

Inadequate Housing, Israel, and the Bedouin of the Negev

Tawfiq S. Rangwala

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Inadequate Housing, Israel, and the Bedouin of the Negev

Abstract

This article examines Israel's treatment of its Arab Bedouin citizens living in the Negev desert through the lens of the international human right to adequate housing. The Negev Bedouin, an agrarian indigenous community, is the most socially, politically and economically disadvantaged segment of the Arab minority in Israel. Their precarious situation is rooted primarily in Israeli land planning pursuits that have ignored Bedouin land claims in favor of settlement programs reserved exclusively for the majority population. This article documents the manner in which the overarching legal and political character of the state has led to the development of a legislative, judicial, and public policy regime aimed at forcibly evicting the Bedouin from their traditional homes in so-called "unrecognized villages" and transferring them to impoverished urban townships. Reviewing Israel's international human rights obligations, particularly the right to adequate housing, this article critically assesses whether Israel's current policies towards the Bedouin are consistent with those obligations.

Keywords

Human rights; Housing--law and legislation; Israel; Bedouins

INADEQUATE HOUSING, ISRAEL, AND THE BEDOUIN OF THE NEGEV[©]

BY TAWFIQ S. RANGWALA*

This article examines Israel's treatment of its Arab Bedouin citizens living in the Negev desert through the lens of the international human right to adequate housing. The Negev Bedouin, an agrarian indigenous community, is the most socially, politically and economically disadvantaged segment of the Arab minority in Israel. Their precarious situation is rooted primarily in Israeli land planning pursuits that have ignored Bedouin land claims in favor of settlement programs reserved exclusively for the majority population.

This article documents the manner in which the overarching legal and political character of the state has led to the development of a legislative, judicial, and public policy regime aimed at forcibly evicting the Bedouin from their traditional homes in so-called "unrecognized villages" and transferring them to impoverished urban townships. Reviewing Israel's international human rights obligations, particularly the right to adequate housing, this article critically assesses whether Israel's current policies towards the Bedouin are consistent with those obligations.

Cet article examine le traitement d'Israël envers ses citoyens arabes bédouins vivant dans le désert du Néguev du point de vue du droit humanitaire international à un logement adéquat. Les bédouins du Néguev, une communauté indigène agraire, sont le segment de la minorité arabe en Israël le plus socialement, politiquement et économiquement désavantagé. Leur situation précaire est principalement causée par les poursuites de planification territoriales israéliennes qui ont ignoré les revendications territoriales bédouines en faveur de plans de colonisations réservés exclusivement à la population majoritaire.

Cet article documente la manière avec laquelle le caractère légal et politique sous-jacent de l'état a mené au développement d'un régime législatif, judiciaire, et d'ordre public visé à expulser de force les bédouins de leurs habitations traditionnelles, des soi-disant « villages non reconnus » et les transférer dans des communes urbaines appauvries. Passant en revue les obligations israéliennes provenant des droits humanitaires internationaux, particulièrement le droit à un logement adéquat, cet article évalue d'un œil critique si la politique courante d'Israël envers les bédouins est consistante avec ces obligations.

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I. INTRODUCTION

Within the seemingly endless cycle of violence between Israelis and Palestinians, an overwhelming amount of academic attention has focused on international human rights issues arising from the Israeli occupation of the West Bank and Gaza. Meanwhile, issues relating to Israel's treatment of Palestinian citizens within its borders (approximately one million people) have often been neglected.¹ A minority within the Palestinian minority, the Arab Bedouin citizens of Israel have faced severe challenges that have been the subject of even less analysis and discussion. The central aim of this article is to explore the manner in which Israeli governmental policies towards the Arab Bedouin population of the Negev (Arabic "Naqab")² violate international human rights law. Specifically, this article examines how the Zionist character of the state has given rise to a series of legislative and policy choices that infringe the Bedouin basic human right to adequate housing.

A historically agrarian and semi-nomadic society, the Bedouin community of the Negev is the most socially, politically, and economically

¹ The confines of this article preclude a detailed discussion of the Palestinian minority generally, but for thorough accounts of the dilemmas faced by Palestinian citizens of Israel, see Rashid Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness* (New York: Columbia University Press, 1997); Sabri Jiryis, *The Arabs in Israel*, trans. by Inea Bushnaq (London: Monthly Review Press, 1976); David Kretzmer, *The Legal Status of the Arabs in Israel* (Boulder: Westview Press, 1990); Ian Lustick, *Arabs in the Jewish State: Israel's Control of a National Minority* (Austin: University of Texas Press, 1980); Hussein Abu Hussein & Fiona McKay, *Access Denied: Palestinian Land Rights in Israel* (London: Zed Books, 2003) [*Access Denied*].

² In order to be consistent with the majority of previous academic literature and media coverage on the subject, I use the Hebrew term "Negev" in this paper. The Negev is the semi-arid southernmost region of Israel, comprising approximately 60 per cent of the country's area.

disadvantaged segment of the Palestinian minority in Israel.³ Like many Bedouin communities throughout the Middle East, the Negev Bedouin are a tribal group whose traditional (and now, in many senses, historical) lifestyle is that of nomadic or semi-nomadic pastoralism. Bedouin societies are often marginalized and viewed as incompatible with the machinery and planning objectives of modern states. In the Israeli context, this dynamic is further complicated by the backdrop of the broader Israeli-Palestinian conflict. While many Israeli scholars and government officials have sought to minimize the hardships faced by the Negev Bedouin as the “practical problem of dealing with a nomadic minority in a modern industrialized state,” this assessment is misleading because the nomadic patterns of the Negev Bedouin had generally ended prior to the creation of the state.⁴

With this in mind, it is important to note that the Bedouin cannot be accurately viewed as a separate ethnic minority; they themselves identify as part of the national Palestinian minority.⁵ The distinction between the Bedouin and the Palestinian minority as a whole—seen by many as a central aspect of a “divide and rule” strategy—is only relevant insofar as it relates to the disproportionate and severe impact state policies have on Bedouin living standards.⁶ It is this consideration that grounds my use of the Bedouin as a compelling case study for assessing the scope and nature

³ All further references in this paper to the “Arab Bedouin” or the “Bedouin” refer to the Bedouin community of the Negev, as opposed to the Bedouin of the Galilee region. These two groups have different origins and speak slightly different dialects of Arabic. The Negev Bedouin are far less integrated within Palestinian society given their isolated position in the Negev. See Penny Maddrell, *The Bedouin of the Negev* (London: Minority Rights Group, 1990) at 4.

⁴ *Ibid.* See also text accompanying notes 102-10.

⁵ See Maddrell, *supra* note 3 at 19, noting that the Bedouin typically identify themselves as Palestinian. The Israeli government has chosen to characterize the Bedouin as distinct from the Palestinian minority in order to foster divisions and prevent mobilization against discriminatory state activity. Despite their geographic distance from the majority of Palestinian citizens of Israel and their distinct cultural practices, the Bedouin are very much a part of the Palestinian minority, and the policies and mechanisms used by the state against the Bedouin are often the same as those employed against the Palestinian minority generally. See also J. Cook, “Bedouin in the Negev Face New Transfer” *Middle East Research and Information Project (MERIP)* (10 May 2003) online: Middle East Report Online <<http://www.merip.org/mero/mero051003.html>>; and A. O’Sullivan, “Beware the Palestinization of the Negev Beduin” *The Jerusalem Post* (28 August 2003).

⁶ Maddrell points out that while the Bedouin face minority status in Israel generally, they must also deal with the hardships presented by their minority status within the larger Palestinian community. The Bedouin are often looked down upon by both Arab and Jewish citizens as primitive, and are “truly a minority twice over.” Maddrell explains that from the Bedouin perspective, their problems have been similar to those encountered by the Palestinian minority generally, and the “similarities far outweigh those differences arising from their divulging economic and social traditions.” *Ibid.* at 4. See also Ghazi Falah, “How Israel Controls the Bedouin” (1985) 14:2 *J. Palestine Stud.* 35 at 36, noting that “Bedouin problems in Israel are not so much those of being Bedouin but rather those of being Arabs in a Zionist state.”

of potential Israeli violations of the right to adequate housing.

In focusing on the Bedouin and the right to adequate housing, I am not suggesting that adequate housing is the only sphere in which Israel potentially commits human rights violations against both its Bedouin citizens and the Palestinian minority generally. However, the right to adequate housing is a key element in defending a myriad of human rights of which the Bedouin are being deprived. The interdependent relationship between human rights of all kinds is a well-established principle of international law.⁷ Adequate housing—a right that encompasses much more than simple shelter—is the foundation for many of these rights because the lack of a secure and stable environment in which to live hinders one's ability (both individually and collectively) to assert other rights functionally. It is also intrinsically connected with the possibility of realizing an adequate standard of living, and, by extension, impacts the potential for substantive human development. The choices, freedom, and social health of communities are so dependent on the right to adequate housing that it can be seen as both a fundamental human right and a pillar of human development.⁸

Part II of this article provides a historical account of the Bedouin and their relationship with the Israeli state. It also examines statistical evidence to assess their standard of living, and contrasts such evidence with that of the Israeli population as a whole. Part III explores the overarching legal character of the Israeli state; the legislation, policies, and jurisprudence that emerge from this character; and its impact on the Bedouin right to adequate housing. Part IV looks at the right to adequate housing within the framework of international human rights law and traces its development and application to Israel. In Part V, observations and conclusions are drawn from the conflict between Israel's international legal commitment to adequate housing and its policies. Part VI concludes by looking ahead and offering recommendations for the future.

⁷ For detailed and thorough analysis of the key features of economic, social, and cultural rights, as well as arguments for the indivisibility, interdependence, and impermeability of all human rights (civil, political, economic, social, and cultural), see Scott Leckie, "Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social, and Cultural Rights" (1998) 20 Hum. Rts. Q. 81; and Craig Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 Osgoode Hall L.J. 769.

⁸ See Clarence J. Dias & Scott Leckie, "Human Development and Shelter: A Human Rights Perspective (Occasional Paper 21)" online: <http://hdr.undp.org/docs/publications/ocational_papers/oc21c.htm> at Part II; and Scott Leckie, "The UN Committee on Economic, Social, and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach" (1989) 11 Hum. Rts. Q. 522.

II. THE BEDOUIN OF THE NEGEV: AN OVERVIEW

The Bedouin are the indigenous inhabitants of the Negev and currently comprise 12 per cent of the Palestinian minority in Israel.⁹ Prior to the creation of Israel in 1948, 90 per cent of the Bedouin population lived as subsistence farmers, while 10 per cent earned their living from raising livestock.¹⁰ Today, 90 per cent of the population works as wage labourers and Bedouin society has undergone rapid urbanization and modernization, primarily as a result of Israeli land planning policy.¹¹ Under Ottoman rule and throughout the British mandate period, the Bedouin enjoyed the use of approximately 12,600,000 dunums¹² of land, which satisfied both their agricultural and livestock raising needs.¹³ Today, they are struggling to retain possession of the 240,000 dunums they currently own or occupy “illegally.”¹⁴ Israeli settlement policy and land planning pursuits have been the major cause of the dramatic reduction in land ownership and have effectively severed Bedouin ties to the land by making their traditional forms of employment untenable.

The majority of the Bedouin were driven out of the emerging Israeli state during the 1948 war.¹⁵ Only 11,000 Bedouin remained from a population of approximately 95,000.¹⁶ After the war, many Bedouin continued to be expelled, in part based on the authorities’ refusal to provide them with Israeli identity cards.¹⁷ Since anyone found without

⁹ Information provided to the author by the Association of Forty, online: <<http://www.assoc40.org>> [*40F Statistics*]. A helpful resource for information regarding the Negev Bedouin is Arab Association for Human Rights, “Article 26: Factsheet No.3: The Arab Bedouin of the Negev” (Nazareth, Israel: HRA, 1999) online: <<http://www.arabhra.org/article26/factsheet3.htm>> [*HRA Factsheet*].

¹⁰ *Ibid.*

¹¹ *HRA Factsheet*, *supra* note 9. See discussion in Part III, below.

¹² A dunum is an Ottoman measuring unit equaling one square kilometre. Four dunums equals one acre.

¹³ Maddrell, *supra* note 3 at 5. *Access Denied*, *supra* note 1 at 127, states that approximately two million dunums were estimated to be in the possession of the Bedouin before 1948.

¹⁴ See Orly Almi, “No Man’s Land: Health In the Unrecognized Villages of the Negev” (Physicians for Human Rights - Israel, July 2003), online: <http://www.phr.org.il/Phr/downloads/dl_155.doc> at 12 [*No Man’s Land*]. The residents of the unrecognized villages currently hold 180,000 dunums of land, or 1.3 per cent of the total area of the Negev.

¹⁵ During the 1948 Arab-Israeli war almost 80 per cent of the Palestinian population fled or was expelled.

¹⁶ Falah, *supra* note 6 at 37.

¹⁷ Maddrell, *supra* note 3 at 6.

identity cards could be expelled to Jordan or Egypt, countless Bedouin were expelled by the time they might have been issued such a card in 1952.¹⁸ Those remaining were uprooted from their homes and placed under military rule in an enclosure zone (*seyag*) for eighteen years.¹⁹ Eleven tribes west of Be'er Sheva (in Arabic "Beer el-Saba") were uprooted immediately and their inhabitants made landless overnight.²⁰ The entire enclosure area encompassed only 10 per cent of the land formerly at the exclusive disposal of the Bedouin community.

During this period, as discussed below, Israel enacted a series of laws and military regulations which served to make Bedouin land claims invisible, and ultimately led to the registration of Bedouin land as state property. The Bedouin, restricted to the enclosure area while such laws took effect, were unable to contest or even learn of the state's registration of what they viewed as privately owned lands. Sabri Jaryis, a leading scholar and researcher on the Arab population in Israel, comments that "[m]ore than any other group, the Negev Bedouin suffered the full and unrestrained harshness of military rule."²¹

The Bedouin population in the Negev currently constitutes nearly 140,000 people.²² Approximately 70,000 live in seven government-planned towns established to resettle and centralize the Bedouin population.²³ These seven towns consistently rank at the bottom of every socio-economic indicator used by the state, and suffer the highest unemployment rates and lowest income levels in Israel.²⁴ While these government towns are supplied with some basic urban services, they lack an economic infrastructure—a fundamental point because the Bedouin re-location to these towns entails

¹⁸ Although identity cards were issued in 1952, many expulsions into Egypt and Jordan continued beyond that date. As many as 7,000 Bedouin may have been expelled in 1953, and mass expulsions to Egypt and Jordan are recorded as late as 1959. See Falah, *supra* note 6 at 43; Maddrell, *supra* note 3 at 6.

¹⁹ Maddrell, *supra* note 3 at 7; see also Ghazi Falah, "Israeli State Policy toward Bedouin Sedentarization in the Negev" (1989) 18:2 J. Palestine Stud. 71 at 78-79.

²⁰ Falah, *supra* note 6 at 38.

²¹ Jaryis, *supra* note 1 at 122.

²² AOF Statistics, *supra* note 9.

²³ See *Access Denied*, *supra* note 1 at 127. According to the order of their establishment, these towns are: Tel Sheva, Rahat, Segev-Shalom, Kuseifa, Ar'ara in the Negev, Houra, and Laqiya.

²⁴ See Ismael Abu-Saad & Harvey Lithwick, *A New Way Ahead: Development Plan for the Bedouin Towns in the Negev* (Center for Bedouin Studies and Development, 2000) at 9-16; and H. Lithwick, *An Urban Development Strategy for the Negev's Bedouin Community* (Center for Bedouin Studies and Development, 2000) at 9-12. See also D. Ben-Tal, "The Bedouin: A Traumatic Transition" *Jerusalem Post* (6 August 1999).

the loss of their traditional agrarian livelihood.²⁵

The other half of the Bedouin population lives in a series of villages unrecognized by the state.²⁶ Although unrecognized, the majority of these villages were erected prior to the creation of the state, and virtually all prior to the creation of the government-established towns.²⁷ These villages are denied all forms of basic infrastructure and are unable to build or develop in any way.²⁸ The villages are characterized by a lack of basic services, such as running water, electricity, telephone lines, paved roads, schools, and other public institutions.²⁹ Since it is impossible to obtain building permits for these villages, hundreds of Bedouin are indicted yearly for “illegal” construction, and countless homes are subject to demolition orders.³⁰ Current estimates by the Israeli government suggest that there are approximately 60,000 unlicensed structures (25,000 of which are homes) subject to potential demolition in the unrecognized villages of the Negev.³¹ Israel’s Central Bureau of Statistics does not publish information on these villages, nor do they appear on official maps or road signs.³² This factor makes research difficult and places an often insurmountable evidentiary burden on Bedouin litigants, because their human rights struggle is easily characterized as a claim for mere “squatter’s rights.”

There are approximately forty-seven unrecognized villages in the

²⁵ Abu-Saad, *ibid.* See also U. Schmetzer, “Bedouins Stay Put in Fight Over Land: The Once-Nomadic Tribesfolk Resist Israeli Government Efforts to Move them to Seven Towns Built for Them – And Cling to Dreams of Farming in a Desert Marked for Development” *Chicago Tribune* (29 July 2003) 5.

²⁶ *Access Denied*, *supra* note 1 at 255-81. See generally Adalah: Legal Center for Arab Minority Rights in Israel, *Institutionalized Discrimination: Adalah’s Report to the World Conference Against Racism* (August/September 2001) reviewing legislation through which certain villages became “unrecognized” [*Adalah’s Report*].

