Duncan Kennedy, explains that 'according to the legitimation hypothesis, the particular set of hierarchies that constitute our social arrangements look more natural, more necessary and more just than they "really" are': Kennedy, n. 34 above, 236. Davies and Holdcroft write that according to CLS, 'the rhetoric of legal rights and the rule of law leads people to think that the existing order, despite its inequitable aspects, is just or at least that is better than any alternative': n. 34 above, 482.

simultaneously legitimizes this privileging and makes it seem natural. As Robert Gordon so aptly explicates, the general umbrella of 'law as legitimating ideology' includes a spectrum of theories. Gordon starts from those closest to straight 'instrumentalist' explanations maintaining that '[a]ll law is pig law dressed up in judges' robe'. That is, law is a means for 'organizing the ruling class and for coercing, cheating and disorganizing the [dominated] class[es]'. Gordon then gradually proceeds to theories emphasizing the complex ways by which law contributes to a hegemonic order. Some Crits explain that 'the ruling class confirms its rule by making good on enough of its promises to convince potential opposition that the system is tolerably fair'. Others stress that 'the ruling class itself is taken by legal ideology', and that usually the middle class are more convinced than lower groups in society. Another version points out that 'the power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live'.[41]

[41] A larger quotation will explain it better:

1. 'All law is pig law dressed up in judges' robe.' That is, law is a means for organizing the ruling class and for coercing, cheating and disorganizing the [dominated] class[es] . . .'
2. '"The ruling class induces consent and demobilizes opposition by masking its rule in widely shared utopian norms and fair procedures, which it then distorts to its own purposes." . . . [I]n a class society these supposedly universal norms are deployed for the benefit of a particular class. . . . [They] operate de facto to reinforce the advantages of wealth and power. The victims of these outcomes feel powerless to complain because the outcomes seem to have been produced by legitimate rules and procedures.'
3. 'The ruling class confirms its rule by actually making good on enough of its utopian promises to convince potential opposition that the system is tolerably fair and capable of improvement, even with all its faults.'
4. '"The ruling class itself is taken in by legal ideology; it believes that it's acting justly when it acts according to the law, that everyone *is* getting approximately the best possible deal. . . ." (In fact, in the case of the ideology of the "rule of law," middle-class people are rather *more* sold on it than working or lower-class people.)' 'Law isn't just an instrument of class domination, it's an arena of class struggle'. The content of legal rules and practices is ideologically tilted in favor of . . . the reproduction of current modes of hierarchical domination, . . . but ruling classes don't have everything their own way.' (This is for example the position of E.P. Thomson in his *Whigs and Hunters: The Origin of the Black Act* (New York, 1975) 258–69).
5. 'The discourse of law—its categories, arguments, reasoning modes, rhetorical tropes, and procedural rituals—fits into a complex of discursive practices that together structure how people perceive . . . social reality'. 'To put this another way, the power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live': Gordon, n. 34 above, 93–5, 109.

As Peter Gable and Paul Harris argue, the 'conservative power of legal thought is not to be found in legal outcomes which resolve conflicts in favor of dominant groups, but in the reification of the very categories through which the nature of social conflict is defined': P. Gable and P. Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' (1982–3) 11 *New York University Review of Law & Social Change* 396, quoted in Minda, n. 35 above, 113.

Whatever version we prefer, the ideology of legalism, in its broad sense, constitutes an important ingredient in the construction of hegemony and legitimation.[42] It contributes to the belief that social inequality is somewhat natural or inevitable, and not the outcome of influential social actors.[43] An abstract and professional legal discourse justifies domination and privilege while simultaneously claiming neutrality in process and outcome.[44] Duncan Kennedy emphasizes how judges make ideological choices of legal interpretation and simultaneously deny these choices.[45] The result is an increase in the 'appearance of naturalness, necessity, and relative justice of the status quo'.[46] Thus, elites attempting to legitimize their dominant power positions construct complex 'legal belief structures' that rationalize hierarchies and privileges.[47] Legalism seeks 'to justify and explain race, class, and gender disadvantage and privilege' through 'an abstract professional discourse which claims "neutrality in process and outcome . . ." '.[48] As a result, legal decisions that promote or perpetuate social inequalities are conceived as being just part of the natural order of things.

Legal geographers apply these CLS insights to demonstrate that legal structures constitute important building blocks in the ordering and legitimation of spatial hierarchies.[49] They argue that 'legal categories

[42] The concept of legal formalism is a contested one. For a review see e.g. D. Kennedy, 'Legal Formalism', unpublished manuscript (2001) (on file with the author). See also M. Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* (Tel-Aviv, 1993) 13–23 (Hebrew); R. Shamir, 'The Politics of Reasonableness', *Theory and Criticism*, (1994) 5, 7.

[43] As David Kairys puts it: 'The law serves . . . to depoliticize . . . and to cast the structure and distribution of things . . . as somehow achieved without the need for any human agency. Decisions and social structures that have been made by people . . . are depicted as neutral, objective, preordained, or even God-given, providing a false legitimacy to existing social and power relations': D. Kairys, 'Introduction' in Kairys (ed.), n. 34 above, 12.

[44] Minda, n. 35 above, 110. David Kairys explains that '[t]he explicit or implicit theme of almost every judicial opinion is "the law made me do it" ': Kairys, n. 34 above, 3.

[45] Kennedy, *A Critique of Adjudication*, n. 34 above. Kennedy writes that while 'Ideology influences adjudication by structuring legal discourse and through strategic choice in interpretation', judges regularly deny their own strategic behaviour and attempt to project a rhetorical effect of legal necessity to their adjudication: Kennedy, *A Critique of Adjudication*, n. 34 above, 19.

[46] Ibid., 2.

[47] R. Gordon, 'Some Critical Theories of Law and their Critics', in Kairys (ed.), n. 34 above 641, 649.

[48] Minda, n. 35 above, 110.

[49] Blomley and Bakan have noted that 'both Critical legal and geographic studies interrogate the categories relied upon within each disciplinary mainstream . . . Arguing that these categories are socially constructed': Blomley and Bakan, n. 12 above, 666. Such constructs 'tend to construct the world in ways that systematically favor the

and distinctions not only draw upon consciousness, but form it . . . both shaping and constraining the social, imaginary and popular readings of the spatiality of social life'.[50] Explicit legal rules and background legal regimes shape a landscape of 'social apartheid, inequitable distribution of public resources and political disenfranchisement'.[51] While law is implicated in the production and endurance of spatial inequalities, various rhetorical devices divert attention from it and therefore contribute to their legitimization and perpetuation.[52] According to Delaney, formal legal argument and reasoning inscribe a 'certain sort of meaning . . . onto lived-in landscapes . . . [S]patial configurations that reflect and reinforce racist ideologies have been justified as right, reasonable, and preferable to other arrangements'.[53]

Thus, the production of allegedly technical formal rules, of strategic acts of categorization,[54] of meticulous legal distinctions, the selective screening of 'facts' accepted in courts,[55] the omnipresence of background rules and assumptions that are never discussed, serve as fundamental pillars of the spatial-legal legitimation of inequalities and hierarchies. As a result, 'contingency is portrayed as necessity, the created is portrayed as the found, the constructed as the natural or the political as the nonpolitical'.[56] I would like to contribute to these insights by offering some preliminary observations on the crucial role of law in shaping settler societies' ethno-spaces.

Law, Supreme Courts, and the Making of Settlers' Land Regimes

The establishment of ethnocratic settler states usually entails the construction of new property regimes.[57] The acquisition of land is a crucial

powerful'. However, since both law and space have an air of objectivity and neutrality, they 'appear simply part of the order of things, and thus non-negotiable': Blomley, n. 27 above. See also Ford in Blomley, Delaney, and Ford, n. 16 above at 53.

[50] Blomley and Bakan, n. 12 above, at 670. See also Blomley, n. 14 above, at 54.

[51] Ford in Blomley, Delaney, and Ford, n. 16 above, 53.

[52] Ibid., 52–3. As Thomas Ross notes, the language of law is 'a magical thing. It transforms things into their opposites. Difficult choices become obvious. Change becomes continuity. Real human suffering vanishes as we conjure up the specter of righteousness. Rhetoric becomes the smooth veneer on the cracked surface of the real and hard choices in law': T. Ross, 'The Rhetorical Tapestry of Race: White Innocence and Black Abstraction' (1990) 32 *William and Mary Law Review* 1.

[53] D. Delaney, *Race, Place and the Law: 1836–1948* (Austin, Tex., 1998), 3.

[54] Ibid., 19.

[55] Gordon Clark relates how in an affirmative action case the court excluded important historical considerations and the 'facts' of the case were 'nothing more than a charade justifying a conservative political agenda': G. Clark, 'The Legitimacy of Judicial Decision Making in the Context of Richmond v. Croson' in Blomley, Delaney, and Ford (eds.), n. 16 above 104, 107.

[56] Delaney, n. 53 above, 23–4.

[57] Following Peter Russell, I focus here on 'countries in which the legal and political traditions of English-speaking settlers and their descendants have come to be the

component in this phase and often occasions a vast and violent dispossession of indigenous peoples from land they possessed for generations.[58] While in most cases land is originally acquired by direct force, this violent acquisition is subsequently translated into institutional arrangements that represent and legitimize power relationships in the ethnocratic state. As we have seen, ethnocratic settler societies usually contain three major groups: founders, immigrants, and natives.[59] Ethnocratic land regimes reproduce and reinforce this social stratification. In the land regime they create, the founders control most land resources. Immigrants usually receive only a small part; while indigenous and alien groups, who often serve as the main contributors of land, are generally denied a fair share of its allocation.[60] By freezing this 'initial' spatial arrangement, the new property system facilitates the perpetuation over generations of the ethnocratic power structure.[61]

The property regime also constitutes a legal-cultural order that reduces the necessity of direct force to maintain the ethnocratic system. Elites of the dominant ethnocratic group strive to institutionalize a hegemony that deflects open debate about the system and justifies their control of the territory. Under this hegemonic system, the ethnocratic spatial order is constructed as something 'taken for granted'. Law and courts occupy a special place in the institutionalization and legitimization of these socio-spatial power structures.[62] As we have seen, CLS scholars and

dominant influence': P. Russell, 'High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence' (1998) 61 *Saskatchewan Law Review*: 247, 248. The ethnocratic model encompasses a wider group of societies. For details see the references in n. 4 above.

[58] As Blomley argues, 'in its founding moment, a property system seems to frequently entail acts of violent dispossession': Blomley, n. 38 above, at 89. See also J. Singer, 'Rereading property' (1992) 26 *New England Law Review* 711; J. Singer, 'Sovereignty and Property' (1991) 86 *Northwestern University Law Review* 1.

