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## Legal Pluralism and Indigenous Peoples Rights: Challenges in Litigation and Recognition of Indigenous Peoples Rights

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LEGAL PLURALISM AND INDIGENOUS PEOPLES RIGHTS:  
CHALLENGES IN LITIGATION AND RECOGNITION OF  
INDIGENOUS PEOPLES RIGHTS

*Dr. Morad Elsana \**

*“Countries that have succeeded in integrating traditional law into their formal legal systems have found that justice [was] done more effectively . . . .”<sup>1</sup>*

*Rodolfo Stavenhagen*

ABSTRACT

*This article discusses the contribution of legal pluralism to the recognition of the rights of indigenous peoples. It presents the options (and their shortcomings) of recognizing land rights of indigenous peoples, with special emphasis on litigation using postcolonial states’ law. It shows that litigation of indigenous rights through national states’ law suffers from fundamental problems, mainly an inherent conflict between interests and goals, and thus it ‘suffers’ from a limitation on the results it produces; namely, it does not result in the recognition of indigenous rights.<sup>2</sup> On the legal principle level, the legal system does not include indigenous peoples’ rights, does not “see” their rights, and even does not “understand” these rights; and is therefore incapable of recognizing them. This article shows that only through “systemic” structural change of the states’ legal system, and specifically, the adoption of indigenous legal systems as another source for rights, postcolonial states’ legal systems would be able to “see” and “recognize” indigenous rights. To demonstrate this, the article, through presenting and analyzing the legal struggle of the Bedouin in the State of Israel, shows the limitation of the modern states’ legal system and the failure of litigation through this system to recognize indigenous Bedouin rights.*

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1. Rodolfo Stavenhagen, THE EMERGENCE OF INDIGENOUS PEOPLES 59 (2012).

2. One must remember that this system was intended, and has been used, to serve the states’ primary interest in land possession.

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## I. INTRODUCTION

The Bedouin land rights issue is an ongoing dispute between the Bedouin and the State of Israel that has preoccupied the parties for 50 years. The dispute severely damages both sides on all levels. Recently, the dispute has begun to present new threats, including threatening core issues on the relationship between the Bedouin and the State of Israel, such as changes in Bedouin identity and sense of belonging.<sup>3</sup>

For many years, the Bedouin and the state have been trying to resolve

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3. For recent changes on the Bedouin youth identity, as a result of land demolition (part of the land issue), see Hani Abu Awad, *Bedouin Children Under the Shadow of Government Home Demolition Policy: A Study of Education and Identity*, 90 (2017) (unpublished Ph.D. dissertation, Howard University) (on file with author).

the dispute through various ways, but without success. In the past two decades, the state has been putting special emphasis on solving the issue in legal ways, namely, litigation. But even though the state wins in the courts, this victory does not solve the problem—after losing in the legal process, the Bedouin did not move from (or release) the land, instead they continued to live on their land. As a result in most cases, neither the state nor the Bedouin can use the land.

The Bedouin continue to struggle for their land rights. Inspired by other indigenous peoples' experiences, as part of their efforts to push the court to recognize Bedouin land rights, they approached the court with “indigenous arguments” to extract a decision that recognizes Bedouin land rights. These efforts failed when the court rejected their test case, the Al-Uqbi tribe's land settlement lawsuit, and all their claims to recognize their lands. The court restated the legal basis it has cited over the years, drawing on a very old Ottoman legal doctrine. That legal basis states that the land the Bedouin claim was *Mawat Land* and, therefore, the State of Israel does not recognize the Bedouin's customary land rights.<sup>4</sup>

This article examines the Bedouin land issue and shows that the focus of the efforts on traditional litigation to resolve the issue is one of the main problems of the present scholarship and advocacy. It shows that the Bedouin land problem is not a “classical” real estate case such as a dispute on land or property ownership that could be approached and resolved through conventional legal arguments, but rather is a complex land rights issue intertwined with historical, political, and cultural aspects.

While the bulk of the research has focused on revoking the “*mawat*” doctrine,<sup>5</sup> or the land settlement ordinance, this article presents the subject from a new, different point of view that has not yet been examined. It examines the issue from the perspective of legal pluralism. It offers a legal alternative that can promote not only the settlement of Bedouin land rights, but also a new framework that aims to regulate other Bedouin rights.