²⁷ *Access Denied*, *supra* note 1 at 255-81.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.* See also *Adalah’s Report*, *supra* note 26 at 37; Cook, *supra* note 5; Ronen Shamir, “Suspended in Space: Bedouins Under the Law of Israel” (1996) 30 *L. & Soc’y. Rev.* 231 at 246-47 and accompanying text; and Amnesty International, *Israel and the Occupied Territories: Under the Rubble - House Demolitions and Destruction of Land and Property* (Amnesty International, May 2004) at 44 [*Amnesty Report*].

³¹ *Amnesty Report*, *ibid.*

³² See e.g. *Map of Israel*, Central Bureau of Statistics (CBS), online: <http://gis.cbs.gov.il/shnaton53/all_israel.jpg> (Hebrew). While the CBS ignores the unrecognized villages, the Ministries of Education, Agriculture, Interior, and Labour and Welfare continue to maintain data on them. A map of the unrecognized villages in the Negev is available on the website of the Regional Council for the Unrecognized Villages, online: <<http://www.arabhra.org/rcuv/map.htm>>.

Negev, with populations ranging from sixty to six thousand.³³ Government officials claim that the villages are unrecognized because they are too small and distant to be afforded government services.³⁴ However, the Jewish settlement of Lavon is recognized despite the fact that only two families live there, while the unrecognized Palestinian village of Im-Tnan has over two thousand residents.³⁵ Although “agricultural villages” have long been touted and endorsed by the Bedouin as a viable alternative to forced resettlement in government townships, not a single one has been built.³⁶ Yet, since the inception of the state, over one hundred agricultural villages for Jewish farmers have been built in the Negev.³⁷

The Bedouin population is extremely young, with 50 per cent of the population under the age of fourteen and a staggering birthrate of 5.5 per cent—as compared to 2 per cent among Negev Jews.³⁸ When combined with massive unemployment, these circumstances become a tremendous social problem given that families need to invest more resources in child rearing and education. Infant mortality rates among the Bedouin are the highest in the country. In 2000, the birthrate was 14.7 deaths per thousand live births, compared with 3.9 deaths per thousand live births among the Israeli Jewish population.³⁹ Furthermore, the age-adjusted general mortality rate is approximately 50 per cent higher among Bedouin than among Jews in the Negev.⁴⁰ Health services in the Negev have improved somewhat over the past several years, in part because of judicial decisions forcing government action.⁴¹ However, both the accessibility of health care services and the quality of care available to Bedouin living in both the

³³ *AOF Statistics*, *supra* note 9. It is difficult to determine the exact number of unrecognized villages that exist in the Negev because it is unclear in some cases whether an entity constitutes a village rather than a connected neighborhood.

³⁴ See Maddrell, *supra* note 3 at 8.

³⁵ *HRA Factsheet*, *supra* note 9.

³⁶ Maddrell, *supra* note 3 at 15.

³⁷ See D. Izenberg, “High Court Asked to Legalize Negev Bedouin Villages” *Jerusalem Post* (15 March 2000). See also *infra* note 190.

³⁸ Center for Bedouin Studies and Development, *Demographic and Health Information on Negev Bedouin Arabs*, online: <<http://www.bgu.ac.il/bedouin/health-info.htm>>.

³⁹ *No Man’s Land*, *supra* note 14 at 78.

⁴⁰ *Supra* note 38.

⁴¹ Even where judicial decisions have forced Israeli authorities to improve Bedouin health care, such decisions are often met with contempt by the government. For example, in 2001, the Israeli High Court of Justice awarded NIS 20,000 to Adalah after the organization was forced to bring a contempt proceeding against the Ministry of Health for failing to implement a court-sanctioned agreement to build six mother-and-child care centers in unrecognized villages in the Negev.

townships and the unrecognized villages remains grossly inadequate.⁴²

The unavailability of resources has also created dramatic educational challenges. The Bedouin education system is in a severe state of crisis. According to a 2001 Human Rights Watch report detailing discrimination against Palestinian Arab children in Israeli schools, the organization concluded that Israel operates two wholly separate school systems for Jewish children and Palestinian children, and that “[d]iscrimination against Palestinian children colors every aspect of the two systems.”⁴³ Finding that Israel’s schools for Palestinian children were overcrowded, understaffed, poorly built, badly maintained, and often altogether unavailable, the report points to many instances in which the Bedouin are particularly disadvantaged and receive less funding and fewer services than the rest of the Palestinian minority.⁴⁴

The Bedouin education figures are startling. Approximately 60 per cent of Bedouin students drop out of school before the twelfth grade, and of those that complete high school, only a meagre 10 per cent pass their *Bagrut* school matriculation exams.⁴⁵ Only two out of every thousand

⁴² See *No Man’s Land*, *supra* note 14 at 60-77 for a detailed discussion of the challenges faced by the Bedouin with regard to obtaining primary health care services. Health care services for the Bedouin have historically been assigned a low priority by the Israeli government, stemming in part from discrimination and neglect. See also S. Shvarts, J. Borkan, M. Morad, & M. Sherf, “The Government of Israel and the Health Care of the Negev Bedouin Under Military Government: 1948-1966” (2003) 47:1 *Medical History* 47.

⁴³ Human Rights Watch, *Second Class: Discrimination Against Palestinian Arab Children in Israel’s Schools*, (September 2001) at 1 [*Second Class*]. In August 2004, Human Rights Watch wrote letters to, among others, Israeli Prime Minister Ariel Sharon expressing deep concern that its recommendations had not been heeded and that the 2005 Israeli budget fails to address “systematic discrimination against Palestinian Arab citizens of Israel in the public education system.” See Human Rights Watch, “Israel: Budget Discriminates Against Children of Arab Citizens: Letter to Prime Minister Ariel Sharon, (11 August 2004), online: <www.hrw.org/english/docs/2004/08/11/isrlpa9225.htm>.

⁴⁴ *Second Class*, *ibid.* at 22-23. See also Ismael Abu-Saad, “The Education System of Israel’s Negev Bedouin: Background and Prospects” 2 *Isr. St. J.* 2 (1997); Ismael Abu-Saad, “Education as a Tool for Control vs. Development Among Indigenous Peoples: The Case of Bedouin Arabs in Israel” (2001) 2 *Hagar Int. Social Sc. Rev.* 241; U.S. Department of State, *Israel and the Occupied Territories: Country Reports on Human Rights Practices - 2003* (Bureau of Democracy, Human Rights, and Labor, 25 February 2004) at 16 [*State Department Report*].

⁴⁵ Center for Bedouin Studies and Development, *Facts About Bedouin Arab Education in the Negev*, online: <<http://www.bgu.ac.il/bedouin/education-lnk1.htm>> [*Education in the Negev*]. On July 23, 2003, Adalah submitted a petition to the Israeli Supreme Court demanding that the Court order the Ministry of Education to provide counselors pursuant to the Ministry’s legal obligations under Israeli law, noting that the seven Bedouin townships in the Negev have the highest drop-out rates in the country and the lowest number of guidance counselors. H.C. 6671/03, *Munjid Abu Ghanem, et al. v. Ministry of Education, et al.* (2003), case pending, online: <<http://www.adalah.org/eng/legaladvocacycultural.php#6671>>.

Bedouin are university graduates.⁴⁶ Twenty-three per cent of the teaching staff at Bedouin schools do not possess the required qualifications that are mandatory throughout Israel.⁴⁷ Many students travel long distances (including round-trip journeys of two hundred kilometers and walks of five kilometers in some cases) to attend schools that have too few classrooms, little or no support staff, and poor facilities and infrastructure.⁴⁸ In 1998, "The Investigatory Committee on the Bedouin Education System in the Negev," convened at the request of the former Minister of Education, delivered a damning criticism of Bedouin schools in the Negev, stating: "The State of Israel, which stands upon the principle of equal educational opportunities of all, cannot ignore the severe crisis of the Bedouin educational system today, and it should act immediately to correct the injustices."⁴⁹ Since most Bedouin have little formal education, the challenges of integrating into the labour force are greatly exacerbated.⁵⁰

III. CHARACTER, POLICY, AND COURTS

Evaluating whether Israel violates the Bedouin collective right to adequate housing requires a careful consideration of both the overarching legal character of the state and the legislative and policy choices that flow from this character. In this part, I first examine the Zionist⁵¹ ideology that shapes the Israeli polity, and discuss the implications of this ideology on the democratic ideal of universal equality. I then examine how Israel's

⁴⁶ *Education in the Negev*, *ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* See also Aliza Arbeli, "The Bedouin Kindergartens are Far From the Children in Order to Concentrate the Dispersal" *Ha'aretz* (29 August 2001); and Cook, *supra* note 5 at 2, noting that children in the unrecognized village of Abda must make a round trip of 87 miles per day to a "recognized" area with a school.

⁴⁹ Y. Katz et al., *Report of the Investigatory Committee on the Bedouin Educational System in the Negev*, submitted to the Director General of the Ministry of Education, Ben Zion-Dal, (19 March 1998), English excerpts online: <[www.http://w3.bgu.ac.il/bedouin/katz-excerpts.htm](http://w3.bgu.ac.il/bedouin/katz-excerpts.htm)> [Katz Report].

⁵⁰ See Ben-Tal, *supra* note 24. Ben-Tal interviews Dr. Ismael Abu-Saad, former Director of the Center for Bedouin Studies and Development at Ben-Gurion University of the Negev, and chronicles the dismal failures of the Bedouin education system and the resultant inability of Bedouin citizens to compete in a "high-tech society." See also Ismael Abu-Saad, "Bedouin Arab Education in the Context of Radical Social Change: What is the Future?" (1999) 25 *Compare* 2 at 149-60.

⁵¹ Zionism is a modern political movement born in Europe in the late-1800s. The common goal of all political Zionists is the establishment and continued existence of a Jewish state in historic Palestine, based on the historic right of the Jewish people, accessible as a national homeland to Jewish communities throughout the world. For a comprehensive anthology of works by influential Zionists, see Arthur Hertzberg, ed., *The Zionist Idea: A Historical Analysis and Reader* (Westport, Conn.: Greenwood Press, 1970); see also David Vital, *The Origins of Zionism* (Oxford: University Press, 1980).

“national character” has been translated into a series of legislative and policy choices that violate the Bedouin right to adequate housing. Finally, I review the manner in which Bedouin litigants and their land claims have been treated by the Israeli judicial system.

A. *The Discriminatory Character of the Israeli State*

1. The Absence of Formal Equality

Zionism is the guiding political philosophy of the Israeli state.⁵² From a governmental policy perspective, Zionism manifests itself in two particular ways. First, it occurs in the absence of formal equality for a sector of the population (Palestinian citizens), such that a distinct segment of the population (Jewish citizens) are given preferred status. Second, it is manifested in Israel’s administration of the state through institutions that cater only to the Jewish population.⁵³

The inherent tension between Zionist ideology and democratic values is apparent in the *Declaration of the Establishment of the State of Israel (1948)*.⁵⁴ The *Declaration* defines Israel as both a Jewish state, committed to the “ingathering of the exiles,” and a democratic one, guaranteeing equality to all its citizens. The first statement defines the national character of the state as privileging one group, namely, the Jewish people, and the second statement stresses universal democratic values. Arguably, the inherently Jewish foundations of the state necessarily compromise the enjoyment of equality for the Arab minority. As the United Nations Committee on Economic, Social, and Cultural Rights noted in its 2003 Concluding Observations on Israel, “The Committee reiterates its concern that the excessive emphasis upon the State as a ‘Jewish State’ encourages discrimination and accords a second-class status to its non-Jewish citizens.”⁵⁵

⁵² For a detailed discussion of the role of Zionist ideology in shaping Israeli approaches to the Arab population and the development of the Israeli land regime, see George E. Bisharat, “Land, Law and Legitimacy in Israel and the Occupied Territories” (1993-1994) 43 *Am. U. L. Rev.* 467 at 474-91; Alexandre (Sandy) Kedar, “The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948-1967” (2000-2001) 33 *N.Y.U. J. Int’l L. & Pol.* 923 at 939-49; and *Access Denied*, *supra* note 1.

⁵³ See also Kretzmer, *supra* note 1 at 49-69; and *Access Denied*, *supra* note 1 at 143-66.

⁵⁴ *Official Gazette*, no. 1, 14 May 1948 [the *Declaration*]. See also *Adalah’s Report*, *supra* note 26 at 1; and *Access Denied*, *supra* note 1 at 19.

⁵⁵ Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Israel, 30th Session, 5 – 23 May 2003, U.N. Doc. E/C.12/1/Add.90 at para. 16.

The contradiction between these two values has been ignored by most Israeli legal scholars.⁵⁶ Where it has been challenged, the famous response offered by former Israeli Chief Justice Shamgar is generally echoed: “[T]he existence of the State of Israel as the state of the Jewish people does not deny its democratic nature, just as the Frenchness of France does not deny its democratic nature.”⁵⁷

Despite the offering of such rhetoric by many Israeli scholars as an adequate resolution of this contradiction, others argue that Israel cannot maintain itself as both a Jewish state and a democratic one (democratic in the sense that it provides for equality amongst all citizens and not merely that it allows them to vote).⁵⁸ This point is expressed by Noam Chomsky, who states:

The Zionist dream is to construct a state that is as Jewish as England is English and France is French. At the same time, this state is to be a democracy on the Western model. Evidently, these goals are incompatible. Citizens of France are French, but citizens of the Jewish state may be non-Jews, either by ethnic or religious origin, or simply by choice To the extent that Israel is a Jewish state it cannot be a democratic state.⁵⁹

Thus, as quickly as the principle of equality became an element of the Israeli state via its founding *Declaration*, it simultaneously became neutralized by its Jewish characterization. While Israel’s legal system has gained much international respect for its progressive rulings on equal rights for disadvantaged groups such as homosexuals⁶⁰ and women,⁶¹ there is no constitutional provision or legislation that provides for the right to equality for all citizens.

Although Israel lacks a formal written constitution or bill of rights, the passage of *Basic Law: Human Dignity and Freedom (1992)*,⁶² was heralded by many as a quasi-bill of rights, which legislated the protection of civil liberties and basic human rights. This law offers the right to “dignity,

⁵⁶ *Adalah’s Report*, *supra* note 26 at 8.

⁵⁷ *Ibid.*

⁵⁸ See e.g. Oren Yiftachel, “‘Ethnocracy’ and Geography: Territory and Politics in Israel/Palestine,” online: <<http://www.bgu.ac.il/geog/members/yiftachel/paper3.html>> [‘Ethnocracy’ and Geography]; and Oren Yiftachel, “Ethnocracy: the Politics of Judaizing Israel/Palestine” (2000) 6:3 *Constellations* 364-90 [Ethnocracy and Politics]. See also text accompanying note 74, below.

⁵⁹ In Jiryis, *supra* note 1 at xi. See generally *Access Denied*, *supra* note 1 at 19-22.

⁶⁰ See H CJ 721/94 *El-Al Airlines v. Danielowitz* [1992-4] Isr. L. R. 478.

⁶¹ See *Miller v. The Minister of Defense*, unpublished decision delivered 11 August 1995; H.C. 453/94 *Israel Women’s Network v. The Government of Israel*, 48(5) P.D. 501.

⁶² 1391 L.S.I. 150. The full English text of the *Basic Law* and its 1994 amendment are available online: <<http://www.knesset.gov.il>> [Basic Law].

life, freedom, privacy, property, and the right to leave and enter the country,” but contains no provision for equality.⁶³ On the contrary, the *Basic Law* reaffirms the Jewish character of the state in Provision 1(a), which states: “The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.”⁶⁴

Israel’s 1998 report to the United Nations Committee on the Elimination of All Forms of Racial Discrimination (CERD)⁶⁵ emphasized that the *Basic Law* did contain the principle of equality by interpretation, but the Supreme Court of Israel has never directly adopted an interpretation of the *Basic Law* (or any other legislation) that included the right to equality. In April 2000, the Supreme Court of Israel issued its decision in the *Qa’dan* case, holding that the state is prohibited from using “national institutions” to perform discriminatory acts on its behalf.⁶⁶ The case involved a petition by the Qa’dan family challenging the Israel Lands Administration (ILA),⁶⁷ the Jewish Agency, and the Katzir Cooperative Association’s refusal to allow the Qa’dans to purchase a home in Katzir on the grounds that the community accepted only Jews as residents.⁶⁸ Restricting itself to the specific facts of the case, the Court held that direct or indirect state discrimination on the basis of nationality was prohibited, and that the state could not absolve itself of its duty to not discriminate by allocating land to institutions that then use the land discriminatorily.⁶⁹

⁶³ A 1994 amendment to the *Basic Law* states that the principles enunciated in the *Declaration of the Establishment of the State of Israel* are part of the values protected by the *Basic Law*. However, this returns us to the starting point of our discussion, where courts must consistently reconcile the tension between a Jewish state and a democratic one in favour of its essentially Jewish character.

⁶⁴ *Adalah’s Report*, *supra* note 26 at 8.

⁶⁵ See CERD/C/294/Add.1. CERD delivered its Concluding Observations at its 52nd session, 19 March 1998 (CERD/C/52 Misc. 29) [*Concluding Observations*].

⁶⁶ H.C. 6698/95. *Qa’dan v. Israeli Lands Administration et al.*, 54(1) P.D. 258.

⁶⁷ The ILA is a governmental body created pursuant to the *Israel Lands Administration Law (1960)* and is charged with the administration of state land.

⁶⁸ Katzir is a Jewish settlement established by the Jewish Agency.