[59] See ibid., 11

[60] 'The frontier settlers did not go out into the wilderness to set down roots in vacant lands. Rather, most the real property in the United States was forcibly seized from American Indians by the United States government, and transferred to non-Indians . . . This redistribution was based on perceived racial hierarchies': ibid., 5.

[61] '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 discriminate—and continue to discriminate—against the original inhabitants of the land': ibid., 45. 'The failure of the United States courts to protect tribal property rights adequately is based partly on a perceived need to legitimate the current distribution of wealth and power by reference to a mythological picture of the origins and current shape of property rights': J.W. Singer, '*Well Settled?* The Increasing Weight of History in America Indian Land Claims' (1994) 28 *Georgia Law Review* 481, 485.

[62] See, e.g. Singer, 'Sovereignty and Property', n. 58 above, 1, 3, 44–5; Singer, n. 61 above, 482; Russell, n. 57 above; E.A. Daes, Special Rapporteur, *Human Right of Indigenous Peoples: Indigenous People and their Relationship to Land (Second Progress Report)* (3 June 1999 available on UN website www.un.org.) On the attitude of US law to Chicanos in Southwestern US see G.T. Luna, 'Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of "Naked Knife" ' (1998) 4 *Michigan J. of Race and Law* 39; G.T. Luna, 'Beyond/Between Colors: On the Complexities of Race: The Treaty of

critical legal geographers argue that dominant groups construct 'legal belief structures', that justify racial and spatial inequalities through a complex professional discourse that claims to be objective and impartial.[63] By reconstituting settlers' cultural biases and power relations into formalized rules such as property arrangements, law plays a significant role in the legitimation and endurance of ethnocratic settlers' regimes.

As recently exposed in an extensive UN comparative study, the legal system often imposes insurmountable legal obstacles that prevent natives and other 'outsiders' from effectively affirming and protecting their land interests.[64] Settler states frequently regard native lands as public land, which can be disposed of by governments without the natives' approval or even knowledge.[65] As a result, many natives have become trespassers on their own land. Even if the state recognizes the native's possession, it is usually conceived to be only 'at the whim of the sovereign' which can revoke the licence to occupy the land.[66] Often, however, 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, as in the case of the doctrine of *terra nullius* (empty land) in force in Australia until 1992.[67]

Guadalupe Hildago and Dred Scott v. Sanford' (1999) 53 *University of Miami Law Review*: 691; W. Fisher III, 'Property and Power in American Legal History' in R. Harris, A. Kedar, A. Likhovsky, and P. Lahav (eds.), *The History of Law in a Multi-Cultural Society: Israel 1917–1967* (Abingdon, 2002).

[63] See n. 62 above, and ff.

[64] See Daes, n. 62 above.

[65] Singer, 'Sovereignty and Property', n. 58 above, 3, argues that 'property interests traditionally held by Indian nations and tribal members are often treated as a commons available for non-Indian purposes when needed by non-Indians'.

[66] Daes, n. 62 above, at para. 33. Even when states recognize native possession of land, this has generally 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 has often been revoked. Ibid., at para. 35. Similarly, Joseph Singer argues that 'tribal property rights are not properly understood as rights at all, but merely as revocable licenses': Singer, n. 61 above, 490. In New Zealand, the traditional view was that the Maori had no legally recognized rights to their lands and fisheries after the British annexation. Their rights were considered at the sufferance of the Crown. See S. Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis', *Harvard Human Rights Journal*, (1999) 12, 57 at 70.

[67] See *Mabo v. Queensland (No. 2)*, 175 CLR at 109. This denial is based partly on a 'cultural clash of paradigms' in which the 'modern Western' legal system does not recognize the ways locals organized their spatial relations as giving rise to property rights. According to Carole Rose, 'in defining the acts of possession that make up a claim to property, the law . . . puts an imprimatur on a particular symbolic system and on the audience that uses this system. Audiences that do not understand or accept the symbols are out of luck': C. Rose, 'Possession as the Origin of Property' (1985) 52 *University of Chicago Law Review* 73, 85. Indigenous and nomadic peoples are prime examples of those 'out of luck'. As Steven Paul McSloy puts it, 'How were American Indian lands taken? The answer is not, as it turns out, by military force. The wars, massacres, Geronimo and Sitting Bull—all that was really just cleanup. The real conquest was on paper, on maps and in laws. What those maps showed and those laws said was that Indians has[?] been "conquered" merely by being discovered': S.P. McSloy, 'Because the Bible Tells Me So: Manifest Destiny and American Indians' (1996) 9 *St. Thomas Law Review* 37, 38.

While the legal system often plays a crucial role in facilitating the transfer of land from native populations to the control of the settlers, it simultaneously conceals the dispossession and legitimates the new land regime. Settlers' law and courts attribute to the new land system an aura of necessity and naturalness that protects the new status quo and prevents future redistribution. Formalistic legal tools play a meaningful role in such legitimization.[68] Courts apply 'linguistic semantics, rhetorical strategies and other devices' to disenfranchise indigenous peoples.[69]

Intricate legal tools and conventions serve as central instruments in defining and altering laws concerning natives' rights. These rules, saturated with a heavy dose of professional, technical, and seemingly scientific language and methods, conceal the violent restructuring with an image of inevitability and neutrality.[70] Procedural rules[71] and obstacles,[72] such as time limits,[73] and questions of jurisdiction and standing;[74] rules of evidence,[75] such as admissibility and weight,[76]

[68] The 'conceptualist framework' of Western law 'renders it highly effective in denying counterclaims . . . the strict application of the rule of law permits judges to deny rights, history, culture, and context to a constructed other': R. Shamir, 'Suspended in Space: Bedouins under the Law of Israel' (1996) 30 *Law and Society Review* 231, 253.

[69] D. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin, Tex., 1997) 3.

[70] For a review of some legal and administrative techniques in the context of Israel's domination of its Arab minority see I. Saban, *The Legal Status of Minorities in Deeply Divided Societies: The Arab Minority in Israel and the Francophone Minority in Canada* (Phd. Dissertation, Hebrew University, 2000) (Hebrew) 315–26; 443–54.

[71] Compare the use of injunctions in altering the course of the labour movement in the USA. As Martha Minow sees it, this is an example of procedure used to support a particular substantive result: M. Minow, 'Politics and Procedure' in Kairys (ed.), n. 34 above, 79, 87.

[72] Daes, n. 62 above, at paras. 46–62. 'A particular problem that has been repeatedly brought . . . is the use or misuse of claim procedures to deprive indigenous peoples of their rights, . . . to land and resources': ibid., at para. 55. See also N.J. Newton, 'Indian Claims in the Courts of the Conqueror' (1992) 41 *American University Law Review* 753, 820.

[73] Such as statutes of limitations. See ibid., 790–800. Kaplan explains that there is support to the view that the California Land Claims Act, which required that 'all claims to the lands covered by the Act be presented by a certain date or be forever lost, extinguished aboriginal title to the California lands in question'. See M.J. Kaplan, 'Annotation: Proof and Extinguishment of Aboriginal Title to Indian Land' (1979) 41 *American Law Review Federal* 425, 471.

[74] e.g., in 1946, an Indian Claim Commission (ICC) was created. As Amy Sender writes, 'Once the ICC was created, the Supreme Court was quick to push Indian title claims before it to the Commission, deeming this issue a political question which was non-justiciable': A. Sender, 'Australia's Example of Treatment Toward Native Title: Indigenous People's Land Rights in Australia and the United States' (1999) 25 *Brooklyn Journal of International Law* 521, 545 at n. 169.

[75] As Austin Sarat and Thomas Kearns explain, 'conventions and rules enable, and, at the same time, constrain the opportunities for voice. This is, for example, surely and purposefully the case with respect to the rules of evidence': A. Sarat and T. Kearns (eds.), *The Rhetoric of Law* (Ann Arbor, Mich., 1994) 12.

[76] See, e.g., Kaplan, n. 73 above, at 436.

presumptions[77] and burdens of proof;[78] the manipulation of past precedents[79] and of legal categories,[80] have the effect of dispossessing indigenous populations without even admitting the dispossession.

Simultaneously, courts adopt a selective deferential position, leaving with or granting the administrative and legislative authorities ample powers over indigenous populations and their connections to land.[81] A striking example of this phenomenon has been the non-enforcement of

[77] e.g., in the late 1980s, the US 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 favour of those favouring 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': D. Geier, 'Power and Presumptions: Rules and Rhetoric, Institutions and Indian Law' [1994] *Brigham Young University Law Review* 451, 454, 472.

[78] 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. . . . 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. 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': Fisher III, n. 62 above. Likewise, Guadelupe Luna has described in detail the mechanism that permitted the dispossession of Chicanos in southwestern USA. Thus, in the case of Chicanos, she argues 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 Chicanos. She also argues that 'the legal and governmental actors extended favorable legal "interpretations" to the dominant population, denied analogous interpretations to Mexican fee holders, and ultimately that favoritism expedited dispossession': G.T. Luna, 'Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a Naked Knife' (1998) 4 *Michigan Journal of Race & Law* 39, 49. See also Kaplan, n. 73 above; Newton, n. 72 above, 818 ff.

[79] See, e.g., Singer, 'Sovereignty and Property', n. 58 above, 3, criticizing contemporary Supreme Court opinions as an 'attack on Indian sovereignty and property'. However, contends Singer, 'from reading the language of the Court's opinions, one would have no idea that anything has changed. The Court presents the recent cutbacks . . . as the straightforward application of settled precedent. Nothing could be further from the truth.' Likewise, in analysing the *Tee-Hit-Ton* case, he claims that 'the Court, in Tee-Hit-Ton, claimed that its decision was compelled by precedent when, in fact, Tee-Hit-Ton was a case of first impression': Singer, n. 61 above, 521. Singer also argues that 'the courts rewrite precedents by relying on cases which misstate or distort the meaning of earlier cases and by failing to recognize conflicting lines of precedents': ibid., 529. See also N. Newton, 'At the Whim of the Sovereign, Aboriginal Title Reconsidered' (1980) 31 *Hastings Law Journal* 1215.

[80] Singer argues that 'the Supreme Court has manipulated the public/private distinction as it applies to tribes in a way that has given tribal governments the worst of both worlds': Singer, 'Sovereignty and Property', n. 58 above, 6.