To present a clear picture of the issue, this article first presents the land problem of the Bedouin in Part II. Then, in the next section, it traces similar cases from the world and examines the ways in which legal pluralism promotes the recognition of indigenous peoples' land entitlement and addresses and solves similar conflicts, with a particular emphasis on the doctrine of legal pluralism involving indigenous

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4. *Mawat* land is a barren or unclaimed land owned by the state, such as forests, mountainous areas, deserts, and the like. See George Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV., 467, 493–94 (1994), <http://digitalcommons.wcl.american.edu/aclr/vol43/iss2/3>.

5. Cf. Oren Yiftachel, Alexander (Sandy) Kedar & Ahmad Amara, *Re-Examining the 'Dead Negev Doctrine': Property Rights in the Bedouin-Arab Space*, 14 MISHPAT UMIMSHAL (2012).

customary legal systems. The article then presents legal pluralism on two levels: (1) on the level of international comparative law and (2) on the level of Israeli national law. It shows that the legal system in Israel is also pluralistic and therefore has a capacity to adopt similar solutions for the Bedouin land issue, based on the doctrine of legal pluralism, and that the Israeli legal system includes all the elements required to recognize the rights of the Bedouin through adopting legal pluralism.

## II. THE BEDOUIN LAND ISSUE AND THE LEGAL DISPUTES

The Bedouin land issue in the State of Israel is a dispute over the ownership of about 1.5 million dunams of land.<sup>6</sup> On the one hand, relying on their customary law and evidence from the Ottoman and the British periods, the Bedouin claim that this land belongs to them. On the other hand, the state, relying on the state's property law (including the Ottoman land act), claims that the Bedouin lands are state land and the Bedouin have no ownership rights to these lands.<sup>7</sup>

The problem arose in the early 1970s, after the state refused to recognize the land rights of the Bedouin, as part of the state's land settlement project, according to the Land Rights Settlement Ordinance (1969),<sup>8</sup> which required the Bedouin to file lawsuits for their land. In the early 1970s, the Bedouin filed about 3,200 lawsuit claims for about 1,200,000 dunams of land.<sup>9</sup> (There were additional claims for about 150,000-200,000 dunams consisting of 20% of Bedouin land claims, where that the state prevented the Bedouin from filing claims on these lands, claiming, mainly, that these lands were expropriated in the 1950s).<sup>10</sup> After the Bedouin filed their claims, the state demanded that each plaintiff present evidence to prove ownership of the land.

At the beginning, most of the Bedouin did not present documents and the claims remained "untouched" (or unprocessed) until the early '70s<sup>11</sup> when the state decided to expropriate the lands of one Bedouin tribe called Alhawashelah that resides in Gasr-Asser village, near Dimona.<sup>12</sup> This was

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6. The numbers are presented differently in different sources. See Oren Yiftachel, and Eli Atzmon, and Ghazi Falah.

7. See the state's arguments as presented in the court's decision in *Salim Alhawashelah v. State of Israel*, 38(3) PD 141 (1974) (Isr.).

8. LAND RIGHTS SETTLEMENT ORDINANCE [REVISED], 5729-, (1969), [https://www.nevo.co.il/law\\_html/Law01/286\\_031.htm](https://www.nevo.co.il/law_html/Law01/286_031.htm) (last visited Aug. 25, 2018).

9. Shlomo Swirski & Yael Hasson, *INVISIBLE CITIZENS: ISRAEL GOVERNMENT POLICY TOWARD THE NEGEV BEDOUIN* 19 (2006).

10. Yiftachel, Kedar, and Amara, *supra* note 5 at 50 (fn 158) Hebrew Version.

11. *Id.* at 50.

12. There have been few cases on Bedouin land, but they did not set a precedent in this matter. See the case of *Alkalab* (1989) and *Abu Solb v. Israel Land Authority*, Civil Appeal 518/86, P.D. 43(4), 297 (1986).

the first case in which the land rights of the Bedouin were subjected to the legal test on the merits of the land rights of the Bedouin. After discussing the land rights of the Alhawashelah tribe, the District Court in Beer Sheva city rejected the tribe's ownership claim, finding that the land is a "*Mawat*" type of land, by use of which term the court inferred that the Bedouin do not have ownership rights under Israeli law. The court stated that, as long as there is no proof of "revival" (*Ihya*) of the *Mawat* land (i.e., that the land should not be designated "*Mawat*"), the tribe has no ownership rights to the land.<sup>13</sup> The members of the Alhawashelah tribe appealed to the High Court, which also rejected their claim. The High Court affirmed the lower court's ruling that the land was "*Mawat*" land and ownership of the land was held by the state.<sup>14</sup> This decision created the well-known Alhawashelah precedent, which states: all Bedouin lands are "*Mawat*" land and the Bedouin have no rights to these lands.<sup>15</sup>

It should be noted that the court founded its decision on an opinion submitted by the state based on a report of a government committee headed by Ms. Plia Albeck, the Commissioner of Settlements in the Occupied Palestinian Territories (hereinafter, the Albeck Committee Report).<sup>16</sup> As a result of that decision, all Bedouin claims, including the land counter-claims that were adjudicated later, followed the same "fate"—rejection on the same grounds.<sup>17</sup>

As of this writing, the courts in Israel have systematically rejected all Bedouin claims, not even accepting one Bedouin land ownership claim. Until this day, not one Bedouin tribe or individual has ever succeeded in winning a land claim case.