⁶⁹ Beyond land planning policy, the decision of the Supreme Court of Israel in *Adalah et al. v. Minister of Religious Affairs et al.*, P.D. 54 (2) 164 (2000), was a precedent-setting decision on equality rights [*Minister of Religious Affairs*]. In that case, *Adalah* challenged the constitutionality of two articles of the *1999 Budget Law*, allocating funding exclusively to Jewish cemeteries. *Adalah’s* petition argued that the Ministry of Religious Affairs must set clear, non-discriminatory criteria for the allocation of public resources to all cemeteries, including Arab Muslim, Christian, or Druze cemeteries. The Court, noting the Ministry’s failure to offer any justification for the unequal distribution of these resources, held that “The resources of the State, whether land or money ... belong to all citizens and all citizens are entitled to enjoy them according to the principle of equality, without discrimination, based on

Heralded as a highly progressive verdict by many Israeli legal scholars, the *Qa'dan* decision received a remarkably different response within the Palestinian legal community in Israel.⁷⁰ Many critics of the decision noted that the Court did not provide the relief requested—an order allowing the *Qa'dan* family to purchase a home in Katzir. The decision also did not explicitly provide that Jewish settlements could not discriminate against Arabs or provide a broader endorsement of racial equality, but merely prevented the transfer of state property specifically for that purpose. To many Palestinian citizens, the decision suggested a legal program of integration and assimilation rather than equality.⁷¹ Furthermore, the Court adopted a forward-looking approach in its decision that negates and obscures the painful history of land appropriation and unfair allocation. Additionally, the Court noted that discrimination between Jews and non-Jews may be acceptable under “special circumstances,” leaving the government with the discretion to determine when and where such circumstances may exist. Thus, while the *Qa'dan* decision may be a catalyst to broader judicial interpretations regarding equality, only explicit statutory or constitutional guarantees of equality can be meaningfully viewed as providing the right to equality for all Israeli citizens.⁷²

The United Nations Committee on Economic, Social, Cultural Rights recently had the opportunity to address the absence of formal equality in Israel and stated:

religion, race, sex or other prohibited consideration.”

⁷⁰ See Ronen Shamir, “Zionism 2000: Past, Future, and the *Qa'dan* Family” (2000) 2 *Adalah's Rev.* 27; Ruth Gavison, “Jewish and Democratic” (2000) 2 *Adalah's Rev.* 32; and Marwan Dalal, “The Guest, the House, and the Judge” (2000) 2 *Adalah's Rev.* 44. See also Jamil Dakwar, “*Qa'dan*: to what extent an achievement?” *Ha'aretz* (15 March 2000); and Hassan Rafiq Jabareen, “On the Oppression of Identities in the Name of Civil Equality” (1999) 1 *Adalah's Rev.* In this article, Jabareen argues that true equality would not be fostered simply by the integration of Palestinians into Jewish (rather than “Israeli”) institutions that embody the Jewish character of the state. Jabareen explains that unlike oppressed minorities in many other countries, Palestinians cannot *equally* be integrated into a state whose defining characteristics are grounded in ethnic and religious rather than civil identity.

⁷¹ Jabareen, *ibid.*

⁷² See *Access Denied*, *supra* note 1 at 54-57. The limited utility of judicial decisions in guaranteeing equality is exemplified by the fact that the *Qa'dan* family was finally allowed to purchase a plot of land in Katzir in May 2004, only after a second petition was filed by the Association for Civil Rights in Israel (ACRI), aimed at curbing protracted efforts by state agencies to prevent the *Qa'dans* from purchasing a plot of land in Katzir. See ACRI's website, online: <<http://www.acri.org.il/english-acri/engine/story.asp?id=177>>. Similarly, in *Minister of Religious Affairs*, *supra* note 69, *Adalah* was forced to file another motion demanding that the Ministry of Religious Affairs comply with the Court's ruling in preparing its 2001 budget.

The Committee is deeply concerned about the continuing difference in treatment between Jews and non-Jews, in particular Arab and Bedouin communities, with regard to their enjoyment of economic, social, and cultural rights in the State party's territory This discriminatory attitude is apparent in the continued lower standard of living of Israeli Arabs as a result, *inter alia*, of higher unemployment rates, restricted access to and participation in trade unions, lack of access to housing, water, electricity, health care, and a lower level of education, despite the State party's efforts to close the gap. In this regard, the Committee expresses its concern that the State party's domestic legal order does not enshrine the general principles of equality and non-discrimination.⁷³

2. True Democracy or "Settling Ethnocracy"?

Israeli political geographer Oren Yiftachel argues that the assumed classification of Israel as a democratic state is illusory. Instead, he argues that Israel is a "settling ethnocracy," where ethnicity rather than territorial citizenship drives the allocation of resources.⁷⁴ Noting that ethnic (or Jewish-based) settlement initiatives have been a central ideological and practical element of the Israeli polity from its origination, Yiftachel posits that one ethnic group enjoys a superior status thereby appropriating the Israeli political apparatus and dictating the nature of its public policies.⁷⁵

Israeli legal scholar Alexandre Kedar, discussing Yiftachel's work, notes that settler societies typically pursue a deliberate strategy geared towards altering a country's demographic and ethnic structure. Thus, Kedar argues that the Israeli legal system, in the first two decades after the creation of the state, began "transforming land possession rules in ways that undermined the possibilities of Arab landholders to maintain their possession, [and] brought about the transference and registration of ownership of this land to the Jewish state."⁷⁶

Challenging many Israeli scholars who have argued for the compatibility of a stable democratic system with a state whose primary political vision requires preferential treatment for one ethnic group, Yiftachel argues that "the illusion of democracy has given internal and international legitimacy to Israel's expansionist practices and policies, and

⁷³ *Supra* note 55 at para.16. Similarly, the *State Department Report*, *supra* note 44, states:

The Government [of Israel] did little [in 2003] to reduce institutional, legal, and societal discrimination against the country's Arab citizens, who constituted approximately 20 percent of the population but did not share fully the rights and benefits provided to, and obligations imposed on, the country's Jewish citizens.

⁷⁴ 'Ethnocracy' and *Geography*, *supra* note 58. See also *Ethnocracy and Politics*, *supra* note 58.

⁷⁵ Oren Yiftachel, "Nation Building and the Division of Space: Frontiers and Domination in the Israeli 'Ethnocracy,'" online: <<http://www.bgu.ac.il/geog/members/yiftachel/paper2.html>>.

⁷⁶ Kedar, *supra* note 52 at 924.

helped foster and preserve a system of unequal citizenship.”⁷⁷ Yiftachel points to many examples of statements by Israeli politicians and scholars that betray a vision of the state’s interests as so deeply intertwined with the Zionist settlement project that they necessarily conceptualize Palestinian citizens as an alien presence within an ethnocratically defined state.⁷⁸ For example, Yiftachel notes the views expressed by the leader of the National Religious Party, former cabinet member Efraim Eitam:

Jordan and Sinai are, in the final analysis, the territorial address for meeting the national aspirations of the Palestinians. Israel should control forever the entire territory between Jordan and the sea. We should offer the Palestinians a choice between enlightened residency (with no voting rights) in Israel, or primitive Arab citizenship. The Arabs in Israel are a ticking time-bomb They resemble a cancerous growth. We shall have to consider the ability of the Israeli democracy to continue the Arabs’ participation.⁷⁹

Exploring the roots of this dynamic, Kedar argues that three fundamental assumptions characterized the Zionist approach to land near the end of the British Mandate period,⁸⁰ each of which can be viewed as critical to the development of the Israeli land regime over the past half-century: “(1) land belongs to the collective and not to individuals; (2) this collective has a special connection (symbolic, at least) to the Jewish people as a whole; and (3) this collective does not include all inhabitants of Palestine, but rather Jews alone.”⁸¹

The ethnocratic orientation of the state, such that its institutions and laws are grounded in the Jewish character of the state, is likely at the root of racist attitudes towards the Palestinian minority in Israel. As Adalah explained in its Report to the World Conference Against Racism in Durban, South Africa:

It is important, then, to approach racism directed at the Palestinian community as a distinct form of racism in Israel. Its distinctiveness is reinforced by Israel’s self-vision of isolation in a region of enemy Arab states, a vision that is axiomatic to the dominant public discourse in Israel. This view is constructed in part by Israel’s geographic circumstance, forged through the displacement of the native Palestinian population, and its historical circumstance, characterized by a series of military confrontations with neighboring Arab countries, both leading up to the establishment of the state in 1948 and in the decades since then. The fact that Palestinian citizens of Israel belong to the “Arab nation,” considered an enemy of Israel,

⁷⁷ Oren Yiftachel, “The Shrinking Space of Citizenship: Ethnocratic Politics in Israel,” online: *Middle East Report* <http://www.merip.org/mer/mer223/223_yiftachel.html> at para. 11.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* at para. 25.

⁸⁰ The British Mandate (i.e. British rule of Palestine) period lasted from 1917 to 1948.

⁸¹ Kedar, *supra* note 52 at 943. See also Bisharat, *supra* note 52 at 475-91.

significantly adds to the racist attitudes held and sentiments expressed against them. The harshly demarcated lines of “us” versus “them” play a prominent role in the national consciousness of the Jewish majority in Israel. These divisions, which help constitute the national mythology, are routinely reinforced through institutionalized differentiation between Palestinian and Jewish citizens in Israel.⁸²

3. Institutionalized Discrimination

Zionism sets the political policy agenda in Israel through the operation and constitutions of three principal organizations: The World Zionist Organization (WZO), the Jewish Agency (JA), and the Jewish National Fund (JNF). These organizations functioned as the leadership of the Zionist movement before the creation of Israel. After Israel came into being, they were given quasi-governmental status and deal with the acquisition of land, the provision of funding for land purchases, and the general development of the state.⁸³

All undertakings by these organizations are conducted on behalf of Jews only. The Knesset (Israeli parliament) has enacted countless laws that transfer state land to the JA or the JNF, while making no explicit provisions about how that land is to be distributed. Moreover, Israel systematically delegates the administration of countless programs and projects to these organizations, with the knowledge that they are bound by their own constitutions and regulations to use any allocated funds exclusively for Jewish benefit.⁸⁴ The influence and practical involvement of

⁸² *Adalah's Report*, *supra* note 26 at 1.

⁸³ See the *World Zionist Organization–Jewish Agency (Status) Law (1952) (WZO Law)* and the *Jewish National Fund Law (1953)*. For a detailed discussion of the history, circumstances, and operation of these laws, see *Access Denied*, *supra* note 1 at 143-97; Uri Davis, *Apartheid Israel: Possibilities for Struggle Within* (London: Zed Books, 2003) at 7-59; and Walter Lehn & Uri Davis, *The Jewish National Fund* (London: Kegan Paul, 1988).

⁸⁴ Article 3(d) and (e) of the Constitution of the Jewish Agency states:

Land is to be acquired as Jewish property and ... the title of the lands acquired is to be taken in the name of the JNF to the end that the same shall be held as the inalienable property of the Jewish people. The Agency shall promote agricultural colonization based on Jewish labour, and in all works or undertakings carried out or furthered by the Agency, it shall be deemed to be a matter of principle that Jewish labour shall be employed.

Article 3(a) of the JNF's Memorandum of Association states its primary object as:

To purchase, acquire or lease or in exchange, etc. ... in the prescribed region (which expression in this Memorandum shall mean the State of Israel in any area within the jurisdiction of the Government of Israel or any part thereof, for the purpose of settling Jews on such lands and properties.

the JA and the JNF in executing Israeli governmental policy is the primary mechanism for effecting institutionalized discrimination in Israel.⁸⁵ These organizations make the discriminatory character of the Israeli state invisible to the outside observer, and allow Israel to claim to be the “only democracy in the Middle East.”⁸⁶

Israeli human rights activist and political writer Uri Davis has more radically argued that Israel should be considered an apartheid state.⁸⁷ Davis points out that while racism is prevalent in all states, including Western liberal democracies, Israel can best be characterized as an apartheid state insofar as racism is regulated in law through legislative action and the legal system, affording Arab citizens a second-class status while forcing “the citizenry through acts of parliament to make racist choices and conform to racist behaviour.”⁸⁸

While neither the *WZO Law* nor many of the other laws passed to perpetuate this system draw explicit distinctions between “Jews” and “non-Jews,”⁸⁹ their vesting of authority over settlement and land development with organizations constitutionally bound to act only in the interests of Jews fosters institutionalized discrimination.⁹⁰ By incorporating the exclusivist provisions of these organizations into the Israeli legal system, Davis argues that this legislative structure functions to preserve the “veil of ambiguity over Israeli apartheid legislation for over half a century.”⁹¹

In Davis, *supra* note 83 at 40. For a detailed discussion, see also *Access Denied*, *supra* note 1 at 143-94; and Lehn & Davis, *ibid.*, at 186-91. Chapter 6 of Lehn & Davis’s book, entitled “Only to Jews,” discusses the mechanisms through which these agencies operate only for the benefit of Jewish citizens in a non-explicit fashion.

⁸⁵ Davis, *supra* note 83 at 55-56. The impact of the *Qa’dan* decision on the ability of the JNF and JA to continue to engage in discriminatory land allocations remains to be seen.

⁸⁶ *Access Denied*, *supra* note 1 at 143-66. Davis, *supra* note 83 at 37-38.

⁸⁷ Davis, *supra* note 83.

⁸⁸ *Ibid.* at 37. Israeli scholars and politicians argue that Israel can hardly be considered an apartheid state given that Arab citizens are entitled to vote, Arab citizens are Members of the Knesset, and Arab citizens (in principle) have equal standing before the courts. Davis argues that the availability of these rights serves only to obscure the fact Israel maintains a political program aimed at legislatively depriving Arab citizens of equal access to and enjoyment of the material allocations of the state (i.e. second-class citizenship).

⁸⁹ *Ibid.* at 43-44.

⁹⁰ *Ibid.* at 41-44.

⁹¹ *Ibid.* at 39. Institutionalized discrimination has not prevented the existence of some overtly discriminatory legislation. For example, recent controversy and international condemnation has been sparked by the *Nationality and Entry into Israel Law (Temporary Order)* (2003). This law prohibits the granting of residency or citizenship status to Palestinians from the Occupied Territories who are married to Israeli citizens, thereby banning family unification. See Adalah’s website for detailed

The land planning policies crafted to facilitate the expropriation of Bedouin land and their forced transfer to the townships, merits an analysis as to whether Israel can be viewed as committing the crime of apartheid against its Bedouin citizens. Article 2(c) of the *International Convention on the Suppression and Punishment of the Crime of Apartheid* applies the term “the crime of apartheid” to:

Any legislative measures and other measures calculated to prevent a racial group from participation in the political, social, economic, and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group ...⁹²

While Israel is not a party to the *Apartheid Convention* and is, therefore, not bound by its terms, it remains an informative tool in deciphering which state actions can be viewed as crimes of apartheid according to international law. Given that the government-sanctioned institutional structure, pursuant to the *WZO Law*, mandates the allocation of agricultural land and resources in the Negev solely for the benefit of Jewish citizens, “legislative measures” aimed at forcibly evicting the Bedouin from their ancestral lands to facilitate such discriminatory purposes prevent the Bedouin from meaningful participation in the “political, social, economic, and cultural life of the country.” Moreover, insofar as the “full development” of Bedouin society remains intrinsically connected with agrarian pursuits, Israel’s sedentarization policy, reviewed below, may well fulfill the criteria specified in Article 2(c) of the *Apartheid Convention* and constitute a crime of apartheid.

B. *Discriminatory Legislation and Policy*

Although Israel has enjoyed virtually unchecked power to control the Arab minority under its authority, it has generally resorted to a complex set of legal apparatus for achieving its land expropriation goals. These legal tools have served to undermine the ability of Bedouin landholders to retain land possession through the application of formalistic legal requirements while at the same time facilitating the mass transfer of land to the state.⁹³ In an article on the use of law in legitimating Israel’s land regime, George Bisharat argues that, like many colonial powers, Israel has used legalism

information, online: <<http://www.adalah.org/eng/famunif.php>>. See also *Adalah’s Report*, *supra* note 26 at 83-84, highlighting other directly and indirectly discriminatory laws.

⁹² International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVII), 28 UN GAOR, Supp. No. 30, U.N. Doc. A/9030 (1974) [*Apartheid Convention*].

⁹³ Kedar, *supra* note 52 at 924.

rather than raw power as a strategy for the appropriation of land “to rationalize and defend acquisition of Arab lands for two principal audiences: the Israeli public itself, and secondarily, the international community.”⁹⁴

1. Empty Space and Rootless Nomads

The Israeli justification for concentrating the Bedouin in urban townships is fueled by a view of the Negev as “empty space.”⁹⁵ Flyers, pamphlets, and advertisements encourage active settlement in the Negev, boasting of the abundance of available agricultural land under the slogan “Making a Desert Bloom.”⁹⁶ Political Zionism has characterized itself as a Western civilizing force, standing in opposition to the “tribalistic and backwards” ways of the Bedouin. The Bedouin are generally regarded as rootless nomads and classified as a natural element on the land, rather than as a civilized population that has settled on it.⁹⁷ This orientalist view of the Bedouin as “other” culminates in the convergence of the two ideas mentioned above: “One aspect of this official story emphasizes the empty quality of the Negev, while another aspect discovers the Bedouin *nomads* as a part of nature. Both aspects ultimately converge into a single trajectory: an empty space that awaits Jewish liberation, and a nomadic culture that awaits civilization.”⁹⁸

Hence, there is a cultural conception of the Bedouin as an archaic, nomadic society that is dying and which must be saved by Western civilization. The Bedouin are viewed as an unsettled population, and their settlements labeled as “spontaneous” rather than “planned.” This cultural dichotomy can be extended into the legal realm, where such

⁹⁴ Bisharat, *supra* note 52 at 468. In arguing that the use of law by colonial enterprises is directed at legitimating state actions for the dominant classes and the international community, Bisharat challenges what he considers the false assumption that the use of law by a colonial power functions to legitimate state actions to the oppressed groups or classes in order to foster implicit consent to such domination and oppression.