[81] See, e.g., P. Prygosky, 'War as the Prevailing Metaphor in Federal Indian Law Jurisprudence: An Exercise in Judicial Activism' (1997) 14 *Thomas Cooley Law Review* 491. '[W]hat does the Court do when Congress regulates Indian nations and its laws are not within one of [the] provisions of the Constitution? The answer is that the Court makes up another, obviously extra-constitutional power for congress to use in dealing with Indian Nations': ibid., at 512. See also pp. 512 ff. See also Saban, n. 70 above, 314–315.

laws and treatises working in favour of natives.[82] Similarly, the doctrine of 'Plenary Power' left the US Congress with practically unlimited discretion in regard to Indians and their lands.[83]

Chief Justice Marshall's notorious opinion in *Johnson* v. *McIntosh* (1823),[84] reveals in my mind in an exceptionally candid (and ambivalent) manner how the settlers' courts defer to the conqueror and simultaneously institutionalize and legitimize the dispossession of natives:

> *Conquest gives a title which the Courts of the Conqueror cannot deny* . . . The British government, . . . whose rights have passed to the United States, asserted a title to all the lands occupied by Indians. . . . *These claims have been maintained and established . . . by the sword. It is not for the Courts of this country to question the validity of this title.* . . .
>
> Although we do not mean to engage in defence of those principles which Europeans have applied to Indian title, they may, we think find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them. . . .
>
> . . . the tribes of Indians inhabiting this country were fierce and savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession to their country was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they . . . were ready to repel by arms every attempt on their independence. . . .
>
> Frequent and bloody wars, in which the whites were not always the aggressors, *unavoidably ensued*. . . . *As the white population advanced, that of the Indians necessarily receded*. . . . The soil . . . being no longer occupied by its ancient habitants, was parceled out according to the will of the sovereign power.
>
> . . .
>
> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, *if the principle has been asserted in the first instance, and afterwards sustained*, if a country has been acquired and held

[82] Daes, n. 62 above, at para. 46. As Siegfried Wiessner points out, for a lengthy period the Canadian Courts did not honour the treaties concluded with Indian tribes: S. Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis', *Harvard Human Rights Journal*, (1999) 12, 57, 66. The point is also raised by Leon Shelef, in his *Future of Tradition* (Portland, Oreg., 2000), 94. In New Zealand, Pendergast CJ referred in an 1877 decision to the Waitangi treaty as 'a simple nullity': *Wi Parata* v. *Bishop of Wellington* (1877) 3 NZ Jur. (NS) 72, S.Ct, quoted in Shelef, at 113. The 'nullity doctrine' was rejected in a 1987 decision. See Shelef at 113.

[83] 'Plenary Power . . . in federal Indian policy and law, this term has three distinct meanings: a) exclusive—Congress, under the Commerce Clause is vested with sole authority to regulate the federal government's affairs with Indian tribes; b) preemptive—Congress may enact legislation which effectively precludes state government's acting in Indian related matters; c) unlimited or absolute—this judicially created definition maintains that the federal government has virtually boundless governmental authority and jurisdiction over Indian tribes, their lands, and their resources': Wilkins, n. 69 above, 374. In some countries the state assumes trust powers over indigenous property, but indigenous often remain with no effective remedies in case this trust is breached: Daes n. 62 above, at para. 73

[84] 21 US (8 Wheat) 543.

under it, *if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.*[85]

Undoubtedly, the body of positive law and jurisprudence developed in regard to indigenous land has often been persistently discriminatory.[86] This should not surprise. As Peter Russell explains, the courts of the common law countries are 'white man's courts': that is, 'judicial institutions established by the dominant settler society, staffed almost entirely by non-aboriginal judges, interpreting and applying the laws of the dominant society'.[87] Before proceeding further within this argument, I would like however to stress that while the American Supreme Court contributed to the dispossession of Native Americans, American jurisprudence on these issues has been ambivalent and sometimes inconsistent.[88] Thus, Peter Russell terms it a 'bitter-sweet' jurisprudence.[89] Furthermore, it is important to note that even though the American Supreme Court granted Congress an unlimited power to extinguish Indian title, it also devised canons of constructions according to which ambiguities in statutes and treatises should be construed in favour of the Indians.[90] Although this canon has not always been observed, it had an impact.[91]

[85] 21 US (8 Wheat) 543, 588–91.

[86] Daes, n. 62 above, at para. 38.

[87] Russell, n. 62 above, 248.

[88] See, e.g., P.P. Frickey, 'Marshalling Past And Present: Colonialism, Constitutionalism, and Interpretation In Federal Indian Law' (1993) 107 *Harvard Law Review* 381.

[89] Russell, n. 57 above 249, 253. Russell assesses the performance of the American Supreme Court as follows: 'The performance of the Supreme Court as the chief expositor of the rights of Indigenous peoples in the United States continues to manifest the same bitter-sweet character evident in Marshall's day. Over the years, the Court has upheld the basic kernel of Marshall's recognition of Indian tribes as nations with a right to internal self-government. It has provided some protection for Indian nations and tribal lands from hostile state legislatures and has sometimes interpreted federal legislation narrowly so as to blunt the assimilationist intentions of Congress.' Also, it has 'created a trust relationship that affords some protection against misconduct by the federal executive branch'. On the other hand, the Court has never wavered in its support for the other central tenet of the Marshallian doctrine—the federal government's plenary power over the Indian nations. The Court has never overturned a federal law on the grounds that Congress has exceeded its jurisdiction to govern Indian affairs, and it has permitted Congress unilaterally to abrogate a treaty with an Indian nation': ibid.

[90] Thus, established canons of construction required a clear statement that Congress really intended to extinguish the original Indian title. Ambiguities were supposed to work in favour of Indian interests. See Singer, n. 61 above, 509. This canon of construction is described by Clinton, Newton, and Price as follows: 'Canons of statutory construction: Once a determination has been made that a particular statute affects Indian tribes or individuals, courts have invoked canons of construction favoring creation and preservation of Indian rights.' American courts have usually 'required a clear and specific statement by Congress—in a statute or in reliable legislative history—before finding an intention to extinguish treaty rights': R. Clinton, N. Newton and M. Price (eds.), *American Indian Law: Cases and Materials* (3rd edn., Charlottesville, Va., 1991), 230–1. See also D. Getches, C. Wilkinson, and R. Williams, *Federal Indian Law: Cases and Materials* (3rd edn., St. Paul, Minn., 1993) at 345. In *County of Oneida* v. *Oneida Indian Nation* 470 US 226, 247–8 (1985) the Court 'has held that congressional intent to extinguish Indian Title must be "plain and unambiguous" '. See also Frickey, n. 88 above, 417, C. Wilkinson and J. Wolkman, 'Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?' (1975) 63 *California Law Review* 601.

[91] Frickey argues that '[a]lthough they are phrased in a variety of ways, the canons [of construction] are designed to promote narrow interpretation of federal treatises, statutes, and regulations that intrude upon Indian self-determination and to promote broad interpretation of provisions that benefit Indians. Many of the most important Indian victories in the Supreme Court were justified by reference to these canons': Frickey, n. 88 above, at n. 158. See also Wilkinson and Wolkman, n. 90 above.

[92] Philip Frickey acknowledges that Chief Justice Marshall 'could not annul the effects of the theories of discovery and Indian title, upon which all Euro-American land titles were based'. Frickey believes however, that unlike the Supreme Court today, Marshall in his 'trilogy' of Indian cases attempted to mediate the tensions between the reality of colonialism, that could not be challenged, and the democratic constitutional order. Frickey, n. 88 above, 385.

[93] Note the subtitle of David Wilkins's book, n. 69 above. See also Saban, n. 70 above, 315–19, who reviews how Israeli law used seemingly neutral categorization to control the Arab minority and prevent it from access to land and space.

[94] Delaney, n. 53 above, 16, 25.

[95] Ibid., 25.

[96] See Singer, n. 61 above, 482. In 1955 the Supreme Court handed down its (in)famous *Tee-Hit-Ton Indians* v. *United States*, 348 US 272 (1955) judgment, in which it refused to recognize Indians' rights in land as property. The Supreme Court decided that the USA might (with limited exceptions) take or confiscate the land or property of an Indian tribe without due process of law and without paying just compensation. The Supreme Court found that property held by aboriginal title, as most Indian land, is not entitled to the constitutional protection that is accorded to other property in the United States. See Daes, n. 62 above, para. 41; P. Russell, 'High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence' (1998) 61 *Saskatchewan Law Review* 247.

[97] These rules are applied 'by judges who do not question . . . the racist/ethnocentric basis of these rules': Newton, n. 72 above, 826. This construction of different legal categories as a legitimating device has already been noted by Legal Realist Felix Cohen: 'Governmental taking of land from white men is called "expropriation"; taking of land from Indians is called "freeing the Indian from the reservation" or "abolishing the reservation system" ': F. Cohen, 'Field Theory and Judicial Logic' in *The Legal Conscience: Selected Papers of Felix S. Cohen* (New Haven, Conn., 1950), 150, quoted in Singer, n. 61 above, 527.

While Marshall's opinion discloses quite openly the unfavourable judicial treatment of Indians and their land,[92] the discrimination of non-settler groups and individuals is often masked by the construction of seemingly 'neutral' legal categories which denote in truth particular social and ethnic groups.[93] As David Delaney explains, a legal landscape, consisting of conceptual boundaries and categorical distinctions, contrives a system of differentiation.[94] 'This conceptual map . . . is not simply a way of talking about power, but a principal way in which power is conceptualized.'[95]

Courts play a central role in the construction of such differential rules and categories. These facilitate the dispossession of native land, while affording a much stronger protection to the property of the dominant and even the immigrant groups.[96] Nell Newton argues that 'rules of formal inequality are still applied in Indian law cases'.[97] Similarly, Singer

contends that the United States Supreme Court has maintained 'a fundamental disjunction between legal treatment of Indian and non Indian property'.[98]

Furthermore, the channelling of these issues into the remote confines of the legalistic realm, the peripheral terrains of deference, procedure, evidence, intricate legal categories, exacting distinctions, makes them so complicated that few venture into these distant and wearisome lands.[99] All this buries land dispossession, transfer, and discriminatory allocation under a mountain of legal technicalities. Placing natives and other non-settler local populations, such as Chicanos, into distinct legal categories, rules of procedure, and evidence masks the application of discriminating laws. These combined legal constructs silence the fundamental questions behind these methods, and result in discussions that are seemingly technical, neutral, and devoid of political positions and biases. Simultaneously these tropes facilitate the dominance of a narrative celebrating the existence of an equitable property regime, and thereby contribute not only to the creation but also to the endurance and persistence of discriminatory land regimes.

The Making of the Israeli Land Regime

Historical Background

My intention in this section is to illustrate the arguments presented in the previous section with examples drawn from Israeli law and court decisions during the making of the Israeli land regime, not to present a systematic legal history of the dispossession of Palestinians after 1948.[100]

[98] Singer, 'Sovereignty and Property', n. 58 above.

[99] 'Indian Law is regarded as an obscure branch of the law containing special technical rules setting it apart from all other areas of law. This substantive law marginalization combined with the obscurity of the courts removes Indian claims even further from the critical scrutiny of the academic and progressive legal communities and from the glare of public opinion as well': Newton, n. 72 above, 848. Similarly, Singer argues that 'American Indian legal issues are generally treated as a specialized field whose principles are irrelevant to the core of United States property law': Singer, 'Sovereignty and Property', n. 58 above, 42. Likewise Philip Frickey argues that 'Federal Indian law does not deserve its image as a tiny backwater of law inhabited by impenetrably complex and dull issues': see Frickey, n. 88 above, 383.