For the Bedouin in the Negev, the state expropriation doctrine that emerged appears to be a deliberate policy of rejecting their claims and an act of dispossession of their land—not a fair and objective process of clarifying their land rights.<sup>18</sup> For this reason, a majority of Bedouin stopped applying to the court for claims to clarify their ownership of the land.

In a commendable but short term and ultimately ill-fated backtracking,

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13. DC (Beer Sheva) 1/69 *Alhawashelah v. State of Israel* (1969), (Not published).

14. See C.A. 218/74 *Salim Alhawashelah v. State of Israel* (1974), PD38(3) 141.

15. *Id.*

16. Haartz Service, *Plia Albeck, Who Paved Legal Way for 100 Settlements*, *Dias*, HAARETZ, (Sept. 27, 2005), <https://www.haaretz.com/1.4875925> (last visited Dec. 3, 2018); SWIRSKI and HASSON, *supra* note 9 at 9 (FN 4) (Ms. Plia Albeck also served in this position in the 1980s, during which she granted permission to establish more than 100 Israeli settlements on Palestinian land in the Palestinian territories, under the pretext that they are state land).

17. Abraham Halima, *Negev lands from the Legal Perspective*, INSTITUTE FOR LAND POLICY AND LAND USE- DEPT. OF LAND POLICY (1985).

18. See Amer Alhuzayel, *LAND OWNERSHIP IN THE NEGEV BETWEEN THE FACTS OF HISTORY AND FALSIFICATION OF ZIONISM* (2006), <http://deyarnagab.net/main.php?content=13&id=61> (last visited Sept. 8, 2018).

from around the 80s until the 90s,<sup>19</sup> the state opted, *temporarily*, to abandon its foregoing litigation approach of negatively determining the land rights of the Bedouin and attempted to settle Bedouin land claims through negotiation. Different plans with different offers were presented and proposed to Bedouin claimants but, unfortunately, no real progress was made.<sup>20</sup>

In 2007, the government formulated the Negev Plan for the Regulation of Bedouin Settlement in the Negev.<sup>21</sup> As part of this plan, the government appointed a government committee headed by retired Supreme Court Justice Eliezer Goldberg to propose a solution to this issue (the Goldberg Committee). The Goldberg Committee met and discussed the land issue of the Bedouin and issued a short report that proposed a solution, but even this solution was not acceptable to the Bedouin. On the contrary, the Bedouin, who did not participate in the Committee's decision-making process, strongly opposed the findings of the Goldberg Committee.<sup>22</sup>

Despite the Bedouin's rejection of the findings and recommendations, the state proceeded with the Negev Plan, adopted the recommendations of the Goldberg Committee, and submitted the recommendations as a bill, which became law known as the Praver Law. This move led to a rebellion, including unprecedented demonstrations and acts of violence in the Negev by the Bedouin population, which was expressed in large-scale public opposition<sup>23</sup> that eventually led to suspension of the Plan.<sup>24</sup>

The government continued to expropriate land from the Bedouin through a special legal procedure called "counter claims." All the Bedouin protests and claims of injustice did not lead to a change of the state's

19. following the conclusions of the Albeck Committee which recommended compensating the Bedouin for their rights to land

20. For example, between 2005 and 2010, the government invited a mediation report from the Consensus Building Institute (CBI), a US institute that helps leaders collaborate with people to understand and solve complex problems. (See the organization's website in which describes CBI work to understand the Bedouin land Issue. Resolving Conflicts between the Israeli Government and Bedouin Stakeholders | Consensus Building Institute, <https://www.cbi.org/case/resolving-conflicts-between-the-israeli-government-and-bedouin-stakeholders/> (last visited Dec. 3, 2018).

21. The Bedouin criticized the plan, claiming that it was actually only another plan for regulating the Bedouin lands to take over their land at minimal cost.