⁹⁵ Shamir, *supra* note 30. See also M. Friedman, “If Young People Don’t Do It, No One Will” *The Jerusalem Report* (29 December 2003) 60, discussing former Prime Minister David Ben-Gurion’s call to Jews to settle the Negev.

⁹⁶ Falah, *supra* note 6 at 35.

⁹⁷ Shamir, *supra* note 30 at 237. See also Falah, *supra* note 19 at 73, providing a review of the factors that typically lead governments to adopt policies aimed at sedentarizing pastoral nomadic communities.

⁹⁸ Shamir, *ibid.* at 236. For the landmark analysis of orientalism and its effect on shaping conceptions of Arabs and the Middle East, see Edward Said, *Orientalism* (New York: Vintage Books, 1979).

conceptualizations obscure Bedouin claims to historic land ownership and only recognize formal land registrations, making the Bedouin worldview appear incompatible with any modern conception of land ownership.⁹⁹ Such thinking, has by extension fostered a view of Bedouin as trespassers and intruders in their own homes.

Thus, Israel sees itself as fulfilling the promise of Westernization by transforming an ancient culture and forcing it into a structured pattern of urban development.¹⁰⁰ However, the Israeli characterization of the Bedouin as nomadic peoples unattached to specific plots of land is false. Unlike many other Middle Eastern nomadic communities, the Negev Bedouin had already ceased living nomadically long before the Israeli government began its settlement program.¹⁰¹ Accordingly, as noted by Ghazi Falah, “these [settlement programs] were not aimed primarily at settling a highly mobile population; rather, the objective was to evict this population from its lands and to resettle it elsewhere.”¹⁰²

Ottoman records of land disputes within the Negev Bedouin community indicate that specific tribes valued their land ownership claims enough to go to war over them.¹⁰³ Historically, Bedouins who could not lay claim to land were relegated to an inferior status.¹⁰⁴ The Bedouin had, and in many cases continue to have, their own sophisticated methods for resolving land ownership disputes.¹⁰⁵ Most Bedouin had permanent places of residence and moved only seasonally for grazing.¹⁰⁶ The ownership of pastoral land was fixed in most cases.¹⁰⁷ In fact, by 1948 the Bedouin were semi-nomadic in that most had a permanent dwelling place and many had

⁹⁹ Shamir, *ibid.* at 237.

¹⁰⁰ See Oren Yiftachel, “Planning and Social Control: Exploring the Dark Side” (1998) 12 J. Plan. Lit. 2 at 395. In this article, Yiftachel develops a critical theory of urban and regional planning. He argues that most accounts of urban and regional planning assume that such endeavours are progressive and ignore the frequent use of planning as an oppressive instrument aimed at exerting social control over marginalized groups.

¹⁰¹ See *Access Denied*, *supra* note 1 at 112-13.

¹⁰² Falah, *supra* note 19 at 72.

¹⁰³ Maddrell, *supra* note 3 at 5.

¹⁰⁴ *Ibid.*

¹⁰⁵ Shamir, *supra* note 30 at 235. See also *Access Denied*, *supra* note 1 at 112-13.

¹⁰⁶ See *Access Denied*, *ibid.*

¹⁰⁷ Maddrell points out that according to a 1931 census 89.3 per cent of the Bedouin were dependant on agriculture while only 10.7 per cent earned a living from raising livestock, suggesting a transition from traditional nomadic pastoralism to settled farming. *Supra* note 3 at 5. See also Falah, *supra* note 8 at 36.

built stone houses.¹⁰⁸ A British Colonial officer in 1937 wrote:

Too much weight must not be attached to the romantic associations with the word "Bedouin" and the sentimental conceptions aroused by the conception of the "noble nomad." The Bedouin of the Beersheba area are semi-pastoral and semi-agricultural. They dwell in tents but are not true wanderers of the desert and otherwise differ little from many *fellahin* [peasants] who live in stone houses but are seasonal migrants.¹⁰⁹

Thus, despite the cultural conceptualization described above, it is not sufficient to suggest that Israel is singularly motivated by the cultural values of an industrialized society. While this worldview is the pretense for publicly celebrating the Bedouin transfer, it is not the state's prime motivation. The underlying motivation is that there is simply no room for a traditional agrarian community on land earmarked for the exclusive agricultural and settlement pursuits of the most advantaged sector of Israeli society, namely the Jewish population.¹¹⁰ As Israel's first Prime Minister, David Ben-Gurion, wrote to his son as early as 1937: "Negev land is reserved for Jewish citizens whenever and wherever they want. We must expel the Arabs and take their place."¹¹¹ More recently, the former Israeli cabinet minister responsible for land management, Avigdor Lieberman, made the following statement regarding Bedouin attempts to resist Israel's sedentarization policies: "*We* must stop *their* illegal invasion of state land by all means possible. The Bedouins have no regard for *our* laws; in the process *we* are losing the last resources of state lands. One of my main missions is to return the power of the Land Authority in dealing with the non-Jewish threat to *our* lands."¹¹² Lieberman's use of the terms "we," "their," and "our" highlights the frequent tendency of Israeli government officials to characterize Bedouin *citizens* as an alien presence on the land, suggesting that only Jewish citizens are viewed as the true owners of state

¹⁰⁸ Maddrell, *supra* note 3.

¹⁰⁹ CO 733/348/11, Public Record Office, Kew. Cited in Maddrell, *supra* note 3 at 5.

¹¹⁰ See Maddrell, *supra* note 3 at 9. See also Rachel Pomerance, "Pioneering Israelis settle the Negev in quest to create a Jewish majority" *Global News Service of the Jewish People*, (5 October 2003) online: JTA News <http://www.jta.org/page_view_story.asp?intarticleid=13282&intcategoryid=1>.

¹¹¹ Quoted in Cook, *supra* note 5 at 1. See Mitchell Ginsburg, "A Bedouin Powder Keg in the Negev" *The Jerusalem Post* (8 September 2003). Referring to Prime Minister Ariel Sharon's five-year plan for the Negev, Ginsburg notes "Over the next five years, the government intends to encourage - and, if necessary, force - 70,000 Negev Bedouin to leave their sprawling shantytowns for new, urban communities, and thus to free up space for Jewish building."

¹¹² *Supra* note 77 at para. 1 [emphasis added].

land.¹¹³

In many cases, the racist and discriminatory underpinnings of Israeli governmental policy towards the Bedouin have been expressed in even clearer terms. For example, in July 2001, the head of the Ministry of Education's Bedouin education system, Moshe Shohat, stated:

Bedouin are a bloodthirsty people who commit polygamy, have 30 children, and continue to expand their illegal settlements by taking over state lands. In their culture, they relieve themselves outdoors and don't even know how to use the toilet.¹¹⁴

From an official Israeli perspective, the motives behind Bedouin sedentarization are benevolent. While the original reasons given for concentrating the Bedouin were based on military security considerations, the justifications for transferring the Bedouin population into the townships have evolved into more sensitive language.¹¹⁵ The modern justifications for transfer are to prevent the spread of "spontaneously" erected settlements and to ensure the provision of basic services.¹¹⁶

Sedentarization of the Bedouin is not simply the inadvertent effect of Israeli policy, but that it actually *is* the Israeli policy. As early as 1959, the government announced that a major aim within its Bedouin policy was "the passage of a law for the settlement of the Bedouin and their transfer to permanent homes in the Negev."¹¹⁷ Israeli legislation and the activities of units like the Green Patrol (discussed below) demonstrate non-benevolent motives. Bedouin settlement activity, such as "spontaneous" building in the

¹¹³ In January 2004, referring to and offering a justification for the practice of toxic crop spraying of unrecognized villages, Israel Lands Administration spokesperson Ortal Tzabar stated: "We did what we had to do because it is our land. The Bedouin invaded the land and planted crops illegally with no permits. It wasn't *their* land. The action was to stop this *invasion* in a less violent way" [emphasis added], cited in H.L. Krieger, "Bedouin Outraged by Crop Spraying" *Jerusalem Post* (29 January 2004). Note again the usage of the terms "we," "their," and "invasion" as illustrative of the perception that Bedouin do not share the entitlement to state land that should presumably be an equal benefit available to all Israeli citizens.

¹¹⁴ Cited in "High Court Asks Why Bedouin Education System Chief Not Fired" *Jerusalem Post* (16 January 2002). See also Robbie Berman, "Israeli Official Slurs Bedouins" *Jewish Week* (20 July 2001).

¹¹⁵ Kurt Goering, "Israel and the Bedouin of the Negev" (1979) 9 *J. Palestine Stud.* 3 at 6.

¹¹⁶ In *Avitan v. Israel Land Authority*, H.C.J. 528/88 (1988) P.D. 43(4), 297 [Avitan], the Supreme Court of Israel effectively legitimized the state's resettlement program as a type of affirmative action program, providing a precedent under which the Israeli government is free to ignore the Bedouin desire to maintain an agrarian lifestyle.

¹¹⁷ Israel, *Knesset Debates* (5 August 1959) at 2923, cited in Jiryis, *supra* note 1 at 103. See especially, Adalah, News Release, "Adalah to PM Sharon: The Government's Five-Year Plan for the Arab Bedouin in the Naqab is Discriminatory and Illegal" (8 May 2003), online: <http://www.adalah.org/eng/pressreleases/pr.php?file=03_05_08> [Adalah Press Release].

unrecognized villages, has been negatively viewed as encroaching on state land designated for Jewish settlement, and seen as a method by which the Bedouin hope to demand land rights and compensation.¹¹⁸ The Negev represents a great mass of land available for future settlement and is prized for that reason above all others.¹¹⁹ Shai Hermesh, the treasurer of the JA and the head of its alleged effort to ensure a Zionist majority in the Negev, commented, “We need the Negev for the next generation of Jewish immigrants. In the Negev you can get land for pennies It is not in Israel’s interest to have more Palestinians in the Negev.”¹²⁰

Thus, while the official purpose for maintaining the military enclosure area discussed above was security, the real reasons involved ensuring an adequate supply of jobs for new Jewish immigrants, preventing Bedouin from returning to their land, preventing the formation of political organizations and collective uprising, and most importantly, state appropriation of Bedouin land.¹²¹ In truth, Israel’s program of “merciful urbanization” is merely the philanthropic pretense under which land can be expropriated without eliciting widespread internal and external criticism. In 1963, Moshe Dayan, then Minister of Defence, made the following revealing remark regarding governmental objectives for the Bedouin community:

We should transform the Bedouin into an urban proletariat in industry, services, construction, and agriculture. Eighty-eight percent of the Israeli population are not farmers, let the Bedouin be like them. Indeed, this will be a radical move which means that the Bedouin would not live on his land with his herds, but would become an urban person who comes home in the afternoon and puts his slippers on The children would go to school with their hair properly combed. This would be a revolution, but it would be fixed within two generations. Without coercion but with government direction ... this phenomenon of the Bedouins will disappear.¹²²

¹¹⁸ Falah, *supra* note 19 at 77. Falah refers to the work of Israeli scholars on the Bedouin, and shows how the Bedouin are characterized as insidiously plotting against the state. Israeli politicians have often been very frank in making such characterizations. Government Minister Effi Eitam recently referred to the Bedouin as waging a “construction jihad” against the Israeli state, and Public Security Minister Tzachi Hanegbi was recently quoted as telling Jews in the Negev to “Rise up in your thousands, take up sticks and get rid of the Bedouin Arabs,” cited in Jonathan Cook, “Sharon Stokes Fears Of Arab Minority to Serve His Long Term Interests” *The Washington Report on Middle East Affairs* (October 2003).

¹¹⁹ Falah, *supra* note 19 at 77.

¹²⁰ Cited in Chris McGreal, “Bedouin Feel the Squeeze as Israel Resettles the Negev: Thousands Displaced from Ancient Homeland” *The Guardian* (27 February 2003).

¹²¹ Maddrell, *supra* note 3 at 7. See especially, Jiryis, *supra* note 1 at 102-30.

¹²² “M. Dayan on Land Policy and the Problems of the Bedouins in Israel” *Ha’aretz* (31 July 1963) (English translation), reprinted in Shamir, *supra* note 30 at 231.

2. Legislating Land Expropriation

This section discusses the manner in which Israel, since its inception in 1948, has developed a legislative canon that effectively makes Bedouin (and Palestinian generally) land claims invisible. This process has been achieved through a series of notorious and potent laws.

The first is the *Absentee's Property Law, 1950*.¹²³ This law allowed the state to acquire real property left behind by those who were expelled or fled their homes during the 1948 war.¹²⁴ The absentee status does not change should the person re-enter the country or even if the person remains in the country—these people became known as “present absentees.”¹²⁵ This law began a process of expropriating land from private Palestinian owners and systematically distributing such land to Jewish ownership, through a variety of institutional mechanisms.¹²⁶ Estimates by the Israeli Custodian of Absentee Property and the JNF suggest that between 70-88 per cent of Israeli territory consists of land classified as “absentee property.”¹²⁷

The *Land Acquisition (Validation of Acts & Compensation) Law (1953)*¹²⁸ stated that land not in the possession of its owner as of April 1, 1952, could be registered as state property.¹²⁹ Since the Bedouin had been transferred into the enclosure zone by this point in time, this law facilitated the massive transfer of Negev lands to the state.¹³⁰ All lands in the western Negev from which the Bedouin had been removed were declared

¹²³ 4 L.S.I. 68. For a detailed discussion of the *Absentee Property Law* and its broad implications for Palestinian citizens of Israel as well as Palestinian refugees around the world, see Bisharat, *supra* note 52 at 513-14; *Access Denied*, *supra* note 1 at 69-76.

¹²⁴ *Access Denied*, *ibid.*

¹²⁵ *Ibid.*

¹²⁶ The ILA administers all public land in Israel and has a legal obligation not to discriminate against citizens. However, 50 per cent of the governing council of the ILA is comprised of members of the Jewish National Fund. The ILA has frequently transferred public land to the JNF, which by its constitution, can only allocate such land for use by Jews.

¹²⁷ Davis, *supra* note 83 at 33. Prior to 1948, Jews controlled only 6-7 per cent of the land within the current boundaries of the state, yet today 93 per cent of all land in Israel is under direct state control. *Adalah's Report*, *supra* note 26 at 3.

¹²⁸ 7 L.S.I. 43 (1952-1953). For a detailed discussion, see Kedar, *supra* note 52 at 952-69; Bisharat, *supra* note 52 at 518-19; Davis, *supra* note 83 at 31-34.

¹²⁹ See Falah, *supra* note 19 at 79. He explains that within a few years after this law was passed, that state was able to transfer 1,225,174 dunums to its control, 325,000 dunums of which were privately owned.

¹³⁰ *Ibid.* See also, Maddrell, *supra* note 3 at 7.

“abandoned” and, thereby, became subject to the Israeli conception of empty space.¹³¹ Moreover, when many Bedouin attempted to return to their lands at the end of the enclosure period they were forced to either lease the land or trespass. Consent to lease has been taken in court as proof that the lessee did not have title.¹³² Interestingly, in connection with the various settlement initiatives proposed during the 1970s by the Israeli government, establishing land ownership has proven relatively easy.¹³³ On the other hand, where Bedouin have insisted on keeping their land, pre-1948 deeds of purchase, Ottoman or British property tax receipts, and other similar forms of evidence have been deemed by Israeli courts as insufficient proof of ownership.¹³⁴

The *Land Rights Settlement Ordinance (1969)*¹³⁵ classified all *mawat* lands as state property, unless formal legal title could be produced.¹³⁶ Although Israeli courts recognized that Bedouin had been living on the lands, they would not recognize tents as settlements.¹³⁷ Furthermore, the courts denied that pastoralism as practiced by the Bedouin constituted “working” the land.¹³⁸ The last opportunity for Bedouin to register their lands against *mawat* status had been in 1921,¹³⁹ at a time when their

¹³¹ Falah, *supra* note 6 at 42. For the specific amounts of land expropriated in the Negev and the instalments see Jiryis, *supra* note 1 at 130-31.

¹³² *El-Wakili v. State of Israel*, (1983) H.C.J. 84/83, P.D. 37(4), 173 [*El-Wakili*], cited in Shamir, *supra* note 30 at 245. For a detailed discussion of *mawat* jurisprudence, see Kedar, *supra* note 52 at 952-64.

¹³³ The paltry sums offered in Israel attempts to compromise on land disputes, have been characterized by the former Israeli government adviser on Arab affairs as “aggravated robbery” in the eyes of the Bedouin. Falah, *supra* note 19 at 77.

¹³⁴ Maddrell, *supra* note 3 at 8; Falah, *supra* note 19 at 76, noting that Israel has generally been willing to recognize Bedouin land claims where Bedouin have agreed to sell.

¹³⁵ 23 L.S.I. 283.

¹³⁶ The Ottoman Empire used a term called *mawat* (literally “dead”) to describe land that was unworked and more than 1.5 miles from the nearest settlement. For a detailed discussion of the historical and statutory category of *mawat* see Shamir, *supra* note 30 at 238-42. Shamir notes that Ottoman requirements for demonstrating that land was *mawat* actually involved showing that land was (1) barren and (2) so distant from any town or village that the person with the loudest voice could not be heard there, with the current rule being an adaptation during the British Mandate.

¹³⁷ *El-Riati v. Batcha*, (1981) Ham. 827/81, D.C.B.S. 33(1) 329, 332 cited in Shamir, *supra* note 30 at 240, n. 10.