[100] For such attempts see A. Kedar, *Israeli Law and the Redemption of Arab Land, 1948–1969* (SJD dissertation, Harvard University Law School, 1996) (on file with the author); A. Kedar, 'Majority Time, Minority Time: Land, Nation and the Law of Adverse Possession in Israel' (1998) 21 *Tel Aviv University Law Review* 665. A. Kedar, 'The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948–1967' (2001) 33 (4) *NYU J. of International Law and Politics* 923–1000; D. Kretzmer, *The Legal Status of the Arabs in Israel* (Boulder, Colo., 1990) 58–9, M. Hofnung, *Israel: Security Needs vs. The Rule of Law* (Jerusalem, 1991) (Hebrew).

Before getting into the examples however, a short background is necessary.[101]

Following a prolonged ethnic struggle between the Jews and the Arabs in Palestine, the United Nations voted on 29 November 1947 in favour of the partition of Palestine.[102] The Jews accepted the partition plan and, immediately following the end of the British Mandate then in force, 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 Palestine's Jewish and Arab communities.[103] During and following the 1948 Israeli 'War of Independence' (known as *al-Nakba*, or 'the Catastrophe', among the Palestinians), Israel/Palestine experienced extensive population movements. This included the flight and expulsion of some 700,000 Palestinians who resided in the territory to become Israel,[104] and the arrival of a similar number of Jews fleeing from Europe (mainly Holocaust survivors) and Islamic countries.[105] Some 160,000 Palestinian Arabs remained after the 1948 war in Israel and received its citizenship.

These massive demographic changes during the early years of Israel's existence played a central role in shaping an ethnic structure consisting of

[101] This section is a condensed version of Kedar and Yiftachel, n. 4 above, and Kedar, 'The Legal Transformation', n. 100 above.

[102] The resolution was accepted by the Jews and rejected by the Arabs. For a more extensive depiction of the history of this strife, and for references, see Kedar, 'The Legal Transformation', n. 100 above, Kedar and Yiftachel, n. 4 above.

[103] The War resulted in Israel controlling most of the territory, while most of the rest came to the control of Jordan and Egypt. E. Benvenisti and E. Zamir, 'Private Claims to Property Rights in the Future Israel-Palestinian Settlement' (1995) 89 *American Journal of International Law* 295, 297; G. Bisharat, 'Land, Law, and Legitimacy in Israel and the Occupied Territories' (1994) 43 *American University Law Review* 467, 502.

[104] The estimates of the number of Arab refugees and of those who remained in Israeli vary. See R. Patai (ed.), *Encyclopedia of Zionism and Israel* (New York, 1971), 72; W. Lehn, *The Jewish National Fund* (London, 1988), 95; E. Said, *The Question of Palestine* (London, 1980), 14, 45; J. Abu-Lughod, 'The Demographic Transformation of Palestine' in I. Abu-Lughod (ed.), *The Transformation of Palestine* (Evanston, Ill., 1971), 140, 153–61; B. Morris, *The Birth of the Palestinian Refugee Problem, 1947–1949* (Cambridge, 1987). See also B. Morris, 'The Origins of the Palestinian Refugee Problem' in L. Silberstein (ed.), *New Perspectives on Israeli History: The Early Years of the State* (New York, 1991) 42–3; G. Gilbar, 'Trends in the Demographic Development of the Arabs in Eretz-Israel, 1870–1948', *Cathedra*, (1998) 45, 43 (Hebrew); J. Landau, *The Arabs in Israel: A Political Study* (London, 1969), 3; S. Jiryis, *The Arabs in Israel* (New York, 1976), 289; Palestine Liberation Organization, Department of Refugee Affairs, *The Palestinian Refugees 1948–2000: Factfile* (Ramallah and Jerusalem, 2000).

[105] The small number of Jews that lived in the areas of Palestine that came under Arab control moved to Israel, as did the majority of Jews who until that point lived in Arab countries (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 also arrived in Israel. Benvenisti and Zamir, n. 103 above, 297.

three major layers.[106] With a certain degree of overgeneralization, it is possible to characterize the ethno-class stratification of Israel during its formative period according to the ethnocratic model as follows:[107] those Jews that resided in Palestine before the creation of Israel constituted the dominant 'charter' group of 'founders'. As this group originated principally from Christian countries (*Ashkenazim*), many Jews arriving after the creation of Israel from similar backgrounds were better integrated into this social layer. *Mizrakhi* Jews, coming from Islamic countries, made up the 'immigrant' group and many of them continued for several generations to occupy secondary social and geographical positions.[108] Those Palestinian Arabs that remained in Israel and became its citizens form the third 'indigenous', 'local', or 'alien' group and occupied the peripheries of Israeli space and society.

Legalizing Dispossession

In 1948, only approximately 13.5 per cent of the Israeli territory was publicly owned and controlled.[109] To remedy this undesired situation, Israel initiated simultaneously with its creation a comprehensive policy geared to establish a new land regime. This regime was based on: (1) nationalization and Judaization of the land, (2) centralized control of this land by state and Jewish institutions (mainly the Jewish National Fund), and (3) selective and unequal allocation of possessory rights to Jews, in ways that mainly favoured the 'founders'. In this chapter I focus on the first component.[110] Israel strove to own and control without delay as much as possible of its sovereign space. Undoubtedly, this goal has largely been met. By the 1960s approximately 93 per cent of the Israeli territory came into the formal ownership and effective control of public and Jewish institutions aggregated together into *Israel Lands* (*Mekarkei Israel*).[111] This achievement rested on two major sources: formal registration of state and ownerless land, and the nationalization of Palestinian land, upon which I focus here.

The property of the Palestinian refugees was fully transferred to public/Jewish ownership. In addition, Palestinians that remained and became Israeli citizens lost approximately 40–60 per cent of the land they had possessed.[112] 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.[113] I will draw my examples from these two pieces of legislation, and the case law associated with them.[114]

I have argued in the third section that settlers' law and courts play an important role in the creation and legitimation of new land regimes. I have emphasized the importance of formal rules and legal techniques in the creation and endurance of these land regimes. I would like to stress here two additional points. The first is that legal legitimation can work only if it makes good on some of its promises to justice and equity.[115] Secondly, I believe that in the case of ethnocratic societies, the major audience of legitimation is not so much the 'indigenous' group, which is often controlled either by direct use or threat of force, or alternatively feels that it has no chance to change the system. I believe that the major audiences of the legal legitimation project belong to the two groups

[106] I am of course aware of the need for a more in-depth and nuanced analysis, focusing on the important differences existing within each layer, the changes taking place within the groups' internal structures, and the continuing evolution of the relationships among them.

[107] The ethnocratic model is a dynamic one, and changes do occur over time. The picture I present here is a generalization of the social structure in the years immediately following the creation of Israel.

[108] The picture is complicated. I do not mean that all Ashkenazi Jews fitted easily into the social framework devised by the 'founding' group. However, overall it seems that the proportion of immigrants coming from Christian and especially eastern European backgrounds, who successfully integrated was much higher than the proportion of Jews coming from Muslim countries.

[109] At the end of the war, Israel controlled an area covering approximately 20.6 million dunams (about five million hectares) of land. However, land officially owned by Jewish individuals and organizations amounted to only approximately 8.5% of the total area of the state. With the addition of land that was formerly owned 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: R. Kark, 'Planning, Housing and Land Policy 1948–1952: The Formation of Concepts and Governmental Frameworks' in I.S. Troen and N. Lucas (eds.), *Israel: The First Decade of Independence* (Albany, NY, 1995) 461, 478; see also A. Granot, *Netivot U Meflasim* (Jerusalem, 1952), 133–4 (Hebrew); Y. Malman, 'A Dunam Plus a Dunam are Worth Billions', *Ha'aretz*, 20 Apr. 1997, B3 (Hebrew).

[110] For a review of the other components see Kedar and Yiftachel, n. 4 above, Kedar, 'The Legal Transformation', n. 100 above.

[111] That is the state, the Development Authority, and the Jewish National Fund, which form together 'Israel Land'. See s. 1 of Basic Law: Lands of Israel (1960).

[112] Kark, n. 109 above; Kedar, n. 100 above, 684; A. Golan, 'The Transfer to Jewish Control of Abandoned Arab Lands during the War of Independence', in Troen and Lucas (eds.), n. 109 above, 403–40; H. Cohen, *Present Absentees: The Palestinian Refugees in Israel Since 1948* (Jerusalem, 2000), 100 (Hebrew); Yiftachel and Kedar, n. 4 above.

[113] Absentees' Property Law, 37 Sefer Hachukim (Laws of the State of Israel) 20/3/50, 86; Land Acquisition (Validation of Acts and Compensation) Law, 122 Sefer Hachukim 20/3/53, 58. Kedar, *Israeli Law and the Redemption of Arab Land*, n. 100 above; Kedar, n. 100 above, 684; I. Lustick, *Arabs in the Jewish State: Israel's Control of a National Minority* (Austin, Tex., 1980); Kretzmer, n. 100 above; Hofnung, n. 100 above.

[114] In the mid-1950s a new phase began, based mainly on settlement of title. I have analysed it in 'The Legal Transformation', n. 100 above.

[115] 'The ruling class confirms its rule by actually making good on enough of its utopian promises to convince potential opposition that the system is tolerably fair and capable of improvement, even with all its faults': Gordon, n. 34 above.

constituting the 'nation'—the 'founders' and the 'immigrants', as well as international audiences.[116]

Though I review in each of the following sections both legislation and case law, the judges' role in the legitimation project is especially interesting in my opinion. The adjudication of the early land dispossession cases by the Israeli Supreme Court judges reveals the two traits mentioned earlier. It seems that these judges attempted to convince themselves, the Jewish population in Israel, and the international community that, notwithstanding the radical changes in its land regime, Israel is a democratic state, based on a rule of law administered impartially by an independent and equitable court system. To convince these varied audiences, and also to attempt to persuade some of the Arab citizens of Israel, the Court had to deliver some of these promises especially in the founding moment of the Israeli land regime.

Absentee Property Legislation

The immediate period following the War saw the Israeli authorities adopting an ambivalent policy toward Palestinian refugees, permitting tens of thousands to return. Soon, however, Israel embraced a policy that called for 'barring the return of refugees'.[117] Simultaneously, Israel began to lay the legal foundations of its new land regime.