22. See the opposing positions of the Bedouin committee members: Ahmad Al-Assad and Faisal Al-Huzail in the Goldberg Committee report. The Regional Council for the Unrecognized Villages in the Negev-RCUV, Goldberg Commission's Recommendations (2007), [http://www.landpedia.org/landdoc/Analytical\\_materials/Goldberg\\_recommendations-english.pdf](http://www.landpedia.org/landdoc/Analytical_materials/Goldberg_recommendations-english.pdf).

23. Hassan Sha'alan Ephraim Mati Sieber, Ahiya Raved, Noam (Dvol) Dvir, Elior Levy and Omri, *Protest and Confrontations against the Bedouin Settlement Plan*, YNET, (Nov. 30, 2013), <https://www.ynet.co.il/articles/0,7340,L-4459623,00.html>; Shirley Seidler, Jackie Khoury & Yaniv Kovovitz, *Mass Protests in Protests Against the Praver Program*, HAARETZ (Nov. 30, 2013), <https://www.haaretz.co.il/news/education/1.2178739>.

24. Moran Azoulay and Itai Blumenthal, *Netanyahu shelved the Praver plan*, (Dec. 12, 2013), <https://www.ynet.co.il/articles/0,7340,L-4464682,00.html> (last visited Sept. 18, 2018).

policy. The state has not made any decision that would veer from the Alhawashelah precedent nor did it offer any recognition of Bedouin land rights. Moreover, on the political and public levels, many state officials, including Ministers and representatives of the state (including Prime Minister Benjamin Netanyahu), categorized the Bedouin as “trespassers” and “thieves of land” who took over state land.<sup>25</sup> In addition, the state continued to expropriate Bedouin lands and use them for various purposes, such as settlement and development, but primarily for the benefit of the Jewish population, while, at the same time, refusing to recognize Bedouin villages. Only a small part of Bedouin land is used for the development and establishment of Bedouin townships.<sup>26</sup>

#### *A. Attempts to Resolve the Conflict*

The above does not mean that there were no attempts to solve the problem. On the contrary, in many cases, the Bedouin tried many times to resolve the dispute (however, without success).<sup>27</sup> On the one hand, for many years they have been trying to obtain recognition of their land rights. For this purpose, they are conducting their struggle on several levels, political, legal, community, and media, to protect their land rights and preserve their traditional economy. The Bedouin tried all the traditional ways to achieve recognition of their land rights, including appealing to the Supreme Court, but all attempts encountered failure and government resistance.<sup>28</sup>

Believing in their historical rights to these lands, the Bedouin applied to the courts several times, but all their applications have been rejected. They then appealed to the Supreme Court several times, and had their claims rejected as well.

#### *B. Alhawashelah and Al-Uqbi:*

The first court case was the case of Alhawashelah of 1969 in the Beer

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25. See Sami Peretz, *the country's biggest mistake in the Negev - and the solution that could make it an attractive place*, THEMARKER, <https://www.themarker.com/markerweek/1.4069394> (last visited Apr. 17, 2018).

26. HUMAN RIGHTS WATCH, *OFF THE MAP: LAND AND HOUSING RIGHTS VIOLATIONS IN ISRAEL'S UNRECOGNIZED BEDOUIN VILLAGES 1*, <http://www.hrw.org/reports/2008/03/30/map> (last visited Sept. 6, 2016) (“Today they comprise 25 percent of the population of the northern Negev but have jurisdiction over less than 2 percent of the land there.”).

27. The Goldberg Commission was only one of many previous attempts, such as the CBI report, and the government's proposals to the Bedouin in the vicinity of the Tel-Elmaleh evacuation in the early 1980s.

28. See the case of C.A. 218/74 *Salim Alhawashelah v. State of Israel* (1974), *supra* note 19; C.A. (BS) 7161/06 *Suleiman Al-Uqbi et. al. v. State of Israel*, (2012).



Sheva District Court.<sup>29</sup> In that case, the central argument by the court was whether the land in question was *mawat* land or not, as can be discerned from the opinion of Justice Halima (p. 143) in the appeal against the Magistrate Court ruling. He stated:

The appellants had stated in their claim memo that they had filed with the Land Settlement Department, that they were claiming ownership of the plots in question by virtue of possession and processing; but they did not say anything about the type of land for the plots they claimed. On the other hand, the State raised the issue of the type of land in dispute when it argued in all the claim memorandums submitted on its behalf, that the land in all the above plots is a '*mawat*.' *With this argument raised by the state, this matter became the main axis in the litigation that took place in court below and before us.*<sup>30</sup>

Also in the Alhawashelah case (1984) in the Supreme Court, the main arguments focused on *proving land claims under Israeli law*. Even when these arguments were based on Ottoman and English law, everything was done according to the official Israeli law. Furthermore, when the Bedouin themselves claimed their rights, their claims were discussed according to the official law of the state.