¹³⁸ *Salim El-Huashlla v. State of Israel*, (1974) Civil Appeal 218/74, P.D. 38(3) 141 [*El-Huashlla*], cited in Shamir, *supra* note 30 at 238-42.

¹³⁹ *Land Ordinance (Mawat) (1921)*, 38 I.R.5. This opportunity for registration was provided by British Mandate authority so that it could assess unused land after assuming control from the Ottoman empire. They followed the tradition of the Ottomans in only allowing such registrations periodically—a sensible policy given the tribal movements and shifts that occurred over the course of Ottoman rule

exclusive claim to ownership of the land was unchallenged. Until 1948, the Bedouin themselves administered land usage in the Negev with minimal interference from external authorities. The idea of registering land earned the distrust of many Bedouin, who saw it as a means of control being exerted by a foreign power.¹⁴⁰ As a result, few Bedouin at that time sought to formally register their land.¹⁴¹ As Falah points out, “The Bedouin, who had an intimate knowledge of the land and had utilized it for centuries, became the victims of a technicality, since they could not provide documentary evidence to support their claims that satisfied Israeli law.”¹⁴²

The signing of Israel’s peace treaty with Egypt also served as a mechanism for the state expropriation of Bedouin land. Under the auspices of the *Negev Land Acquisition (Peace Treaty with Egypt) Law (1980)*¹⁴³ large tracts of Bedouin land were confiscated to purportedly build military bases and an airport.¹⁴⁴ No appeal process existed and compensation ranged from two to fifteen per cent of that offered by Israel to Jewish settlers forced to relocate from the Sinai.¹⁴⁵ The Bedouin were told that there was no time to consult with them prior to the signing of the peace treaty (Camp David Accords), and the resultant land acquisition plan immediately took effect as law.¹⁴⁶ In one instance, fifty-six thousand dunams of land were taken for building a military base at Im Tinan. The base was never built, and in 1994 the land was turned over for use by Jewish farmers.¹⁴⁷

Home demolitions are the cornerstone of Israel’s day-to-day policy

(16th–19th centuries). See Kedar, *supra* note 52 at 937-38.

¹⁴⁰ Goering, *supra* note 115 at 7. See also Shamir, *supra* note 30 at 241.

¹⁴¹ See Maddrell, *supra* note 3 at 5, noting “[t]he Negev Bedouins failure to register their tribal land holdings must be seen in the context of the absence of any challenges to their rights at that time.” See also *Access Denied*, *supra* note 1 at 105-13.

¹⁴² *Supra* note 19 at 76. Maddrell, *supra* note 3 at 8, quotes an Israeli Interior Ministry official in 1978 who stated “the government will never recognize the Bedouin’s claims to ownership rights in the Negev because they lack sufficient proof that the land belongs to them.” Maddrell also notes that Israeli law lecturer David Kretzmer has commented that it is impossible for the Bedouin to prove land ownership in the current situation.

¹⁴³ 34 L.S.I. 190.

¹⁴⁴ Falah, *supra* note 19 at 80; Maddrell, *supra* note 3 at 11.

¹⁴⁵ Maddrell, *ibid.*

¹⁴⁶ *HRA Factsheet*, *supra* note 9.

¹⁴⁷ *Ibid.* The Israeli master plan for the Negev in 1976 noted the government’s desire to use Negev land claimed by the Bedouin for airports and other development, indicating that its expropriation was planned long before the Camp David Accords (1979) or the passage of the law. According to Falah, *supra* note 19 at 80, military needs served as a pretext for appropriating one of the few areas of Negev land still in the hands of its original Bedouin inhabitants.

aimed at forcibly evicting Bedouin from their homes in unrecognized villages, and re-settling them in urban townships.¹⁴⁸ The phenomenon of the unrecognized villages was a byproduct of the *Planning and Building Law (1965)*,¹⁴⁹ which zoned all land in Israel as residential, agricultural, or industrial. Certain Bedouin villages were “unrecognized” by the planning scheme, their lands thereby being classified as agricultural.¹⁵⁰ The law forbade any form of unlicensed construction on agricultural land—effectively subjecting any house in any unrecognized village to demolition with a court order.¹⁵¹ While ownership is often not disputed, the law created a scheme whereby the whole community as well as each individual home and building instantaneously became illegal.¹⁵² The fact that the villages and homes may have existed prior to the enactment of the statute, and even the state itself, was not a consideration overriding the fact that they now existed on agricultural land. In fact, the *Planning and Building Law* allows the courts to issue retroactive demolition orders. Residents of unrecognized villages discovered that any extension or moderate construction effort they might engage in was defined as being against the public interest. Since the villages are unrecognized, they have never had any local authority to whom they could apply for a change in the status of their land. On the other hand, despite similar violations of planning and building regulations in the Jewish sector, Jewish homes are never demolished. Instead, the standard practice has generally been to retroactively grant permits and exhibit tolerance towards unlicensed building in the Jewish sector.¹⁵³

Legislation has also served to directly hinder the ability of the Bedouin to engage in their traditional livelihoods. For example, the *Plant Protection (Damage by Goats) Law (1950)* requires Bedouin shepherds to get a permit from the Ministry of Agriculture to graze their goats on

¹⁴⁸ See Maddrell, *supra* note 3 at 9. See generally, *Amnesty Report*, *supra* note 30 at 43-46.

¹⁴⁹ 19 L.S.I. 330.

¹⁵⁰ *Adalah's Report*, *supra* note 26 at 34.

¹⁵¹ See *supra* note 31 and accompanying text. In 2003, the Israeli government demolished approximately seventy-five Bedouin-owned buildings in the Negev, including homes, shops, a water storage facility, and most provocatively, a mosque in the village of Tel al Milleh.

¹⁵² It is perhaps this dynamic that prompted MK Ophir Pines-Paz (Labor) to remark: “Whoever agrees to the term ‘unrecognized settlement’ is lending a hand to the institutionalized discrimination by all the government offices against Beduin citizens.” Quoted in M. Shariv, “Knesset Negev Day Focuses on Bedouin Needs” *Jerusalem Post* (28 November 2001).

¹⁵³ *Access Denied*, *supra* note 1 at 235; and *Amnesty Report*, *supra* note 30 at 41.

adjoining state lands, which are often military areas.¹⁵⁴ While the Israeli government's claim is that this law is aimed at preventing overgrazing, erosion, and desertification, there has been significant controversy regarding the ecological justification for this law, and many have suggested that it operates merely to wear down defiant Bedouins, insistent upon maintaining their traditional lifestyles.¹⁵⁵ Permits are issued at the discretion of ministry officials, and are generally accompanied by an awkward condition stipulating that the state is not responsible for any casualties.¹⁵⁶ During the first three years in operation, Bedouin flocks were reduced from two hundred and twenty thousand to eighty thousand through governmental action.

3. Implementing a Policy of Forced Transfer

Israeli policy towards the Bedouin is characterized by two central aims. The first aim is to concentrate and sedentarize the Bedouin in order to make their traditional land available for exclusively Jewish settlement programs.¹⁵⁷ The second aim is to domesticate the indigenous Bedouin community, making them available as a cheap source of wage labour for the Jewish economy.¹⁵⁸ The legislative and policy tools used to achieve these goals aim directly to cut the Bedouin off from their culture and make life in the unrecognized villages unbearable until they are forced to move to the townships.¹⁵⁹

¹⁵⁴ *HRA Factsheet*, *supra* note 9.

¹⁵⁵ Israel's three leading ecologists attacked the "Black Goat law" (as it has come to be known) as outdated and erroneous in its suppositions, noting that there was no significant overgrazing in the Negev highlands, which the Bedouin were prevented from using. Maddrell, *supra* note 3 at 13. See also *The Jerusalem Post* (15 August 1978), cited in Falah, *supra* note 6 at 44.

¹⁵⁶ *HRA Factsheet*, *supra* note 9.

¹⁵⁷ *Access Denied*, *supra* note 1 at 129-30; Maddrell, *supra* note 3 at 8; Falah, *supra* note 19 at 75.

¹⁵⁸ Maddrell, *supra* note 3 at 8.

¹⁵⁹ *Ibid.* Shmuel Rifman, former chairperson of the Ramat HaNegev Regional Council, made the following comment:

What is happening today is the systemic seizure of state lands ... This is then accompanied by phenomenon such as theft of property, delinquency and drugs. The problem is that our struggle with the Bedouin has deep political roots. This is a struggle for land, and where there is land there is blood ... We came to this country to establish a Jewish state in the Land of Israel. Ben Gurion did not intend to establish a Bedouin state in the Negev.

Quoted in *No Man's Land*, *supra* note 14 at 15. See also, C. Bailey, "Barak, Shas, and the Bedouin" *Jerusalem Post* (19 July 1999).

Ensuring that the Bedouin can no longer sustain themselves through traditional forms of employment is integral to Israel's forced transfer policy. This objective has thus far been achieved through a variety of administrative practices. For example, although the state has few problems offering long term leases to Jewish farmers on land formerly owned by the Bedouin, Bedouin farmers are generally only provided with short-term leases that do not allow for permanent cultivation.¹⁶⁰ Moreover, Bedouin farmers are not usually given water allowances, unlike their Jewish counterparts.¹⁶¹ No assistance is provided to Bedouin farmers in drought years, while substantial assistance is provided to Jewish farmers operating on long-term leases.¹⁶²

Efforts at making Bedouin agricultural pursuits untenable have also been facilitated by the efforts of the Open Areas Inspection Unit, known as the "Green Patrol." The Green Patrol was established in 1976 as an attachment of the Ministry of Agriculture, and was led by Ariel Sharon (now Prime Minister and then-Minister of Agriculture).¹⁶³ The Green Patrol was founded to fight the so-called Bedouin incursion onto Israeli lands, and was intended "to act as the executive arm of government policy."¹⁶⁴ Falah explains that the Green Patrol is a paramilitary unit comprised of twenty to thirty men deemed to be "nature activists," who mobilize for special operations to pull down Bedouin tents, seize flocks, and destroy crops planted without an appropriate permit.¹⁶⁵ Its continuous expansion to speed up the urbanization of the Bedouin has been characterized by numerous incidents of violence and unauthorized action.

¹⁶⁰ Maddrell, *supra* note 3 at 12.

¹⁶¹ *Ibid.*; see also *HRA Factsheet*, *supra* note 9. While there never appears to be enough water to accommodate Bedouin agricultural needs, the numerous agriculture-based Jewish *kibbutzim* and *moshavim* in the Negev have had plenty of water.

¹⁶² *Ibid.*

¹⁶³ Current Prime Minister Ariel Sharon remains Israel's most controversial politician. In addition to the Green Patrol, Sharon also founded Unit 101 in 1953, which was a small yet highly controversial commando unit, known as the most aggressive unit within the Israeli Defense Forces (IDF). See Falah, *supra* note 6 at 43.

¹⁶⁴ Falah, *ibid.* at 43.

¹⁶⁵ *HRA Factsheet*, *supra* note 9; Falah, *supra* note 6 at 43; Maddrell, *supra* note 3 at 10. Maddrell provides a comprehensive look at the comments various government officials have made regarding the Green Patrol. She provides a survey of Bedouin attitudes towards the Green Patrol, and emphatically calls for its disbandment. Despite its provocative actions, the Green Patrol has received little media attention outside of the Israeli press.

Allegations of excessive brutality have been commonplace.¹⁶⁶ In 1983, the High Court of Justice ruled against the Green Patrol for intentionally disregarding a court-ordered injunction.¹⁶⁷

Additionally, since 2002, the Israel Lands Administration has frequently, without warning, sent airplanes to spray and destroy almost 7,500 acres of Bedouin crops with toxic chemicals.¹⁶⁸ According to a recent detailed report by the Arab Association for Human Rights, the chemical used by the government—Roundup—is not safe for aerial spraying.¹⁶⁹ Moreover, the practice of aerial spraying is being used to bypass proper legal channels in the state's unresolved land dispute with the Negev Bedouin, in an effort to inflict physical and financial damage that forces the Bedouin to abandon their homes in the unrecognized villages.¹⁷⁰ The report further discusses the manner in which this practice violates Bedouin human rights, including the right to health, the right to a livelihood, the right to work, and property rights generally.¹⁷¹ Reflecting upon this new practice, Professor Yitzhak Nevo of Ben-Gurion University of the Negev commented:

Spraying crops is another means of extorting the Bedouin to accept townships. It's another instrument of making their lives in villages unliveable and unbearable so as to get them to accept the townships policy. When the crops are destroyed, the population is at risk of malnutrition and hunger ... [a]nd that is what the government aims at, to use poverty and hunger to coerce the Bedouin to accept townships policy.¹⁷²

¹⁶⁶ For example, in August 1998, Sliman Abu Jlidan of the Azazmeh tribe was shot dead by a member of the Green Patrol for straying into a closed area and fleeing when challenged. See *HRA Factsheet*, *supra* note 9; Maddrell, *supra* note 3 at 10.

¹⁶⁷ See *Jerusalem Post* (2 March 1983), cited in Maddrell, *supra* note 3 at 10.

¹⁶⁸ See Arab Association for Human Rights, *By All Means Possible: A Report on Destruction by the State of Crops of Bedouin Citizens in the Naqab (Negev) by Aerial Spraying With Chemicals* (Nazareth: Arab Association for Human Rights, 2004); *No Man's Land*, *supra* note 14 at 17-20; Cook, *supra* note 118; and *Amnesty Report*, *supra* note 30 at 43.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.* See also *State Department Report*, *supra* note 44 at 20, noting "In addition, in April [2003], the ILA sprayed chemical herbicide on 2,000 dunums [500 acres] of land belonging to several unrecognized villages to compel residents to move into one of the seven townships."

¹⁷¹ On March 22, 2004, Adalah filed a petition with the Supreme Court of Israel on behalf of Bedouin citizens whose land was sprayed with toxic chemicals and on behalf of various human rights organizations. H.C. 2887/04, *Saleem Abu Medeghem, et al. v. Israel Lands Administration, et al.* (2004). The petition, on numerous grounds, seeks an immediate halt to the practice spraying crops. On March 23, 2004, the Court issued an interim injunction preventing further spraying pending a ruling on the petition. The petition is currently pending. Online: <<http://www.adalah.org/eng/legaladvocacycultural.php#2887>>.

¹⁷² Quoted in Krieger, *supra* note 113.

Perhaps the most disturbing action aimed at pressuring the Bedouin to leave the unrecognized villages is the denial of all basic services and the prevention of the development of any form of infrastructure.¹⁷³ No permits for building are ever issued, and illegal construction projects are exhaustively prosecuted. Given that as many as twelve people often live within a Bedouin home in the unrecognized villages, the villages are made unlivable through the deprivation of basic services. In fact, Article 157A of the *Planning and Building Law* was specifically designed to dislodge residents from unrecognized villages, by forbidding national utility companies from connecting an unlicensed building to electricity, water, or telephone networks.¹⁷⁴

Few unrecognized villages have any connections that allow for running water, and clean drinking water is in short supply.¹⁷⁵ The quantity and quality of available drinking water is far below the minimum health standards stipulated by the World Health Organization.¹⁷⁶ In a case brought before the International Water Tribunal, the Israeli government's policy was declared illegal. The jury pronounced:

The jury is unable to countenance any governmental action which uses the denial of water as a means of enforcing zoning or planning. These policies have a negative effect on the health of the populations in the "unrecognized villages." The jury deplores the denial of water of sufficient quantity and quality.¹⁷⁷

¹⁷³ *No Man's Land*, *supra* note 14 at 7-8. See also *State Department Report*, *supra* note 44 at 20; and *Amnesty Report*, *supra* note 30 at 43.

¹⁷⁴ Article 157A, *supra* note 149.

¹⁷⁵ See *No Man's Land*, *supra* note 14 at 21-28 for a detailed discussion of the negative health effects caused by the denial of access to running water from official connections in the unrecognized villages. In 2001, Adalah filed a petition to the Supreme Court of Israel against the Minister of National Infrastructure and other governmental organizations, demanding that water, like any other public good, be allocated in an equal and non-discriminatory fashion. See H.C. 3586/01, *The Regional Council for Unrecognized Villages in the Naqab et al. v. The Minister of National Infrastructure*, et al., decision delivered 16 February 2003. The Court dismissed the petition in February 2003 based on the state's representation that water access had been provided for five of the seven villages named in the complaint, despite the fact that such access did not include connection of the villages to the water network made available to Jewish agricultural settlements in the Negev.

¹⁷⁶ *HRA Factsheet*, *supra* note 9.

¹⁷⁷ *The Galilee Society v. The State of Israel* (1992), (International Water Tribunal) at paras. 6-8. (19 February 1992). The tribunal is an unofficial forum for the resolution of international disputes regarding water rights. Despite choosing to appear that the tribunal as a respondent, Israel has failed to comply with the pronouncement of the jury.

Almost no unrecognized villages are connected to a sewage network or have adequate refuse disposal services.¹⁷⁸ Many homes do not have bathrooms and cannot obtain permission to build them. Outbreaks of diarrhea and jaundice are commonplace amongst children in these villages. Moreover, no unrecognized villages in the Negev are connected to electricity, and most villages must resort to running private generators that barely suffice to provide lighting.¹⁷⁹ According to a 2003 report prepared by Physicians for Human Rights - Israel on health in the unrecognized villages, "the residents of the unrecognized villages do not enjoy decent living conditions and the provision of underlying determinants of health that are essential for leading a healthy life."¹⁸⁰

Despite the lack of services in the unrecognized villages, the government-established townships cannot be seen as a reasonable alternative living arrangement. This is primarily because the towns rob the Bedouin of their cultural identity and hinder their cultural and social development.¹⁸¹ Further, the townships, despite being "recognized," remain the poorest recognized localities in Israel.¹⁸² They have no central sewage systems, few paved roads, and a complete lack of local employment opportunities.¹⁸³ Unlike the facilities provided to neighboring Jewish communities, there is no provision for maintaining livestock or engaging in agriculture.¹⁸⁴ It is no surprise that, as a result of these conditions, half of the Bedouin population has refused to voluntarily surrender their homes

¹⁷⁸ See *No Man's Land*, *supra* note 14 at 34-45, for a detailed discussion of the negative health effects in the unrecognized villages due to the absence of a proper sewage system and adequate refuse disposal.