The Absentee Property Regulations provided a major component to this new land regime.[118] This legislation displayed many of the characteristics of settlers' law outlined in the previous section. It granted far-reaching discretion to the Israeli authorities. For instance, all property belonging to an 'absentee' was vested in a Custodian of Absentee Property (CAP) with need for no further legal action, thereby imposing the legal onus on the landholder to prove that he was entitled to retain the land.[119] The Regulations also constructed professedly 'neutral' legal categories, which encompassed in reality only Palestinians. Formally, the definition of an 'absentee' was 'colour blind'. It included any person who resided in Arab countries that participated in the War, or in any part of Palestine not under the Israeli military control, or any British-Mandate Palestinian citizen that abandoned his place of habitual residence.[120] By this very definition, practically all Palestinian refugees, who predominantly moved to Arab countries or outside the area controlled by Israel, automatically became 'absentees'. Furthermore, the inclusion of any person who 'abandoned his place of habitual residence' was so all-encompassing that it could potentially include many Jewish and Arab Israeli citizens. Indeed, a 1949 law review article warned that the language of the Regulation captured not only Arabs, but also many Jews. The author, Dr Vaks, asked rhetorically: '[d]id the legislators intend that these regulations would apply also to Israeli Jews resident in Israel [?] If the regulations were meant to apply *only to Arabs*, then it should be said plainly and clearly in the regulations or in attached explanation'.[121] Indeed, while ethnocratic legal regimes usually do not dispossess the dominant ethnic group, they devise systems of differentiation, and construct legal categories that facilitate the application of discriminatory rules without admitting it. Not surprisingly, another author answered Dr Vaks' suggestion, explaining that Israel could not openly discriminate and enact separate laws for Arabs and for Jews. Instead, he suggested utilizing the particular exemption clauses of the regulations.[122] Indeed, the regulations included sophisticated mechanisms that resulted in a routine exception of Jews from the status of 'absentees'. For example, section 28(a) compelled the CAP to issue an exemption certificate to any person who, though he came under the formal definition of an absentee, had left his habitual residence 'out of fear of Israel's enemies'.[123] The actual practice of the CAP resulted in a systematic exemption of Jews. Simultaneously, several tens of thousands of Arabs who became Israeli citizens nevertheless became absentees and acquired the irreconcilable title of 'present absentee'—one that would haunt them for the rest of their lives.[124]

[116] Compare Gordon, 'The ruling class itself is taken in by legal ideology; it believes that it's acting justly when it acts according to the law, that everyone *is* getting approximately the best possible deal'. (In fact, in the case of the ideology of the 'rule of law', middle-class people are rather *more* sold on it than working- or lower-class people.) 'Law isn't just an instrument of class domination, it's an arena of class struggle'. The content of legal rules and practices is ideologically tilted in favour of '. . . the reproduction of current modes of hierarchical domination, . . . but ruling classes don't have everything their own way . . .' Gordon, n. 34 above.

[117] See Bisharat, n. 103 above, 504. See also T. Segev, *1949: The First Israelis* (New York, 1986), 30.

[118] The Regulations, which supplemented earlier decrees, were first enacted in Dec. 1948, but published only at the beginning of 1949: Absentee Property Regulations, 1949, 37 IR 59 Supplement No. 2. A special governmental committee started to draft the regulations during the War. See 3 *Knesset Record* 163, 167. Apart from several meaningful changes introduced in the permanent legislation (the Absentee Property Act (1950)), these regulations set down the fundamental law governing absentee property.

[119] See s. 5 of the Regulations.

[120] The definition of 'absentee' included any person on who on or after 29 Nov. 1947 was one of the following: (1) a citizen or subject of Lebanon, Egypt, Syria, Saudi Arabia, Jordan, Iraq, or Yemen; (2) in any of these countries or in any part of Palestine outside the area of the Regulations; (3) was a Palestine citizen who had abandoned his place of habitual residence. The definition also included any organization, official or not, responding to similar conditions becoming absentee. See s. 1(a).

[121] Dr. A. Vaks, 'A Comment on the New Absentee Property Regulations', *Hapraklit*, (1949) 6, 28, 29. Emphasis in original.

[122] S. Yifrah, 'Absentee Property', *Hapraklit*, (1949) 6, 92.

[123] See s. 28(a). S. 28(b) and ss. 29 and 30 prescribed additional conditions under which the Custodian of Absentee Property could release an individual or his property from the status of absentee.

[124] See Bisharat, n. 103 above, 513. According to Lustick, n. 113 above, 173–4, almost half the Palestinians who remained in Israel became 'present absentees'. Kretzmer, n. 100 above, 57, estimates similarly that about 75,000 Arabs became 'present absentees'. According

As I have argued in the previous section, the burden of proof is an important tool in the dispossession of native land. Steve Wexler notes that many facts cannot be proven in court and therefore must be assumed. If the burden of proof is imposed on a certain side or social category, 'when it comes to the making of decisions, it turns out that rarely, if ever, can the burden of proof be met. What a surprise! This is the way law works: it is more likely to reach the conclusions it starts out assuming'.[125] The drafters of the Regulations probably understood this point. They provided the CAP with potent evidentiary powers and gave him the possibility easily to shift the burden of proof on to land possessors. The CAP could appropriate any property on the strength of his own judgement. All he needed to do was certify in writing that a person, body of persons, or property came under the status of 'absentee' or absentee property. The burden of proof that it or they did not come under these categories fell upon the owner or person involved.[126] If this did not suffice, the Custodian was also immune from revealing the source of his information that led him to classify a person as an absentee.[127]

Notwithstanding the sweeping scope of the Regulations, they were nevertheless temporary legislation. For instance, the CAP could not transfer the ownership of the land vested in him, but only lease it for short-term periods.[128] Soon, however, Israel established a more enduring arrangement. In late 1949, the Knesset began an intensive debate over the enactment of permanent legislation, the Absentee Property Act.[129] In its effort to convince opponents to support the statute, the government invoked the legitimizing authority of the courts. For example, in justifying the statute, Finance Minister Eliezer Kaplan emphasized that the Regulations had been examined several times by the Israeli courts and

to Don Peretz, 'Every Arab in Palestine who had left his town or village after November 29, 1947, was liable to be classified as an absentee under the regulations. All Arabs who held property in the New City of Acre, regardless of the fact that they may have never traveled farther than the few meters to the Old City, were classified as absentees. The 30,000 Arabs who fled from one place to another in Israel, but who never left the country, were also liable to have their property declared absentee. Any individual who may have gone to Beirut or Bethlehem for a one-day visit, during the latter days of the Mandate, was automatically an absentee': D. Peretz, *Israel and the Palestine Arabs* (Washington, DC, 1958), 152.

[125] S. Wexler, 'Burden of Proof, Writ Large' (1999) 33 *University of British Columbia Law Review* 75, 78.

[126] This power was criticized by several members of the Israeli Parliament during the debate on the permanent legislation. See, e.g., the criticism of Y. Bader of the right wing Herut party, (1949) 3 *Knesset Record* 139–40, 144.

[127] See ss. 12, 32.

[128] The regulations were periodically renewed until the 1950 enactment of the law of absentee property. See, e.g., Statute for the Extension of the Force of Security Regulations Concerning Absentee Property, (1949) 12 IR 57; Statute for the Extension of the Force of Security Regulations Concerning Absentee Property (1949) 27 IR 12.

[129] In this chap. I will not be able to describe the interesting and even unusual coalitions of supporters and opponents in the Knesset debate.

had received 'their honorable sanction'.[130] Likewise, Justice Minister Pinhas Rozen, a member of the centrist-liberal 'Progressive Party', comforted those among his colleagues who questioned the far-reaching arrangements in the statute. Members of the Knesset should not be overly concerned, he explained, since the courts would monitor the extensive powers of the Custodian. Should the CAP act in a way that is not in accordance with his duties, the court's doors are wide open.[131] As will be seen, the Supreme Court's interpretation of this statute did not fully fulfil these assurances.

The statute contained a clause allowing the CAP to transfer the full ownership of all land vested in him to a new entity called the 'Development Authority'.[132] Furthermore, though an amendment geared to exempt the Palestinians legally residing in Israel (the 'present absentees') received a cross-section of support,[133] the amendment was rejected. A small minority enacted the statute essentially as the government proposed it.[134]

Patterns of Supreme Court Adjudication of Absentee Property Cases

When the initial shock of the War had waned, 'absentees' began to approach the Israeli courts.[135] Most Palestinians defined as 'absentees' were refugees that could not reach the Israeli judiciary. As the effort to exempt Arab citizens of Israel from the status of absentees failed, the Supreme Court encountered mainly those 'present absentees'. In adjudicating such cases, the Court had limited authority. Since Israel had adopted the British model of parliamentary supremacy, the Supreme Court lacked the power of judicial review over statutes. Consequently, the Court could not forthrightly invalidate the absentee property legislation.[136] However, like certain common law courts, the Israeli Supreme Court enjoyed broad powers of interpretation and classification that potentially gave it substantial leeway. Accordingly, litigants approaching the Court did not directly contest the absentee legislation as such but attempted instead to persuade the Court to exclude them from its scope.

[130] (1949) 3 *Knesset Record*, 139.

[131] (1949) 3 *Knesset Record*, 165–6.

[132] See s. 19(a) of the Absentee Property Act 1950.

[133] Members of the General Zionists, United Religious, Mapai, Mapam, Nazareth Democrats, and Communist parties voted for it. Two-thirds of members present abstained.

[134] The vote was 26 in favour, and 18 against, out of the 120 members of the Knesset. Reported in Peretz, n. 124 above, 172.

[135] Apparently the first litigation of an Arab against the CAP reached the Supreme Court in September 1949, as an appeal from a District Court decision from June 1949. See AC 48/49 *The CAP* v. *Gyres Saba Slati*, PD 3 61. Until the end of 1950 fewer than half a dozen such cases reached the Supreme Court.

[136] I refer to the term 'Absentee Legislation' to include both the Absentee Regulations and the Absentee Statute.

Certain petitioners attempted to persuade the Court that since they never left their residences they were not 'absentees'.[137] At first, the Court displayed a neutral, if not even sympathetic, approach toward those present absentees reaching it. If an Arab could convince the Supreme Court that the CAP groundlessly classified him as an absentee, he had a reasonable chance of winning his case. Simultaneously the Court also instructed the CAP to exercise more effectively the extensive legal powers he commanded. Thus, in a 1950 case, the Court accepted the contention of a Christian Arab that the CAP failed to refute the *prima facie* evidence he produced proving that he was not an 'absentee'.[138] While ruling in favour of the petitioner, the Court also reminded the CAP that he enjoyed potent evidentiary power at his disposal: according to the absentee legislation, the Custodian could issue a written certificate, declaring a person or property absentee. This shifted the onus to the claimant to disprove it.[139] In a later case, the Court even allowed the CAP to issue the certificate while the Court proceedings were pending. As the petitioner failed to fulfil the onus, the Court dismissed the petition.[140] In another case however, the Court decided that the Arab landholder successfully fulfilled the onus, and refuted the *prima facie* presumption created by the issuance of the certificate.[141] Thus, in individual cases, the Court made sure that the CAP did not exceed his legal authority. At the same time, the court took it upon itself to remind the CAP of his immense powers and instruct him how to use them efficiently.