¹⁷⁹ *Ibid.* at 28-34.

¹⁸⁰ *Ibid.* at 84. The report placed the blame for the denial of such basic services squarely on the Israeli government. It noted such deprivation "reflects a deliberate and long-standing policy on the part of the Israeli government to deny these residents access to the basic services to which they are entitled as human beings," and that the "lack of recognition and the neglect described in this report are the product of an ideology that discriminates against the Palestinian minority in Israel, and against the Arab Bedouin who live in the unrecognized villages of the Negev." For a detailed discussion of health issues among the Bedouin of the Negev, see also Maddrell, *supra* note 3 at 17.

¹⁸¹ See *supra* note 24 and 25.

¹⁸² See *supra* note 24 and accompanying text. See also *State Department Report*, *supra* note 44 at 20, stating "The recognized Bedouin villages [the seven recognized townships] receive basic services from the Government; however, they remain among the poorest communities in the country."

¹⁸³ See *supra* note 24 and 25.

¹⁸⁴ *Ibid.*

and re-locate to official townships.¹⁸⁵

From the government's perspective, the resoluteness of many Bedouin to stay in the unrecognized villages may have reinforced the need for more aggressive coercion.¹⁸⁶ In April 2003, the government unveiled a USD \$265 million five-year plan (2003-2007) regarding the Bedouin sector in the Negev. The plan's stated objective is "to alter and improve the situation of the Bedouin population in the Negev, relieve its distress, arrange for orderly reordering of land in the Negev, and strengthen law enforcement."¹⁸⁷ It calls for the creation of seven new government-established towns for the Bedouin in the Negev, completing the development and infrastructure of the existing seven townships, contesting and settling ownership claims and land arrangements, a massive reinforcement of officials for enforcing the state's right to land, enforcing the various planning and construction laws discussed above, and taking actions against "trespassers."¹⁸⁸ However, this plan was issued as an administrative order rather than through legislation, and reflects a lack of consultation with the Bedouin community in the unrecognized villages and a lack of any recognition of the Bedouin's historical land rights as an indigenous population.¹⁸⁹ Despite alternative proposals by Bedouin leaders and several non-governmental organizations, the government authorities have refused to even consider such options.¹⁹⁰

Simultaneously, work on new Jewish settlements in the Negev has

¹⁸⁵ *Ibid.* Maddrell provides a detailed discussion of the hardships faced by Bedouin in the townships, and of the deplorable lack of services available when compared with similarly situated Jewish settlements, *supra* note 3 at 13-15. See also Falah, *supra* note 19 at 85-88.

¹⁸⁶ *The Amnesty Report*, *supra* note 30, suggests that the government's designation of the Negev as a priority area for absorption of new Jewish immigrants, rather than resoluteness on the part of the Bedouin, has prompted the government's renewed determination to press forward with its aggressive master plan. See also, Pomerance, *supra* note 110, suggesting that Jewish settlement efforts in the Negev are being encouraged in order to tip the demographic scales to counter a rapidly growing Arab population.

¹⁸⁷ See *Adalah Press Release*, *supra* note 117. See also, Ginsburg, *supra* note 111.

¹⁸⁸ *Ibid.* See especially, Cook, *supra* note 3.

¹⁸⁹ *Ibid.* In 2000, the Association for Civil Rights In Israel (ACRI) petitioned the Supreme Court of Israel demanding that the government include the Bedouin unrecognized villages in its zoning plan, so that residents can obtain building permits and access to basic services. The petition noted that while the government has established 106 Jewish agricultural settlements in the Negev, Bedouin agricultural settlements remain unrecognized. The parties reached a settlement whereby the government agreed to account for the development of rural Bedouin agricultural villages and consider the recommendations of the Regional Council of Unrecognized Villages in the Negev in formulating its regional zoning plan. For a more detailed discussion, see ACRI's website, online: <<http://www.acri.org.il/english-acri/engine/story.asp?id=89>>.

¹⁹⁰ *Ibid.*

already begun, with the first Jewish community, Givot Bar, being built on the land of the Araqeeb village, which was “temporarily” confiscated from the Bedouin in 1953.¹⁹¹ Givot Bar was hastily erected by a dozen Jewish families in the middle of the night. Israeli Housing and Construction Minister Effi Eitam explained that the move took place under cover of darkness to immediately create facts on the ground in order to prevent the Bedouin from appealing to the High Court of Justice.¹⁹²

The effect of Israeli legislation and policies on the Bedouin right to adequate housing, as well as the general welfare and situation of the Bedouin altogether, was noted with concern in the Concluding Observations of the United Nations Committee on Economic, Social, and Cultural Rights at its thirtieth session in 2003:

The Committee continues to be concerned about the situation of the Bedouins residing in Israel, and in particular those living in villages that are still unrecognized. Despite measures by the state party to close the gap between the living conditions of Jews and Bedouins in the Negev, the *quality of living and housing conditions* of the Bedouins continue to be significantly lower, with limited or no access to water, electricity, and sanitation. Moreover, they continue to be subjected on a regular basis to land confiscations, house demolitions, fines for building “illegally,” destruction of agricultural crops, fields and trees, and systematic harassment and persecution by the Green Patrol, in order to force the Bedouins to resettle in “townships.” The Committee is also concerned that the present compensation scheme for Bedouins who agree to resettle in “townships” is inadequate.¹⁹³

C. *Bedouin Before Israeli Courts*

Distinct legal consequences flow from the view of the Bedouin as nomadic wanderers, and this has resulted in judicial decisions that violate Bedouin rights. Generally, Israeli courts view the Bedouin as invisible (rather than as legal entities with potential land ownership rights), reflecting the Zionist narrative of the Negev as empty land. As Ronen Shamir points out, “Once the Bedouin are placed on the side of nature, judicial practices tend, on the one hand, to objectify the denial of Bedouin claims of land ownership and, on the other hand, to facilitate state policies of forcing the Bedouin into urban settlements.”¹⁹⁴

¹⁹¹ See Cook, *supra* note 3. See also Pomerance, *supra* note 110.

¹⁹² See Arieh O’Sullivan, “New Village Irks Bedouin” *Jerusalem Post* (20 January 2004); and Hilary L. Krieger, “Activists Petition Against Negev Settlement” *Jerusalem Post* (25 January 2004).

¹⁹³ *Supra* note 55 at para. 27 [emphasis added].

¹⁹⁴ Shamir, *supra* note 30 at 231. See also Kedar, *supra* note 52 at 929-30, noting “the Israeli legal system used procedural and evidentiary rules in ways that curtailed the chances of Arab landholders from retaining their land. As a result, while Israeli rules of property were undergoing a transformation that facilitated the acquisition of land from Arab landholders, the legal system bestowed upon this

Israeli judges have continuously used rigid notions of land ownership and title, refusing to examine whether such legal categories are simply inapplicable to Bedouin claims. Where openings for potential legal challenges exist, they are often closed off by stringent demands for documentation or limitation periods.¹⁹⁵ Through an objectification of Bedouin land claims, the judiciary plays a critical role in turning the faulty Zionist vision of the Negev as an empty space awaiting Jewish settlement into a “taken-for-granted objective reality.”¹⁹⁶

In the *El-Huashlla*¹⁹⁷ case, thirteen Bedouins asked the Supreme Court of Israel to uphold their ownership rights over several plots of land on the basis that their rights over said property had existed for generations. The state defended its expropriation of the lands based on the *Land Rights Settlement Ordinance (1969)*,¹⁹⁸ which had stipulated that the land was *mawat* (“dead”) unless a formal title could be produced. Since the Bedouin could produce no such title, they were forced to argue that the land was not *mawat*, and presented evidence indicating the existence of a nearby settlement (*Seer*) that might bring the classification of the land outside the scope of the law.¹⁹⁹ The Court held that Bedouin tents do not constitute settlements,²⁰⁰ that Bedouin pastoralism did not constitute “working” the land in a productive fashion, and denied the claim, stating:

The Court has before it a description of the area, as it had been observed by those who toured the Negev in the middle of the previous century. This description reveals that in the said area there had been no village and no agriculture, and *except for a Bedouin tent-encampment and wild vegetation the whole area was nothing but barren desert.*²⁰¹

transformation an aura of inevitability and naturalness.”

¹⁹⁵ This is an interesting issue given that most Bedouin land claimants were in a restricted enclosure zone at the time of state expropriation. See generally the discussion of the *El-Wakili* case in Shamir, *supra* note 30 at 243. Kedar, *supra* note 52 at 956, notes that “Settler courts often use procedural and evidentiary tools to curtail the possibility of native possessors retaining the land they occupy. Similarly, Israeli jurisprudence imposed heavy evidentiary onuses on the possessors. This suited the demand for ‘modern’ and written evidence, a particularly forbidding requirement for the typical Bedouin landholder.”

¹⁹⁶ Shamir, *supra* note 30 at 236.

¹⁹⁷ *El-Huashlla*, *supra* note 138.

¹⁹⁸ *Supra* note 135.

¹⁹⁹ *Ibid.*

²⁰⁰ See *El-Riati v. Batcha*, *supra* note 139, where the court denied an injunction against moving a Bedouin tent, stating that Bedouin tents were by their nature mobile objects designed for movement, and hence relocation would have no injurious impact on nomadic peoples.

²⁰¹ *El-Huashlla*, *supra* note 138 [emphasis added].

In *Abu-Solb v. Israel Land Authority*,²⁰² the Supreme Court of Israel gave resounding support to the dominant conception of the Negev as empty. Bedouin appellants argued that their lands had been taken “fraudulently” under the *Land Rights Settlement Ordinance (1969)*, since they were not notified of proceedings to transfer their lands to state ownership, as required under the law. They claimed ownership of certain plots of land they had worked and possessed “for years.”²⁰³ This argument, and subsequently the appeal as a whole, was dismissed because the Bedouin could not have been residing in those areas for years, as they were in the enclosure zone for an eighteen year period. The Court relied on witnesses who claimed that they never saw any Bedouins in the Negev during that period. The Bedouin claim was denied because the desert was viewed as empty, based on the undeniable legal fact that the state had officially emptied it. This was treated by the Court as a straightforward logical conclusion. If Bedouin were on the land at the time in question, they were there illegally because they should have been in the enclosure zone and, as such, could not profit from their wrongdoing. Moreover, the fact that the Bedouin did not receive notice was irrelevant because the registrations were posted in all Jewish settlements, which were the only legal places such postings could occur.

Thus, under the provisions of the *Planning and Construction Law* the Bedouin living in the unrecognized villages have been reduced from possible claimants in land ownership disputes with the government to criminal defendants. Currently, injunctions to stop demolition orders for illegal construction are the primary source of litigation involving Bedouin claimants. Lawyers generally seek to argue that the individual case involves exceptional circumstances, rather than insisting that the law perpetuates historical injustice and oppression.²⁰⁴ This trend is a product of the judges’ and prosecutors’ use of a wide array of precedents to support the claim that past injustice does not excuse present lawlessness. Even where the unfortunate historical circumstances of the Bedouin are noted, these concerns are dismissed by an emphasis on the rule of law (and its attendant formal provisions).²⁰⁵ The Supreme Court of Israel has frequently inverted history so that Israeli law precedes Bedouin claims, and thus informs a conceptual scheme that views state policy as intended to foster Bedouin

²⁰² (1986) Civil Appeal 518/86, P.D. 43(4), 297.

²⁰³ *Ibid.* Discussed and translated in Shamir, *supra* note 30 at 244.

²⁰⁴ See Shamir, *supra* note 30 at 247.

²⁰⁵ *Ibid.*

prosperity and development.²⁰⁶

In *El-Sanaa v. District Committee for the Southern District*,²⁰⁷ demolition orders were issued to Bedouins who had moved into a planned township but who had not yet obtained construction permits. For failing to comply, the Bedouins were fined and sentenced to a year in prison. On appeal, the court held that while it could not justify the illegal building, the exceptional circumstances in this case merited leniency. Thus, the court was able to appear both benevolent and firm, while simultaneously disregarding Bedouin historical oppression by the state, and declaring the collective practices of the Bedouin illegal as an objective fact.

A further example of the court's conception of Bedouin land rights is exemplified in *Avitan v. Israel Land Authority*.²⁰⁸ In this case, a Jewish police officer asked the court to overturn an administrative decision denying him the right to lease land in a Bedouin township at the reduced leasing fees enjoyed by the Bedouin. In denying the request, the Court considered the history and tribal culture of the Bedouin, and stated:

At stake are Bedouins that lived for many years as nomads and their attempts to permanently settle in one place failed and further involved law breaking activities, until a state interest to help them had been established, in order to achieve important public goals.²⁰⁹

IV. THE RIGHT TO ADEQUATE HOUSING

A. *Adequate Housing and U.N. Instruments*

Any discussion of the right to adequate housing must find its starting point in the *Universal Declaration of Human Rights*.²¹⁰ The *UDHR* marked the first time the right to adequate housing was enshrined in an international human rights instrument. As an inspiration for the entire human rights framework, the *UDHR* postulates how humans can live with the maximum degree of freedom and fulfillment. Article 22 articulates an

²⁰⁶ *Ibid.*

²⁰⁷ (1987) Criminal Appeal 193/87, D.C.B.S. 49(2), 397 [*El-Sanaa*], cited in Shamir, *supra* note 30 at 248.

²⁰⁸ *Supra* note 116.

²⁰⁹ *Ibid.* Quoted in Shamir, *supra* note 30 at 304.

²¹⁰ G.A. Res. 217A (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [*UDHR*]. Article 22 provides that, "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

overarching emphasis on the right to human development, and integrates all branches of human rights (civil, political, economic, social, cultural) within the rubric of greater human development.²¹¹

This emphasis on human development (individually and collectively) underpins the need for specific concentration on the right to adequate housing. Article 25 states: “Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services.”

The fundamental importance of the right to adequate housing has received greater attention as human rights law has evolved over the past five decades. While the *UDHR* uses the language of indivisible legal rights, and is considered by some to have the standing of customary international law, its legal role has been as a catalyst for greater legal solidification of the right to adequate housing within other U.N. covenants and conventions.

The right to adequate housing has legal foundations within several binding instruments of international human rights law. These include some of the most widely ratified treaties within the U.N. human rights framework, such as the *International Covenant on Civil and Political Rights*,²¹² the *International Covenant on Economic, Social, and Cultural Rights*,²¹³ the *Convention on the Elimination of All Forms of Racial Discrimination*,²¹⁴ the *International Convention on the Elimination of All Forms of Discrimination Against Women*,²¹⁵ and the *Convention on the Rights of the Child*.²¹⁶

The *ICESCR* offers the most legally significant provision on housing rights in Article 11(1), which states:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

²¹¹ See J. David Hulchanski & Scott Leckie, *The Human Right to Adequate Housing: 1945-1999* (Geneva: Center on Housing Rights and Evictions, 2000) at 4-5. See also Dias & Leckie, *supra* note 8.

²¹² 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 Mar. 1976) [*ICCPR*].

²¹³ 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) [*ICESCR*].

²¹⁴ 21 December 1965, 660 U.N.T.S. 195 (entered into force 4 January 1969), Article 5.

²¹⁵ GA Res. 34/180, UN GAOR, 1981, Supp. No. 46, UN Doc. A/34/46, 193, Article 14(2).

²¹⁶ GA Res. 1386 (XIV) 14 U.N. GAOR, 1959, Supp. No. 16, U.N. Doc. A/4354, 19, Principle 4.

Article 11(1) has been the subject of significant analysis and is the leading international legal source on housing rights. As a party to the *ICESCR*, Israel is bound by its terms, and obligations under it should be reflected in Israel's domestic policy.²¹⁷

The U.N. Committee on Economic, Social, and Cultural Rights (*CESCR*) was established in 1986, and has done more than any other international body to shape, define, and further the human right to adequate housing. It was created by the Economic and Social Council (*ESOC*) and is responsible for monitoring the implementation of the *ICESCR*. In this capacity, the *CESCR* operates on the basis of reports from states parties to the *ICESCR*, information from specialized U.N. agencies, NGO reports, and generally available literature. As of January 2004, the *CESCR* has adopted fifteen general comments dealing with various aspects of the *ICESCR*. In developing an overview of the right to adequate housing within the context of Israeli violations, this article focuses on four General Comments in particular (General Comment nos. 3, 4, 7, 9).

B. *Interpreting the Right to Adequate Housing*

To many, the notion of "a right" to adequate housing has appeared illusive and difficult to interpret. Critics have argued that it should be viewed as a goal rather than as a right, that the notion of "adequate housing" is too vague to be taken seriously, or that the requirement that states provide "adequate housing" for their citizens imposes an unreasonable and unfeasible burden.²¹⁸ Such critiques are misleading. Rather than unrealistically being required to instantly provide a home for every citizen, states are simply required to use "all appropriate means" to achieve the goal of universal housing. This demands that states not adopt retrogressive legislation or policies that deny housing rights, or discriminate in land planning and housing allocations. Moreover, the right to adequate housing is a model of the interdependence of various human rights, including civil and political rights. For example, it may be impossible to maintain the right to security of person, public assembly, or education where the right to adequate housing is compromised. In terms of economic, social, and cultural rights, the right to adequate housing is an essential component of the general right to an adequate standard of living.

Perhaps too much has been made of the word "housing," given that legal interpretations of the right to adequate housing, discussed below,

²¹⁷ Israel ratified the *ICESCR* on January 3, 1992, with no declarations or reservations.

²¹⁸ See Dias & Leckie, *supra* note 8.

clearly reflect the fact that it reaches beyond the provision of simple shelter. Scott Leckie, the Executive Director of the Center on Housing Rights and Evictions and a leading housing rights activist, explains:

Because the right to adequate housing encompasses a much broader range of concerns than simply the direct provision of a dwelling to the homeless by the State, or reductionist notions of housing constituting exclusively “four walls and a roof,” this right must be understood holistically as constituting both an independent right and a composite right comprising all relevant human rights matters linked in any way to the existence, protection, and security of the home ... An accurate view of housing rights must also recognize not only the physical manifestations of a structure called “the home,” but must equally embrace the procedural, non-material aspects of housing rights, which, in many respects, may be ultimately more fundamental than purely the issue of housing supply or availability.²¹⁹

The issuance of the *CESCR's General Comment No. 4: The right to adequate housing*²²⁰ represents the most far-reaching and authoritative legal interpretation of the right to adequate housing, and clearly established the norms and guidelines that parties to the *ICESCR* must follow towards implementing Article 11(1). While many of the fundamental principles articulated in the General Comment are relevant in the Israeli context, the focus in this section is on those principles that best address the implications of Israeli policy towards the Bedouin.

Paragraph 7 of *General Comment No. 4* stipulates that the right to adequate housing should “not be interpreted in a narrow or restrictive sense.” The *CESCR* argues against a construction of the right to adequate housing as simple shelter. The right to adequate housing involves “the right to live somewhere in security, peace and dignity.” In this paragraph, the *CESCR* stresses the connection between the right to adequate housing and other basic human rights. This theme is also echoed in paragraph 9, highlighting the notion that the failure to protect housing rights is tantamount to a slippery slope, in which other economic and social rights are simultaneously rendered insecure.

The key value of this General Comment lies in its stringent and structured treatment of the term “adequate.” Paragraph 8 outlines seven criteria that must be met before housing can truly be deemed adequate. The general presumption that “adequate” housing cannot be pinned down and must depend solely on a variety of domestic factors is dismissed. The first such criterion is the “[l]egal security of tenure.” The *CESCR* holds that all persons should be safe to enjoy exclusive possession of their land and property. Also, the *CESCR* calls for “genuine consultation with affected

²¹⁹ *Ibid.*

²²⁰ UN CESCR, 1992, UN Doc. E/1992/23 [*General Comment No. 4*].

persons and groups” in implementing measures aimed at conferring legal security of tenure.²²¹ Paragraph 8(b) argues that an adequate house must contain facilities essential for health, security, comfort, and nutrition. Sustainable access to potable drinking water, energy for cooking, refuse disposal, site drainage, and emergency services are specifically mentioned as entitlements of beneficiaries of the right to adequate housing. Paragraph 8(e) deals with accessibility and states: “Within many States parties, increasing access to land by landless or impoverished segments of the society should constitute a central policy goal.” Paragraph 8(f) provides that adequate housing must allow for access to employment options, health care services, schools, and other social facilities. Thus, the interpretation of the term “adequate” is incompatible with housing that deprives citizens of basic services, especially when these services are generally available to the rest of the population.²²²

Among the most important provisions for assessing the treatment of the Bedouin population is paragraph 8(g). This paragraph provides: “The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.”²²³ Asserting that “adequate” in fact means “culturally adequate,” the *CESCR* goes well beyond the concept of shelter, and ties housing rights to the cultural identity and development of individuals and groups. According to this provision, housing is not adequate if it merely provides shelter and services, even if ideal, while neglecting the cultural ramifications of housing policy. This consideration is, for obvious reasons, particularly salient in the context of the Negev Bedouin.

Paragraph 11 of *General Comment No. 4* provides that state parties must give special consideration to those segments of the population already living in unfavorable conditions. Policies that benefit those who are already socially and economically advantaged at the expense of disadvantaged groups are inconsistent with commitments under the *ICESCR*. The same paragraph continues:

²²¹ *Ibid.* at para. 8(a).

²²² While international law generally provides that economic barriers should not hinder the realization of economic and social rights, this issue is not particularly relevant in the Israeli context. There has never been any reasonable claim suggesting that Israel cannot support the Bedouin right to adequate housing based on a quantifiable lack of resources, particularly in light of the ample funding available for the hundred or more Jewish agricultural settlements receiving basic services in the Negev.

²²³ *Supra* note 220 at para. 8(g).

It would thus appear to the Committee that a general decline in living and housing conditions, directly attributable to policy and legislative decisions by state parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.²²⁴

Paragraph 12 mandates the adoption of a national housing strategy that attempts to reconcile domestic policy with international legal commitments arising out of Article 11(1). Such a policy should once again “reflect extensive genuine consultation with, and participation by, all of those affected.”²²⁵ Paragraph 13 expands this requirement for state monitoring efforts, and notes that reporting guidelines adopted by the *CESCR* emphasize the need to “provide detailed information about those groups within ... society that are vulnerable and disadvantaged with regard to housing.” Specifically included within an enumeration of these groups are those living in “illegal” settlements, and those subject to forced evictions.

Finally, paragraph 18 unequivocally declares “the Committee considers that instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.” The right to adequate housing includes the right to be protected from forced eviction.

C. *Forced Evictions and the Right to Adequate Housing*

Although *General Comment No. 4* interprets forced evictions as a *prima facie* violation of the right to adequate housing,²²⁶ it does not comprehensively define what practices and policies might constitute forced evictions. *General Comment No. 7* is the most authoritative comment on forced evictions and human rights within the international law framework.²²⁷

General Comment No. 7 is innovative in several respects. First, it provides a new approach in regards to the correlation between national wealth and forced evictions, and insists that forced evictions are not an appropriate catalyst for national development objectives. Second, it

²²⁴ See also *General Comment No. 3: The Nature of States' Parties Obligations*, UN CESCR, 1991, UN Doc. E/1991/23 [*General Comment No. 3*]. It provides that states should not deliberately adopt retrogressive measures.

²²⁵ *Supra* note 220 at para. 12.

²²⁶ *Supra* note 220.

²²⁷ *General Comment No. 7*, UN CESCR, 16th Sess., Annex IV, U.N. Doc. E/1998/22 (1997) [*General Comment No. 7*].

explicitly declares that evictions must not result in homelessness—those who are subject to forced evictions must be provided reasonable alternative housing and should not be subject to other human rights violations as a result of their eviction. Third, it requires state parties to explore “all feasible alternatives” prior to forced evictions.²²⁸ Finally, *General Comment No. 7* focuses on the strict conditions under which forced evictions might be deemed legal, reflecting the belief that there may be a variety of scenarios in which they may be justifiable and consistent with international law.

“Forced evictions” are defined in paragraph 3, which states:

The term “forced evictions” as used throughout this general comment is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.²²⁹

Paragraph 9 of *General Comment No. 7* stresses that Article 2(1)²³⁰ of the Covenant, when read in conjunction with Article 11(1), requires states parties to use all “appropriate means” to ensure the right to adequate housing. This in turn means that states parties to the *ICESCR* have a positive duty both to enact legislation to prevent forced evictions, and to actively ensure that the law is enforced against state agents or third parties who might be carrying such evictions out.

Paragraph 10 obliges states parties to consider Article 2(2) of the *ICESCR* (non-discrimination provision)²³¹ and ensure that evictions that are carried out do not embody discriminatory practices. Moreover, while the General Comment provides that some evictions may be lawful, such evictions must be carried out in a fashion consistent with the *ICESCR*, ensuring that other human rights are not violated in the process, and ensuring the availability of all legal recourses to the evicted parties.

Paragraph 13 states that all feasible alternatives must be explored before any forced eviction is carried out, and that such alternatives must be

²²⁸ *Ibid.* at para. 13.

²²⁹ *Ibid.* at para. 3.

²³⁰ Article 2(1) of the *ICESCR* provides, “Each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” This article forms the basis for the CESCR’s *General Comment No. 3*.

²³¹ Article 2(2) of the *ICESCR* provides: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

“explored in consultation with the affected persons.” This paragraph also provides that adequate compensation for any property affected must be part of any eviction that does take place, and that the state must ensure an “effective remedy” for persons whose rights have been violated, pursuant to Article 2(2) of the *ICCPR*.

Paragraph 14 contemplates cases in which eviction is justified. Lawful evictions must be carried out with due respect for the relevant provisions of international human rights law. Moreover, relevant legislation or laws that sanction evictions should clearly lay down the circumstances under which they might be permissible. From this provision, it can be extrapolated that evictions carried out that are either arbitrary or not sanctioned by law, or both, are *prima facie* illegal, and as such cannot be consistent with the right to adequate housing. It is also insufficient to merely offer general circumstances in which interference with a person’s home may be acceptable; rather, a state party must specify the “precise circumstances in which such interferences may be permitted.”²³²

Paragraph 15 provides that certain procedural protections should exist when forced evictions occur. These include:

- (i) an opportunity for genuine consultation with those affected;
- (j) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- (k) information on the proposed evictions, and where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- (l) especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- (m) all persons carrying out the eviction to be properly identified;
- (n) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- (o) provision of legal remedies; and
- (p) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.²³³

Paragraph 16 is extremely important in its insistence that evictions should not lead to homelessness or render individuals vulnerable to other human rights abuses. The paragraph provides that “[w]here those affected are unable to provide for themselves, the State party must take all

²³² *Supra* note 227 at para. 14.

²³³ *Ibid.* at para. 15.

appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.”²³⁴

D. *Israel's International Legal Obligations*

While the above sections provide an analysis of interpretations of the right to adequate housing and the subject of forced evictions by the *ICESCR*, these interpretations cannot be considered abstractly without an examination of Israeli obligations under the *ICESCR*. To establish that Israel violates the right to adequate housing, it is necessary to prove both that the right is, in fact, being violated, and that Israel is legally obligated to prevent such violations.

While the *CESCR's General Comment No. 3* does not focus solely on the right to adequate housing in Article 11(1), it attempts to clarify the nature of state parties' obligations under the *ICESCR* in general.²³⁵ Article 2 of the *ICESCR* has a special relationship with the entirety of the Covenant in that it sets the guidelines by which states parties must actively seek to implement its contents. Specifically, three contentions in *General Comment No. 3* are particularly applicable to Israel. First, while the Covenant provides for progressive realization, “steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the states concerned.”²³⁶ Second, this obligation to take steps quickly must be pursued through “all appropriate means, including particularly the adoption of legislative measures.”²³⁷ Third, beyond legislative measures, the *CESCR* envisages that “all appropriate means” should include the provision of domestic judicial remedies for violations of rights protected under the *ICESCR*.

While *General Comment No. 3* accepts that the *ICESCR* allows for a flexible scheme of achieving the rights provided therein, specific steps must be taken to make such a realization possible. The object of the *ICESCR* and *General Comment No. 3* is to establish clear legal obligations for states parties with respect to fully realizing basic economic and social human rights. As paragraph 9 of *General Comment No. 3* concludes:

²³⁴ *Ibid.* at para. 16.

²³⁵ *Supra* note 224.

²³⁶ *Ibid.* at paras. 1-2.

²³⁷ *Ibid.* at para. 3.

[The *ICESCR*] imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.²³⁸

General Comment No. 9 elaborates on the principles set down in *General Comment No. 3*, particularly with regard to state parties' duty to give effect to the *ICESCR* within their domestic legal systems.²³⁹ Paragraph 3 of *General Comment No. 9* notes that the domestic application of the *ICESCR* must be pursued in light of two principles of international law. The first principle invokes Article 27 of the *Vienna Convention on the Law of Treaties (1969)*, which provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."²⁴⁰ The second principle invokes Article 8 of the *UDHR*, which provides: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."²⁴¹ The *CESCR* goes on to state that although the *ICESCR* has no article that explicitly obligates state parties to develop judicial remedies,²⁴² a justification for a failure to provide them would have to show that the provision of such remedy were not "appropriate means" for enforcing rights protected under the Covenant. The convergence of these two principles suggests that the provision of judicial remedies for economic and social rights is *de facto* mandatory. A party to the *ICESCR* cannot invoke its internal law as a justification for failing to provide judicial remedies, which is presumptively the only justification for arguing that judicial remedies would be inappropriate means.

Paragraphs 4 and 5 provide that legally protected international human rights should be directly applicable within the domestic legal system. While no rigid specification of the means by which these rights should be implemented domestically is provided, the *CESCR* specifies that the means should be adequate to ensure just treatment. Moreover, paragraph 8 of the *CESCR* "strongly encourages formal adoption or incorporation of the Covenant in national law." Thus, a state that did not adopt any legislative measures to protect economic and social rights (such as the right to

²³⁸ *Ibid.* at para. 9.

²³⁹ *General Comment No. 9: The domestic application of the Covenant*, UN CESCR, 1998, UN Doc. E/C. 12/1998/24 [*General Comment No. 9*].

²⁴⁰ (1969) A/CONF.39/27.

²⁴¹ *Supra* note 210.

²⁴² Unlike Article 2(3) of the *ICCPR*, which does provide such an obligation.

adequate housing) and afforded judicial remedies that did not countenance international legal obligations, would in effect be failing in its obligations under the Covenant. The overarching theme of this General Comment is that persons living within the jurisdiction of any state that is party to the *ICESCR* have the right to expect authorities (administrative and judicial) to take Covenant rights into account when making decisions. The *ICESCR* should have legal effect when protected parties seek to rely on its guarantees, over and above domestic legal provisions. This is true regardless of whether such rights have been formally incorporated into domestic legislation. Moreover, it is not acceptable for the allocation of resources to be exclusively within the political domain, to the extent that challenges to government actions cannot be judicially resolved. Finally, in paragraph 15, the *CESCR* provides that courts must take *ICESCR* rights into account and ensure that state conduct is consistent with its obligations under the Covenant. “Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.”²⁴³

When applied in the context of Article 11(1) housing rights, *General Comment No. 9* can be read in conjunction with paragraph 17 of *General Comment No. 4*, which is particularly interesting insofar as it suggests that many components of the right to adequate housing are highly compatible with the provision of domestic legal remedies. Such areas might include legal appeals seeking injunctions against forced evictions or demolitions, legal appeals seeking compensation following an illegal eviction, and legal recourse allegations of discrimination in the allocation or availability of housing.

V. APPLICATION AND ANALYSIS

A. *The “Collective” Right to Adequate Housing*

The analysis set forth above regarding Israeli legislative and policy choices that violate the Bedouin right to adequate housing is based on the concept of collective rights. Communities, and not just individuals, have the right to adequate housing. Article 1(1) of the *ICESCR* stresses the need for the self-determination of communities as a whole,²⁴⁴ and helps interpret the community dimensions of the right to adequate housing in Article 11(1).

²⁴³ *Supra* note 239.

²⁴⁴ Article 1(1) *ICESCR* provides: “All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

The Bedouin as a community are faced with a choice between living in deplorable conditions, or being forcibly moved to an alternative location against their wishes. By withholding services and preventing construction in the unrecognized villages, Israel offers the possibility of an adequate standard of living (although even that has been shown to be contentious in the townships), only where the right to self-determination is sacrificed.

The policy of forcing the eviction of the Bedouin deprives the Bedouin of equal rights as citizens. As pointed out above, the institutional structures in place to promote statewide development cater only to Jewish citizens.²⁴⁵ While agricultural settlements for Jewish immigrants are built at a rapid pace, including over 100 in the Negev since 1948, Israel has neither created nor even recognized the existence of Bedouin agricultural communities in the Negev.²⁴⁶ Meanwhile, Bedouin land in the Negev (and other Palestinian land throughout the country) is expropriated pursuant to a policy of furthering exclusively Jewish development. Although Israel is not a party to the *Apartheid Convention*, the community dimension of Article 11(1) is inherently violated by the existence of state-sanctioned inequality. While the question of whether Israel can appropriately be labeled an apartheid state remains a subject of considerable debate, clearly those who retain only second-class citizenship can never hope to reach a standard of living comparable to that of the favoured segment of the population. At a minimum, the systematic manner in which the Bedouin are deprived of their basic rights, discussed in depth above, provides overwhelming evidence that they are the victims of a crime of apartheid perpetrated by the Israeli state.

Looking closely at *General Comment No. 4*, it is clear that the unrecognized villages do not meet the interpretation of “adequate” set forth by the *CESCR*. Living in these unrecognized villages is quite distant from living in “security, peace, and dignity.” For instance, the Bedouin have a birthrate that is amongst the highest in the world. However, despite rapid population growth, Bedouin in unrecognized villages cannot engage in even the most basic construction efforts, have access to few services, and constantly face the potential of their homes being demolished. Intimidation at the hands of the Green Patrol is commonplace, and Bedouin in the unrecognized villages are forced to live in fear of governmental action aimed at forcibly removing them from their homes. Israel has defined their homes and lifestyles as incompatible with the discriminatory public interest. No home falling within such a classification can be deemed adequate.

²⁴⁵ See *supra* notes 84-87.

²⁴⁶ See *supra* note 189.