Then, in the mid-1950s the Court confronted a question of a different magnitude. As in previous cases, the petitioners argued that they had never left their habitual place of residence and therefore their property

[137] Such litigants maintained that the actions of the CAP were *ultra vires*.

[138] Mazlah Joseph, a Christian Arab, petitioned the Supreme Court against the appropriation of his land by the CAP. The petitioner argued that he should not have been classified as an absentee: he had produced *prima facie* evidence that he had never left his village, and proved that he held an Israeli identity card. Apparently, while at first some of the elders of the village supported his claim, later some of them claimed that he had left to go to Lebanon. The Court ruled that the CAP's belief that Joseph was an absentee, or the existence of rumours that the petitioner had left the country for Lebanon during the war did not suffice to refute the evidence produced by the petitioner: BGZ 91/50 *Mazlah Yoseph* v. *The Inspector of Absentee Property*, PD 5 154. (Opinions by Beker and Dunkelblum JJ, Asaf concurring. Decided in Jan. 1951.)

[139] See s. 32 of the Emergency Regulations (Absentee Property) and s. 30 of the Absentee Property Act that replaced them. Additional evidentiary advantages made it extremely difficult for a person to challenge the facts stated in such a certificate. E.g., normally, the CAP could not be questioned as to the source of his knowledge. See s. 32 of the Regulations, and s. 30 of the Statute. In Mazlach, not only did the Court remind the CAP that he could issue the written certificate, but it also stressed that the decision did not preclude the Custodian from issuing such a certificate at a later date.

[140] See *Abed Elkader El Matri* v. *The Custodian of Absentee Property*, Psakim 4 347. (Decided in May 1951, Zilberg and Vitkon concurring.)

[141] AC 216/58 *The CAP* v. *Mery Habib Hana*, PD 13 740. (Decided by Justice Hashin in April 1959, Agranat and Berinzon concurring.)

should not be classified as absentee property. However in *The Custodian of Absentee Property* v. *Samara*, while the petitioners did not leave their residence, the residence itself was displaced.[142] The Rhodes Armistice Agreement between Jordan and Israel (1949) determined that the area known as the 'Triangle' would be turned over to Israel. This gave Israel sovereignty over additional thousands of Palestinians, among them the respondents. The dispute focused on a particular segment of the respondents' property. Before the enactment of the Rhodes Agreement, while the respondents' home and part of their land were in Jordanian territory, additional tracts were already in Israeli territory.[143] While leaving untouched the land that had just come under Israel, the CAP declared the tracts initially in Israeli jurisdiction to be 'absentee property'. He reasoned that as the respondents had resided in an area situated outside Israeli jurisdiction they qualified as absentees.[144] The respondents argued that the Custodian's action violated the Rhodes Agreement, which stipulated that the residents of the villages transferred to Israel 'shall be entitled to maintain, and shall be protected in, their full rights of residence, property and freedom'.[145]

Yet, in such issues, the courts of the conquerors often defer to their sovereigns, and treaties protecting native and alien groups have a long history of infringement. This often happened to native peoples. Additional 'aliens' who did not constitute an integral part of the settler's nation suffered as well. For example, following the Mexican–American War, the United States acquired vast amounts of territory from Mexico. The conquest also incorporated a significant population of Chicanos, many of them holding land.[146] The war ended with the enactment of the Treaty of Guadalupe Hidalgo (1848). As Guadalupe Luna explains, the Treaty contained provisions that promised to protect the private property of the conquered population.[147] Several articles, in a language

[142] AC 25/55 *The CAP* v. *Abed El-Latif Samara and Others*, PD 10 1825. (Decided in Dec. 1956, by Justice Berinzon, Hashin and Susman concurring.)

[143] As they were conquered during the War.

[144] The CAP believed them to be absentees according to Regulation 1(a)(1)(b) of Security Regulations (Absentee Property) 1948. During the crucial period: (1) they owned property in the area under Israeli jurisdiction and (2) they stayed in a section of Eretz Israel outside the Israeli jurisdiction.

[145] The Treaty Between the Hashemite Jordan Kingdom and Israel: General Armistice Agreement, Signed at Rhodes on 3 Apr. 1949, s. 6(6), reproduced in R. Lapidoth and M. Hirsch (eds.), *The Arab-Israel Conflict and its Resolution: Selected Documents* (Dordrecht, 1992), 89. See also AC 25/55, n. 142 above, 1828.

[146] See G. Luna, 'Symposium: En el Nombre de Dios Todo-Poderoso: The Treaty of Guadalupe Hidalgo And Narrativos Legales' (1998) 5 *Southwestern Journal of Law and Trade in the Americas* 57, 58.

[147] The Treaty promised that the Chicanos, and their heirs, 'and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States': ibid., at 58.

reminiscent of the Rhodes Agreement, 'secured Mexicans in their title' and guaranteed to them 'the same protection of law that it extended to the citizens of the United States'.[148] Yet, according to Luna, by the turn of the century, despite the presumed protection of their property in the Treaty and in the Constitution, Chicanos lost most of their land, a great deal of it due to the American Court's adjudication.[149]

Similarly, while the District Court ruled in favour of Samara, the Supreme Court reversed the decision and endorsed the CAP's pronouncement that the land was absentee property. According to the Supreme Court, the Rhodes Agreement did not intend to offer the villagers any rights additional to those they enjoyed before their annexation to Israel.[150] The Court also emphasized that the agreement was by no means subject to the judicial powers. The treaty was signed between two governments and the rights and obligations it set forth were solely for the states involved to enforce.[151]

Moreover, dominant groups produce 'legal belief structures' that justify dispossession with 'an abstract professional discourse' which claims 'neutrality in process and outcome'.[152] Simultaneously, judges regularly deny their own ideological choices in interpretation and attempt to project a rhetorical effect of legal necessity to their adjudication.[153] It is not surprising therefore that, in reversing the decision, Judge Berinzon claimed that the Supreme Court judges 'understand and appreciate the human goal and wish of the District Court judges . . . to recognize the rights of the respondents' as equal citizens. However, 'as judges we are not free to refrain from rendering the correct interpretation of the law just because the result might seem to us unsatisfactory' the Court concluded and reversed the lower court's decision.[154]

Another line of adjudication encountered by the Supreme Court involved litigants asking to be exempted from the status of absentees. These petitioners admitted that they had left their habitual residences, and therefore formally qualified as 'absentees'. However, they argued that the CAP should grant them a non-absentee certificate since they left their residences 'not because of military operations, nor for fear of them

[148] Luna, n. 146 above at 72.

[149] See G.T. Luna, 'Beyond/Between Colors: On the Complexities of Race: The Treaty of Guadalupe Hildago and Dred Scott v. Sanford' (1999) 53 *University of Miami Law Review* 691.

[150] The protection did not extend therefore to land located in territory belonging to Israel prior to the annexation.

[151] AC 25/55, n. 142 above, 1829–31.

[152] Gordon, n. 47 above, 649, Minda, n. 35 above, 110.

[153] Kennedy, n. 34 above, 19.

[154] In such cases, the legislature could address the problem. AC 25/55, n. 142 above, 1834.

or for fear of Israel's enemies'.[155] It is noteworthy that the few individuals who reached the Supreme Court in the earlier period requesting to be defined as non-absentees were not typical Muslims Arabs.[156] Litigants were either Christian Arabs[157] (who enjoyed a somewhat better status[158]), or persons who could prove a special link to Israel, such as a petitioner who originally left Palestine on a spying mission for the State of Israel but who upon his return was categorized as an absentee.[159]

Notwithstanding the potent powers granted to the CAP, in the years immediately following the War, the Court managed to craft canons of constructions that limited the CAP'S discretion and compelled him to grant the desired exemption. Thus, Ashkar, a blind Christian Arab, succeeded in releasing himself from the category of absentee. He argued that he was groundlessly classified as an absentee and that he never received the chance to refute the evidence purporting to support this classification. In accepting the petition, the Court acknowledged that the absentee laws provided the authorities with extensive power 'as this emergency hour demands'.[160] However, the extensive powers granted by the legislator compel the authorities 'to act with composure and with an attitude of honesty and understanding of the consequences they might cause. Even the most extensive authority does not justify arbitrariness or obstinacy out of stubbornness or a feeling of wrangling.'[161] The Court trenchantly

[155] He was obliged to execute his powers according to s. 28(a) of the regulations (27(a) of the Statute). S. 28(a) of the Regulations stated that if the Custodian is of opinion that a certain person, who could be defined as absentee according to s. 1(b)(1)(III) left his living place—(1) because of fear that the enemies of Israel would harm him, or (2) not because of military actions or fear of them, the Custodian must give that person, on his demand, a written certificate that he is not an absentee.

[156] Muslims were the dominant majority of Arabs in Israel.

[157] e.g., a blind Christian Arab who apparently was denounced as an absentee by a neighbour who coveted his shop. See BGZ 43/49 *Ashkar* v. *The Inspector of Absentee Property*, PD 2 926 (decided by Dunkelblum and Ulshan, Zilberg concurring). In BGZ 3/50 *Emili Kauer and Others* v. *The CAP*, PD 4 654 (decided in July 1950 by Justice Ulshan, Dunkelblum and Zilberg concurring) the Court began its opinion by mentioning that one of the petitioners served as a civil servant during the Mandate. Two of the daughters were married to Englishmen and live abroad.

[158] See M. Abu Ramadan, *Les Minorités en Israel et le Droit International*, Ph.D. Dissertation, Aix-en-Provence, 2001.

[159] BGZ 99/52 *Palmoni* v. *The CAP*, PD 7 837 (decided by Judge Landau on 21 Aug. 1953, Ulshan and Asaf concurring).

[160] BGZ 43/49, n. 157 above, 935.