Paragraph 8 of *General Comment No. 4* states that adequate housing should involve the legal security of tenure. The Bedouin have no such tenure and their homes have been categorically deemed illegal. This condition exists despite the fact that many of these homes existed prior to the legislation that made them illegal, and in most cases prior to the existence of the state. Moreover, adequate housing should also include services necessary for health, comfort, safety, and nutrition. However, the unrecognized villages chronically lack basic services and are plagued by poor sanitation and health conditions.²⁴⁷

An important element of the right to adequate housing is that it should reflect “genuine consultation with affected persons and groups.”²⁴⁸ This requirement is notoriously missing in the Israeli context. Bedouin living in the unrecognized villages of the Negev have no recognized local political representation. Israel launched its policy of sedentarizing the Bedouin unilaterally while claiming to be acting in the best interests of the Bedouin community.²⁴⁹ Meanwhile, there exists no mainstream political forum through which Bedouin living in the unrecognized villages can address the Israeli policy directed at them. This, of course, supports the theory that Israel’s Bedouin policy, which is described in benevolent terms, is in fact aimed at facilitating the mass expropriation of, and resultant settlement building on, the remaining land in the Negev.

General Comment No. 4 also provides that the right to adequate housing includes “culturally adequate housing.” The above discussion of culturally adequate housing above reveals that “adequate” housing is a relative concept. In many cases, demolishing a person’s home and putting them in a tent would be considered a breach of the right to adequate housing. In the Bedouin case, removing them from a tent and putting them in urban homes is the same violation, manifested in an entirely different way.²⁵⁰ The notion of “adequate” articulated in *General Comment No. 4* goes well beyond the concept of shelter, and involves “the right to live somewhere in security, peace, and dignity.”²⁵¹ The composition of the townships does not pass such a test when cultural adequacy is considered.

²⁴⁷ See *supra* note 180 and accompanying text.

²⁴⁸ *Supra* note 220 and accompanying text.

²⁴⁹ See *supra* note 116.

²⁵⁰ While some Bedouin continue to live in tents, others now generally live in tin shacks or older homes made of stone or wood. I do not mean to suggest that those Bedouin who live in houses in the unrecognized villages would find houses in the townships to be culturally adequate. Rather, I am using the symbolism of tents and houses to indicate the difference between rural dwelling and urban dwelling in the Bedouin context. Bedouin culture is essentially compromised by urbanization.

²⁵¹ *Supra* note 220 at para. 7.

Moreover, the townships do not provide access to productive land or employment, and, as such, serve to unduly impoverish the Bedouin population. The townships remain the most poorly funded localities in Israel, and as noted earlier, rank at the bottom of every socio-economic scale used by the state.²⁵²

B. *An Overarching Policy of Forced Evictions*

To determine whether the totality of Israeli actions directed at the Bedouin constitutes a policy of forced eviction, one need only look to the definition of forced evictions provided in *General Comment No. 7*.²⁵³ Both conditions set down in paragraph 4 are met. Bedouin families are being removed from their homes in the unrecognized villages against their will, and there are no appropriate provisions or legal protections being afforded to them. Israeli policies do not simply involve displacing individual agents from their homes, but also represent an effort to transfer an entire community or society to an alternate location.

Home demolitions are only the final step in such a process. Each time a Bedouin family moves out of an unrecognized village because it has been made uninhabitable by the state, it is a forced eviction in that they are being removed from their dwellings through state coercion. The denial of basic services, the denial of traditional forms of employment, and the unavailability of any modern conveniences enjoyed by other citizens of the state all contribute to the forced eviction process. Home demolitions operate as an outward symbol of a general governmental policy that ignores the rights of the Bedouin by making it impossible for them to satisfy state-supported planning and zoning policies while continuing to maintain an agrarian lifestyle. In this respect, an emphasis on stopping home demolitions through individual procedural challenges serves only to obscure the systematic policy initiatives of the Israeli government.²⁵⁴

²⁵² See *supra* notes 24-25. In December 2003, Adalah filed a petition to the Supreme Court of Israel challenging the exclusion Arab towns from the government's National Priority List (a discretionary list used to determine the localities in need of the greatest development resources). In March 2004, the Court issued an order requiring the Attorney General to explain the exclusion of the seven Bedouin townships in the Negev from the highest rating on the National Priority List for educational resources. The case, H.C. 11163/03, *The High Follow-up Committee for the Arab Citizens of Israel, et al. v. The Prime Minister of Israel*, is pending.

²⁵³ *Supra* note 227 at para. 3.

²⁵⁴ For further discussion of the individualization of legal claims, see *supra* note 205 and accompanying text. See also, Letter from Adalah Staff Attorney Marwan Dalal to former Israeli Attorney General, Elyakim Rubenstein and others, dated July 11, 2001, demanding that the systematic policy of home demolitions and a means to combat "illegal" construction be halted, online:

According to paragraph 16 of *General Comment No. 7*, a state must provide certain procedural safeguards if evictions are to be considered lawful. In the case of the Bedouin, even such procedural protections do not exist. There is no opportunity for the Bedouin to have genuine consultation with the relevant authorities. Actions against the Bedouin are taken unilaterally. Moreover, the fact that Bedouin villages are unrecognized means that they have no political representation to voice their grievances and potentially impact legislative choices. In the instant case, the Bedouin play no active role in choosing their destinies, and can only reactively assert their rights when faced with court-ordered demolition.

Moreover, the Bedouin are rarely provided with adequate and reasonable notice of eviction. Since all homes in the unrecognized villages are subject to demolition, the Bedouin are generally provided with an order to demolish their homes themselves. If they fail to do this, in addition to being criminally prosecuted, the state may take action and demolish the home at any given time. As I have already pointed out, an eviction does not occur only when the home is demolished by the state. Rather, a Bedouin family can also be forcibly evicted when it is forced to demolish its own home or simply leaves the dwelling against its will and out of fear and insecurity.

Paragraph 16(c) of *General Comment No. 7* requires that Bedouin whose homes have been declared illegal should have reasonable access to information regarding the alternative purpose for the land. In this case, the alternative purpose is simply that the land has been classified as agricultural. However, the land is not available for the agricultural pursuits of the Bedouin themselves. The history of land expropriation in Israel leads one to believe that land expropriation is being used to favour a distinct segment of the population. In Jewish towns and villages, illegal building is generally allowed and demolition orders are rarely issued.²⁵⁵ Moreover, Jewish residents have an outlet to apply to for a change in the status of their land where necessary. Clearly, the alternative purposes for the land are imbued with discriminatory considerations that violate Article 2(2) of the *ICESCR*.²⁵⁶

Israel's failure to take any "appropriate means" towards ending the forcible removal of Bedouin from the unrecognized villages disregards its obligations under the *ICESCR*. The failure to offer any genuine consultation with the Bedouin, the systematic denial of basic and essential services, and

<<http://www.adalah.org/eng/pressreleases2001.php>>.

²⁵⁵ See *Access Denied*, *supra* note 1 at 235.

²⁵⁶ See *supra* note 213.

the methods used to curb traditional employment possibilities, all serve to create a policy of forced evictions. Home demolitions are the most visible manifestation of such a policy, although the mass exodus of Bedouin from the unrecognized villages, and the substandard conditions in which those who remain live, also demonstrate the existence of a *prima facie* policy of forced evictions.

While the above analysis has shown the manner in which Israel maintains an illegal policy of forced evictions, *General Comment No. 7* contemplates situations in which such evictions might be justified. The limitations clause in Article 4 of the *ICESCR* also suggests that violations of Article 11(1) might be acceptable under certain stringently defined conditions. Article 4 states:

[T]he State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.²⁵⁷

While there are circumstances under which a forced eviction might be justifiable, General Comments nos. 4 and 7 provide that such circumstances must be exceptional and in accordance with the relevant principles of international law. It is crucial to focus on the term “exceptional circumstances.” The Arab Bedouin have historically resided in the unrecognized villages and are not accused of breaching legal duties or contractual obligations. It is difficult to find exceptional circumstances that merit their eviction. The U.N. fact sheet on forced evictions lists some scenarios illustrative of exceptional circumstances:

- (a) racist or other discriminatory statements, attacks or treatment by one tenant against another
- (b) unjustifiable destruction of rented property
- (c) persistent non-payment of rent
- (d) persistent anti-social behavior which threatens, harasses, or intimidates
- (e) manifestly criminal behavior which threatens the rights of others
- (f) the illegal occupation of property which is inhabited at the time of occupation
- (g) the occupation of land or homes of occupied populations by an occupying power

...²⁵⁸

²⁵⁷ *Ibid.*

²⁵⁸ Office of the High Commissioner for Human Rights, “Forced Evictions and Human Rights: Fact Sheet No. 25” (Geneva: United Nations, 1996), online: <<http://www.unhchr.ch/html/menu6/2/fs25.htm>>.

None of the above circumstances exist in the case of the Bedouin residing in the Negev. However, the above list is neither legally binding nor exhaustive, and one might argue that other public policy reasons might allow Israel to invoke the limitation clause contained in Article 4. Assuming this is the case, the various mechanisms discussed in the General Comments reveal that the onus is on the state to justify its actions when forced evictions are a ramification of governmental policy—they must show that there is an explicit justification supported by law and that it is consistent with international legal commitments. A failure to do this will place the state squarely in violation of the *ICESCR*.

Such a justification is not possible in the Israeli context. Before an eviction can be justified in the public interest, the human costs of serving that public interest must be weighed. In this case, the public interest is that of supporting Jewish settlement building and agricultural pursuits, which is in fact, supported by law. The public interest in question is not “for the purpose of promoting the general welfare in a democratic society,” but rather benefits only the members of one dominant group. Balanced against the suffocation of Bedouin culture and the state’s seemingly discriminatory motives, Israel can hardly offer a satisfactory justification for the forced eviction of the Bedouin population in the unrecognized villages. In fact, where the public interest driving a forced eviction is itself contrary to international legal commitments (as the discriminatory building of settlements available to only one segment of the population certainly is), it cannot serve as a legitimate justification. Where the conditions that caused the homes to become illegal were based on discriminatory legislation, it is absurd to suggest that the same legislation could be used to articulate acceptable (according to international law) public policy reasons for allowing their destruction.

Even if Israel could demonstrate that the transfer of Bedouin to urban townships was a legitimate public interest in some fashion, it would still have to demonstrate that forced eviction is the least drastic means of achieving this goal. Israel has offered no legitimate incentive for the Bedouin to move out of the unrecognized villages, and as such cannot claim that they are turning to forced evictions after exhaustive alternative efforts. As I suggested earlier, reasonable alternatives in genuine consultation with the Bedouin have never been and are currently not being adequately explored or pursued.

Paragraph 17 of *General Comment No. 7* is extremely important in that it requires suitable alternative housing in the event of a forced eviction. When homes in unrecognized villages are destroyed, however, there is no consideration as to how the family might maintain its traditional rural lifestyle. The general presumption is that the evicted family will move to the

townships, purchase housing through government subsidies (often described as inadequate), and seek employment as urbanized wage labourers. The Commission on Human Rights supports a similar interpretation, stating:

[A]ll governments [should] provide immediate restitution, compensation, and/or appropriate and sufficient alternative accommodation or land, consistent with their wishes and needs, to persons and communities that have been forcibly evicted, following mutually satisfactory negotiations with the affected persons or groups²⁵⁹

Thus, even if the forced eviction of Bedouin from the unrecognized villages could somehow be justified, Israel would be required to demonstrate that adequate alternative arrangements had been made. The government-established townships categorically fail in this regard. Another issue is whether the towns actually fulfill the objectives articulated by the Israeli government, namely, to solve the pressing needs of the Bedouin community in the areas of housing, social services, and economic prospects. Given that the towns represent the poorest communities in Israel and are characterized by a lack of infrastructure, the justifications put forward for transferring the Bedouin are themselves contradicted by current conditions in the townships.

C. *Israel's Legal Obligations*

Although the *CESCR* can monitor the implementation of the Covenant, aid in its interpretation, and criticize state parties that fail to comply, the *ICESCR's* ultimate effectiveness rests with domestic implementation. Thus, the *CESCR* has focused much attention on appropriate legislative action and the provision of judicial remedies.

General Comment No. 9 calls for the provision of domestic judicial remedies, through which Bedouin might be able to contest forced evictions and assert their internationally protected human rights. Yet, the right to adequate housing is not protected in Israel. At present, the only legal avenue open to the Bedouin is to insist that their particular home does not violate public interests, as defined by the *Planning and Building Law (1965)*. Since all homes in unrecognized villages are deemed to violate the public interest, such challenges are generally futile. The absence of any security of tenure makes ownership claims untenable. Even if the Bedouin tried to assert their rights under the *ICESCR*, the Supreme Court of Israel has accepted the proposition that international law is not automatically binding

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Commission on Human Rights, Resolution 1993/77 (10 March 1993), online: <<http://www.ohchr.org/english/about/publications/docs/fs25.htm#annexi>> .

upon Israeli courts.²⁶⁰ Israel's failure to allow domestic law to yield to international law represents a further failure to meet its international legal commitments, as interpreted by *General Comment No. 9*.

General Comment No. 9 also places special emphasis on the desirability of the direct incorporation of the Covenant into domestic law. Israel does not implement the *ICESCR* by any means that might ensure just treatment. Thus, while the Bedouin may seek injunctions against demolitions, they cannot invoke any law that yields the protections afforded under the Covenant, nor can they invoke any rights afforded by the *ICESCR*. Instead of legislating to protect economic, social, and cultural rights in Israel, the state actively strips Bedouin of those rights through the legislative and policy mechanisms discussed in Part III of this article, and offers no mechanism by which the Bedouin can legally challenge violations of their right to adequate housing.

VI. CONCLUSION

It is unlikely that current efforts by Bedouin litigants to assert their right to adequate housing and seek effective protections and remedies from Israeli land planning policies will succeed. Israel has no formal constitution in which the right to adequate housing is enshrined, and there is no legislation that provides that right for minority citizens. Furthermore, Israeli courts and judges are themselves imbued with an ideology that marginalizes and negates the historical context of Bedouin land ownership claims.

The cumulative effect of Israeli legislation and policy toward the Bedouin constitutes a policy of forced eviction—a *prima facie* violation of the right to adequate housing protected under Article 11(1) of the *ICESCR*. These policies cannot be justified either on public interest grounds, or as the result of exceptional circumstances. The foundations of Israeli policy as it concerns the Bedouin are discriminatory and confer benefits to Jewish citizens exclusively. Israel operates in violation of its international legal commitments and should act to rectify such a failure immediately. If it does not, Israel should be strictly condemned, censured, or potentially face severe international action.

Looking ahead, an increased international focus on Israeli policies

²⁶⁰ Israel's international human rights treaty obligations have not been incorporated into Israeli domestic law. Under Israeli law, incorporation of international law occurs only when the Knesset passes a specific act or acts to that effect. However, principles which reflect provisions of customary international law, are considered by Israeli courts to the extent that they are consistent with Israeli legislation. Israeli courts have referred to particular provisions of the Universal Declaration of Human Rights (*UDHR*) as reflecting principles of customary international law.

that violate international human rights norms may force Israel to desist in its policy of sedentarizing the Bedouin into urban townships. As has been requested by many Bedouin community representatives, the Bedouin should be allowed to establish agricultural villages, and the *Planning and Building Law* should be amended or repealed accordingly. Similarly, the 2003 five-year plan for the Bedouin in the Negev should be replaced with a program that reflects genuine consultation with the Bedouin community. Numerous small Jewish settlements and kibbutzim, including more than 100 designated Jewish agricultural settlements, are scattered throughout the Negev and have no difficulty obtaining basic services. Policy towards the Bedouin should reflect the right to equality, the right to be free from racial discrimination, and the right to participate in the design of policy and the local governance of Bedouin communities. As the *CESCR* noted in its 2003 Concluding Observations:

The Committee further urges the State party to recognize all existing Bedouin villages, their property rights, and their right to basic services, in particular water, and to desist from the destruction and damaging of agricultural crops and fields, including in unrecognized villages. The Committee further encourages the State party to adopt an adequate compensation scheme that is open to redress for Bedouins who have agreed to resettle in the townships.²⁶¹

Judicially, a glimmer of hope still lies within the *Basic Law: Human Dignity and Freedom*. While this semi-constitutional law contains no specific provision guaranteeing equality for all citizens, there remains room to argue that the concept of human dignity is meaningless without the right to adequate housing. Those who live in fear of losing their homes endure emotional toil and insecurity inconsistent with the right of all citizens to live in dignity. Moreover, the connection between the right to adequate housing, human dignity, and human development more generally is a well-established principle underlying all human rights law. Litigation that attempts to highlight this connection may yield more positive results than what members of the Bedouin community have experienced in the past. If the decisions of the Supreme Court of Israel in *Qa'dan* and *Ministry of Religious Affairs* serve as precedents for more progressive judicial rulings on equality rights, and more radically as catalysts for legislative and administrative reforms, much will have been achieved.

Another legal avenue through which the right to adequate housing continues to be asserted domestically is through the use of international law as a persuasive tool. While the Israeli Knesset has disregarded international legal concerns in creating legislation, the courts have often been receptive to international legal principles and comparative constitutional analysis as

²⁶¹ *Supra* note 55 at para. 43.

interpretive considerations in reaching their verdicts.

Israel must also create a national housing strategy, along with legislation, which aims to deal specifically with reducing poverty and conferring security of tenure on those living in unrecognized villages. As well, policies must be shifted in order to provide balanced funding to the existing Bedouin townships, with a view to equal treatment with Jewish communities of comparable size and structure. These steps must “reflect genuine consultation with, and participation by,”²⁶² members of the Bedouin community.

²⁶² *Supra* note 220 at para.12.