[161] BGZ 43/49, n. 157 above, 935, by Judge Dunkelblum. Ashkar, a blind Christian Arab and a legal resident of Haifa, possessed an Israeli identity card and participated in the national elections. In Jan. 1948 he temporarily moved to Fassutah, a northern village in the Galilee (which was then not yet under Israeli occupation), but returned to Haifa in Mar. 1948, before the conquest of the city by the Hagana. Ashkar claimed that, being the only Christian in his neighbourhood, he had left Haifa out of fear of 'foreign gangs' (probably meaning irregular Arab forces). In Dec. 1948, after the inspector of Arab property had established that Ashkar had not left Haifa since its conquest by Jewish forces, Ashkar was permitted to collect rent from his home in Haifa and to lease a shop in the city. Shortly afterwards, Ashkar was denounced as an absentee by one G'eris Salum who

criticized the 'domineering methods' applied to the petitioner and ruled in his favour.[162] Likewise, though its circumstances during the War fitted nearly to the letter the legal definition of 'absentees', the Court nevertheless released a Christian family with close British connections from that status.[163] The Court conceded that the discretion rested in the CAP 'to be of the opinion' that the circumstances justified the issue of the certificate. Nevertheless, it ruled that the legislator did not supply the CAP with 'magic words' immunizing him from judicial interference.[164]

Before long however the Court retracted from this line of liberal precedents.[165] The particular circumstances in *El Fahum* v. *The Custodian of Absentee Property* apparently gave legal support to the CAP's decision not to grant El Fahum a non-absentee certificate.[166] However, in dismissing El Fahum's request, the Court also greatly expanded the scope of the CAP's discretion.[167] The Court decided now that, in order to succeed, the

coveted the shop and argued that Ashkar had procured his contract under false pretences. The Custodian of Absentee Property, not taking the time to hear Ashkar's version, issued a certificate declaring him an absentee and ordering him to evacuate his shop. Ashkar requested the Supreme Court to issue an order requiring the Custodian to annul the certificate, cancel his status as an absentee, and allow him to reclaim ownership of his shop, with regard to which he had a contractual obligation. Justice Dunkenblum decided that the evidence against Ashkar had been unsubstantiated. Furthermore, the Custodian of Absentee Property could not issue a certificate declaring a person an absentee without first hearing from the person in question. In the case of Ashkar, if he could prove that he had left Haifa out of fear of Israel's enemies, the Custodian was obliged to issue him with a certificate stating that he was not an absentee.

[162] 'It seems that the Custodian of Absentee Property was of the impression that the [Absentee] regulation gives him unlimited power to violate or cancel binding agreements, and, simultaneously, to lend this action legal sanction by issuing a verdict favorable to himself': BGZ 43/49, n. 157 above, 937. The Court decided to accept Ashkar's first two requests, that is, it ordered the CAP to annul the classification of both Ashkar and his property as absentees. Yet it left the solution of the dispute over the shop to the regular courts.

[163] BGZ 3/50, *Emili Kauer and Others* v. *The CAP*, PD 4 654. Undoubtedly, a forceful evacuation of Arabs in the Jewish area of Haifa, effected in Dec. 1947 by Jews who stated that Arabs would not be tolerated in a Jewish quarter since Jews were no longer tolerated in Arab quarters, could easily be attributed to military operations or fear of them. Furthermore, the circumstances of this family at the end of 1947 and the beginning of 1948 reinforced the opinion that they were forced to move from one place to another because of military operations or fear of them. The full story of the family is more complex. See ibid., at 655, 658.

[164] The court ordered the issue of the requested certificate. 'It would be absurd', explained the Court, 'that the only situation in which a court could force the Custodian to adhere to the law would be one in which the Custodian acknowledged that he believed the petitioner but nevertheless refused to issue him with the certificate': ibid., at 660–1.

[165] BGZ 100/63, *El-Fahum* v. *The CAP*, PD 17 2274 (decided in 1963 by President Ulshan, Susman and H. Cohen concurring). I have found no published decisions of the Supreme Court on the subject decided between 1953 and 1963.

[166] El-Fahum, an Israeli citizen, appears to have left Israel in July of 1948 for Lebanon, where he remained until 1949. The credibility of El Fahum's contention that he had left Israel for medical reasons—and was therefore entitled to a non-absentee certificate—was a shaky one. See BGZ 100/63 at 2274–5.

[167] The Supreme Court distinguished an earlier case, in fact limiting it to its specific circumstances: BGZ 100/63 at 2276.

petitioner must convince the Court that the CAP's refusal to issue the certificate is so 'logically untenable that it warrants our intervention to compel [the CAP] to believe' the petitioner's version and issue the certificate.[168] Thus, a new canon of construction has been silently instituted. The grounds for challenging the authorities in absentees' decisions were hardened, while the Court's interference with their discretion was severely limited, leaving Arab landholders with diminished protection against their dispossession.

The shift in the canon of construction was manifested in other areas as well. For example, in an early case, the Supreme Court offered a very limited interpretation to section 17 of the Absentee Property Act. The section legalized property transfers effectuated by the CAP even if the CAP made a mistake and the owner of the property was not an absentee. It is important to note that the Court's equitable interpretation was advanced in a case involving a Jew whose property was mistakenly transferred by the CAP. In this decision, the Court ruled that section 17 was 'exceptional and deviated from the legal norms established in any civilized nation'.[169] While it did not invalidate the section (an action that lay outside the constitutional rules of the period), the Court decided that it would 'restrict the section as much as feasible . . . without distorting the express words of the statute'.[170]

Nonetheless, a decade later, when an Arab woman relied on the precedent to attack the CAP for transferring her property even though she was not an absentee, the Court opted for a very different construction formula.[171] While the Court formally recognized its own precedent, it restricted its scope in a way that demonstrated the relative weight it gave to private property and to the perceived interest of the (Jewish) collective. Simultaneously, the Court's reliance on a regular property doctrine

[168] The judges would interfere only if they had sufficient ground to hold that the CAP, by refusing to accept the petitioner's version, 'did not act as a person of common intelligence, and did not have a reasonable ground to reject' the petitioner's version: BGZ 100/63 at 2276. Furthermore, the petitioner also attempted to convince a special committee to release his property from the status of absentee property: BGZ 100/63 at 2275. The Committee refused on the ground that the land was intended for agricultural (Jewish) settlement. Rejecting the petitioner's argument that this was an unreasonable justification, the Supreme Court refused to intervene. The court decided that it would intervene only if the function is performed illegally, such as without good faith or with discrimination. The court also stressed that the Committee was not a formal party to the litigation. 'In many occasions this Court has declared that it would not take upon itself functions imposed by law on various institutions of the state': BGZ 100/63 at 2277.

[169] AC 131/53, *Mirza* v. *Avraham Binkovsky*, PD 8 1461, 1465 (decided in Nov. 1954 by Goytoyn and Zilberg, Berinzon concurring).

[170] Ibid., at 1468. It also decided that it should be 'limited rather than expanded': ibid., at 1467.

[171] AC 170/66, *Vashfia Piad* v. *The CAP*, PD 20(4) 433 (decided by Justice Landau, in Oct. 1966, Halevi and H. Cohen concurring). The Custodian offered to pay her what he had received for her property, but she demanded that her land be returned to her.

concerning good-faith transactions helped integrate the absentee legislation within the general framework of property law, and 'normalized' it.[172]

Thus, just like in its decisions in other segments of absentee legislation, the Court retracted from its earlier interventionist canon in favour of a deferring attitude. Furthermore, the rhetoric of the decision simultaneously professes the limits of the Courts of the Conquerors, while it legitimizes a provision defined only a decade earlier as deviating 'from the legal norms established in any civilized nation'.

> This Court should not question the extent of justice or wisdom in this legislative solution, as long as the meaning of the statute is clear. In any event, one should remember that the whole Absentee Property Act came to address incidents occurring at that time—with the abandonment of properties occurring on a large scale—and the need to use these properties for the pressing aim of Olim (Jewish New Immigrants) settlements and development projects. In these circumstances it was difficult to prevent mistakes occurring due to lack of information—as the present case demonstrates—and not always is it easy to reverse the situation.[173]

These and similar examples demonstrate a shift that took place in absentee doctrine.[174] The earlier cases demonstrate in my opinion that a different canon of construction existed within the Israeli legal system. Sometimes, it was applied by the same judges that later changed the canon. This transformation took place covertly. The judges did not acknowledge the shift. The result of this transformation has been that the chances of absentees securing their property were gradually diminished. This process took place not through changes in legislation, but through technical adjustments, seemingly unimportant, but effectively amounting to a judicial dispossession of Israeli Arabs. The hardening of judicial attitude began roughly in the second third of the 1950s. It coincided with another important piece of legislation, the Land Acquisition Act.

[172] 'Indeed, one should not easily injure a right of property in land, and therefore comes the need to narrowly interpret Sec. 17(a). Sometimes, however, even the proper protection of the right of property should retract before a more important consideration. Such a consideration . . . for example, . . . prefers the right of good faith purchase for value over the right of the real owner. . . . Likewise, the sections of the Absentee Property Act clearly indicate the legislator's intention to prefer the security of transactions concluded by the Custodian of Absentee Property in good faith over the protection of the right of property of the real owner': *Vashfia Piad* v. *The CAP* n. 171 above, at 436.

[173] Ibid., at 436. The Court concluded therefore that s. 17 barred the appellant from regaining her property. The Development Authority offered alternative land to the appellant and the Court recommended that such a settlement should be concluded. In the meantime, the Court rejected the appeal and imposed expenses on the appellant.

[174] For a detailed analysis see Kedar, *Israeli Law*, n. 100 above.

Land Acquisition Act and Adjudication

Following the War, the Israeli authorities seized large tracts of land. While many of these takings were based on the absentee legislation, not all appropriation was grounded upon that legislation. Additional land was seized on the basis of other provisional laws, as well as without any legal justification.[175] Most of these provisional laws appropriated only the rights of possession and use. They did not address the question of ownership, which therefore formally remained with their original owners.[176] To conclude the process, Israel enacted in 1953 the Land Acquisition (Validation of Acts and Compensation) Act.[177] The Finance Minister, who presented the draft law, explained that its purpose was to 'instill legality in some acts done during the war and following it'.[178]

Section 2 of the Statute set out the essential mechanism. It authorized the Finance Minister to issue a certificate stating land not to be in the possession of its owners and proclaiming that the land was assigned for purposes of essential development, settlement, or security between May 1948 and April 1952. Such certificate automatically transferred the ownership of the land to the Development Authority.[179] The statute conferred a right to receive limited compensation, normally undervalued monetary indemnification, and in some cases also a grant of a modest plot of alternative land.[180]

The petitioner in *Younes* v. *The Finance Minister* inhabited a village proclaimed a military 'closed area'.[181] A portion of Younes' land lay outside the closed area, but he could not cultivate it since he did not receive permission to leave the village. Soon after the enactment of the Land

[175] Kretzmer, n. 100 above, 58–9.

[176] For that reason, s. 17 of the Absentee Property Act did not apply.

[177] 122 SH 58 (20 Mar. 1953).

[178] 12 *Knesset Record*, 2202 (3 June 1952).

[179] The section stated:

> '2(A) Property in respect of which the Minister certifies by certificate under his hand—
> (1) that on 1st April, 1952 it was not in the possession of its owners; and
> (2) that within the period between 14th May, 1948 and 1st April, 1952 it was used or assigned for purposes of essential development, settlement or security; and
> (3) that it is still required for any of these purposes—
> shall vest in the Development Authority and be regarded as free from any charge, and the Development Authority may forthwith take possession thereof.'

[180] e.g. in the parliamentary debate on the law the Arab Knesset member Masaad Kassis criticized the date chosen for setting the value of the land (1950). He explained that since the land registration offices had been closed, the Arabs could sell only to the JNF. The JNF continued to offer the same prices that it offered before the creation of the State, only this time it offered it in Israeli Pounds instead of British Pounds. The going price for land reached only 25 Pounds per dunums, while he estimated the real value to be 10 times higher. He suggested changing the law so it would set the price to the one paid by a willing seller to a willing buyer on the date of issuance of the certificate. This suggestion was not accepted.

[181] Until 1966, Arab villages were formally under military rule, and many were declared closed areas, where movement was restricted.

Acquisition Statute (1953), the Finance Minister issued a 'Section Two Certificate'. The certificate proclaimed that the petitioner's land was not in his possession and transferred the property to the Development Authority.[182] The Court rejected the petitioner's claim that the issue of such certificate was a quasi-judicial act and therefore he was entitled to present his version to the Minister before he issued the certificate. The Court decided that the issue of the certificate itself constituted 'conclusive evidence' that the conditions of the statute had been fulfilled.[183] The Court also rejected the petitioner's argument that as long as nobody else took possession of his land (which was the case), he remained its sole possessor. The Court preferred an interpretation more agreeable to the Israeli authorities. It ruled that 'possession' in this statute meant *actual* possession, and since the possessor did not physically possess the land, its transfer to the Development Authority was legal.[184] Moreover, the Court decided to interpret section 2 of the statute in a way that effectively barred any judicial interference in the subject. Thus, the Court's choice of interpretation deferred to the authorities and went far beyond the written words of the statute. It increased the evidentiary power granted in the statute, by transforming the certificate into an irrefutable presumption. At the same time, the Court attempted to project an image of necessity and lack of choice. The Court found 'that a certificate according to section 2, is conclusive evidence of the facts mentioned in it'. While the Court conceded 'that the legislator did not use this term explicitly', it decided nevertheless that the legislator's purpose was clear. 'The legislator did not want any objection or contradiction of the facts mentioned in the certificate.' As a result, concluded the Court, 'the statute precludes any practical possibility to appeal the facts mentioned in the certificate'.[185] The decision of the Court precluded any effective challenge to the issue of such certificates. Thus, it gave unlimited power to the Finance Minister to define any tract of land as not in the possession of its owner and as a result dispossess him without any recourse.[186]

[182] BGZ 5/54, *Younes* v. *The Finance Minister*, PD 8 314, 318 (decided in Mar. 1954 by Ulshan, Zilberg and Landau, *per curiam*).

[183] Ibid., at 317. Kretzmer, n. 100 above, 59.

[184] BGZ 5/54, at 317–18. The court added that it would have been good if the people concerned could be heard, but that it found no ground in the statute for such a right: ibid., at 317.

[185] Ibid., at 317. The court concluded therefore that the ownership of the land was lawfully transferred to the Development Authority. In BGZ 214/51, *Salim* v. *The Agriculture Minister*, PD 5 1655 (decided in Nov. 1951, by Ulshan, Agranat and Sharshevsky *per curiam*) the court summarily dismissed a complaint against the transfer of possession of land on the ground that a Kibbutz was established on the land, and therefore the petitioner should litigate in the district court.

[186] The Court refused to interfere even when the s. 2 certificate suffered from procedural defects. In *Dg'ani* v. *The Development Authority* (1967) the Court accepted the appellant's argument that the certificate was flawed, but decided nevertheless this would not help the appellant. 'The appellant may hold to any technical argument to prevent the transfer of his property, but a Court would not accept such arguments, unless they go to the heart of the matter', the Court concluded and dismissed the appeal. AC 672/66, *Dg'ani* v. *The Development Authority*, PD 21(1) 365, 367 (decided by Vitkon in Mar. 1967, Agranat and Many concurring).

Thus, as in the case of absentee property adjudication procedural and evidentiary rules restricted to a minimum the possibility of land possessors securing their land.

Summary and Conclusion

This chapter offered some preliminary observations on the legal geography of ethnocratic settler societies. It began with a short review of the concept of ethnocratic settler societies that was developed by political geographer Oren Yiftachel. Specifically, it focused on how the division of such societies into three major groups, that of 'founders', 'immigrants', and 'natives', influences the organization of space in settler societies. The chapter also pointed to several mechanisms, among them law, that exist within such societies and facilitate, preserve, and legitimate the discriminating allocation of space and power. However, in order to preserve the hegemony of the dominant groups, the ethnocratic society must deliver some of its claims to justice and democracy. Hence the internal tensions and instability of such societies.

The second part of the chapter pointed to the emergence of a new discipline, that of legal geography. After reviewing some arising trends within this field, the chapter highlighted the critical outlook of many legal geographers and focused on the influence of Critical Legal Studies (CLS) on Critical Legal Geography (CLG). The focus of CLS on the concept of legitimation seems especially helpful in analysing the interconnections between law and space. While law plays an important role in creating and organizing spaces of inequalities, it simultaneously conceals and legitimizes these inequalities beneath a neutral and professional discourse. The production of allegedly technical formal rules, of strategic acts of categorization, of meticulous legal distinctions, the selective screening of 'facts' accepted in courts, the omnipresence of background rules and assumptions that are never discussed serve as fundamental pillars of the spatial-legal legitimation of inequalities and hierarchies.

The third section of the chapter drew upon insights from the ethnocratic model as well as from CLS and CLG in order to offer some preliminary reflections on law and space in ethnocratic settler societies belonging to the common law family. The establishment of such societies usually entails the construction of a new land regime, which is often constructed on a violent dispossession of natives. The violent acquisition is then translated into legal arrangements that represent the ethnocratic power structures and at the same time obscure the dispossession. This

legal-cultural order reduces the need for direct force, and legitimizes the unequal ordering of space and society. Law generally, and Supreme Courts specifically, play a crucial role in this hegemonic project. Settlers' law and courts attribute to the new land system an aura of necessity and naturalness that secures the founders' interests. Intricate legal tools and conventions serve as central instruments in defining and altering laws concerning natives' rights. These rules, saturated with a heavy dose of professional, technical, and seemingly scientific language and methods, conceal the violent restructuring with an image of inevitability and neutrality.

Procedural rules, questions of jurisdiction, rules of evidence, such as burdens of proof, manipulation of precedents and of legal categories, selective deference to legislators, the channelling of these issues to the remote and boring confines the legal landscape, and similar legal constructs have the effect of dispossessing indigenous populations and simultaneously silencing the fundamental questions behind the ethnocratic land regime. Yet, as explained in the previous two sections, in order for the legitimation project to work, it must deliver some of its promises. for 'equal justice under law'. Thus, a tension exists between judges' professed commitments to universal values such as 'equal justice under law' and their attributes as 'Courts of the Conquerors' forming part of the ethnocratic project.

The fourth section of the chapter brings this tentative theoretical framework to the land of Israel. Specifically, it examines several examples of the legal ordering of the dispossession of Palestinian citizens of Israel after the creation of Israel in 1948. The examples are drawn from two major acts of legislation: absentee property legislation, and the Land Acquisition Statute, and their construction and application by the Israeli Supreme Court. As the examples provided in this section demonstrate, Israeli law, like legal systems of other settler societies, has provided an arsenal of legal tools that facilitated the dispossession of Arabs from the land they held. This section illustrates in my opinion the special role of law in the dispossession of indigenous groups, but also the complex role of law in attempting to construct a hegemonic order that endeavours to regularize the new land regime. Thus, the Israeli Supreme Court, especially in the years immediately following the Israeli War of Independence, intervened in acts of dispossession, and sometimes invalidated them.

At the same time, it constantly reminded the authorities of the vast power at their disposal. These forces drew much from the arsenal of procedure, evidence, categorization, and discretion often shaped by the Court itself. Furthermore, increasingly, the Israeli Supreme Court constructed interpretive and evidentiary canons that enhanced the effectiveness of dispossessing legal tools at the service of Israel. For instance, during the production and regularization of Israel's land regime, the state benefited from strong presumptions in its favour, while Arab landholders bore the burden of marshalling the legal complexities of providing clear evidence in support of their position.[187] These burdens and onuses they often could not meet.[188]

At the same time, Israeli Supreme Court judges attempted to convince themselves, the Jewish population in Israel, and the international community that, notwithstanding the radical changes in its land regime, Israel is a democratic State, based on a rule of law administered impartially by an independent and equitable court system. To convince these varied audiences, and also to attempt to persuade some of the Arab citizens of Israel, the Court had to deliver some of these promises especially in the founding moment of the Israeli land regime. Furthermore, for reasons that lie outside the scope of this chapter, it seems that the Israeli Supreme Court became much harsher as time progressed. It abandoned a relatively liberal canon of construction it devised in its the first few years in favour of a much harsher one, shifting onuses on Arab possessors, abandoning earlier precedents without admitting doing so.

As this chapter and these examples demonstrate, legal institutions play a crucial role in reorganizing settlers' space. In this chapter, I have touched upon the making of settlers' land regime. However, attention must be drawn also to the transformation of the legal geography of settler states. Certain courts in settler societies start to look afresh at their past land policies. Thus the Australian Supreme Court, which until the last decade refused to recognize land rights of aborigines, began recently to reframe the legal and political discourse by laying down its famous *Mabo* v. *Queensland*[189] and *Wik* v. *Queensland*[190] decisions. In *Mabo*, the Court 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.[191] Similar moves can be observed in high courts of other settler societies such as New Zealand and Canada.[192] There are those who perceive them as 'Catalytic events in Aboriginal decolonization'[193] or as manifestations of a 'jurisprudence of regret'.[194] Others stress the limitations of these legal decisions.[195]

[187] The original quotation from Frickey is the following: 'The state gets the benefit of a strong presumption in favor of its sovereignty, and the opposing party bears the burden of marshalling the legal complexities and finding clear evidence of congressional support for its position': Frickey, n. 88 above, 416.

[188] This attitude was also manifested in the Court's jurisprudence concerning the land settlement process that took place in the late 1950s and the 1960s especially in the northern part of Israel the Galilee. I have analysed this issue in depth elsewhere. See Kedar, 'The Legal Transformation', n. 100 above

[189] *Mabo* v. *Queensland (No. 2)*, n. 67 above.

[190] *The Wik Peoples* v. *Queensland*, 141 ALR 129.

[191] *Mabo*, n. 67 above, 82.

[192] See Russell, n. 57 above, 247–76.

[193] Ibid., 258.

[194] J. Webber, 'The Jurisprudence of Regret: The Search for Standard of Justice in Mabo' (1995) 17 *Sydney Law Review* 5.

[195] See, e.g., Daes, n. 62 above.