In the second round of litigation (2012 and 2014) there were two decisions: the Al-Uqbi case (District Court (2012) and High Court Appeal (2014)).<sup>31</sup> Although this time, the Bedouin made sure to present arguments based on their traditional law in the analysis of the Beer Sheva District Court in 2012 (Judge Dovrat).<sup>32</sup> In this case, the issue revolved around *whether the land of the Bedouin (the Plaintiffs) is miri or a mawat land*. Thus, naturally and ostensibly, all the arguments were based on the official legal system of the state.

The decision of the District Court, as described in the Supreme Court by Justice Hayut, provides a further picture of the treatment of the Bedouin's arguments by the court. During the decision, Justice Hayut stated that "The court below [District Court] rejected the appellants' argument that the tribe was not required to register the plots in its name in the Tabu<sup>33</sup> to acquire rights there because the Ottoman authorities and

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29. DC (BEER SHEVA) 1/69 *Alhawashelah v. State of Israel* (1969), *supra* note 13.

30. C.A. 218/74 *Salim Alhawashelah v. State of Israel* (1974), *supra* note 14 at 143.

31. Noa Kram, *Al-Uqbi v. The State of Israel: The Concealing of Bedouin Law and History in Determining Land Ownership in the Negev, Law, Society and Culture*, 389, FACULTY OF LAW, TEL AVIV UNIVERSITY (2017) (Hebrew).

32. C.A. (BS) 7161/06 SULEIMAN AL-UQBI ET. AL. V. STATE OF ISRAEL, *supra* note 29.

33. Tabu (also Tapu). The term was used to indicate the title deed that certified *Tabu* rights (registered land rights), but also mean the Land Registry.

the Mandatory authorities granted autonomy to the Bedouin in the Negev and legalized [recognized] land rights acquired according to their customary Bedouin law.”<sup>34</sup>

In addition, the court adopted Professor Kark's opinion that in both the Ottoman and the British Mandate there was no sweeping recognition of Bedouin ownership of the Negev's lands, preferring it over Prof. Yiftachel's opinion that the Ottoman regime and the regime of the British Mandate gave legal validity to the rights acquired under Bedouin customary law, even without registration in the Land Registry.<sup>35</sup>

#### *C. Al-Uqbi Decision in the High Court (Justice Hayut 2014)*

In the appeal of the Al-Uqbi tribe, there was another attempt to get the court to recognize Bedouin rights under their customary law.<sup>36</sup> Even though, this time, the Bedouin demanded recognition of their rights according to their customary law, they sought to present the issue through the Ottoman law rather than their customary law and the doctrine of legal pluralism. They argued that the Ottomans recognized the traditional land rights of the Bedouin at the time, and not by making an argument based on legal pluralism. Their argument was based on a “challenge of proving the law” that existed before the establishment of the state. The court rejected that argument in this decision as well.<sup>37</sup> In Section 12 of the decision, the court stated:

On the legal level, the Appellants claim that according to the laws that applied to the Negev region until the establishment of the State, the fact that the Al-Uqbi tribe lived in plots for generations gave it ownership over them. The appellants repeatedly claimed that both the Ottomans and the Mandatory authorities granted legal autonomy to the Bedouin to admin their property and lands according to their customary Bedouin law, and therefore the appellants argued that the Ottoman Land Law and the *Mawat* Ordinance did not apply in the Negev until the establishment of the State, and that the law that applied in the Negev during the relevant period was Bedouin customary law.” (Al-Uqbi, 2014, page 12)

#### *D. Legal Autonomy: Rights According to the Traditional Law:*

In addition, the Bedouin claimed that the authorities that preceded

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34. C.A 4220/12 Al-Uqbi vs. State of Israel, Nivo 2015, 5–6.

35. *Id.* at 5–6.

36. *Id.* at 12, 31, 34.

37. *Id.* at 5–7.

Israel (the Ottomans and the British Mandate on Palestine) granted the Bedouin legal autonomy and enabled them to operate according to their traditional law, as well as to acquire land rights based on their customary law. Last, the Bedouin claimed to have ownership rights under their customary law.<sup>38</sup> The court ruled that the Bedouin in the Negev had no legal autonomy in the Ottoman Empire nor during the British Mandate period.<sup>39</sup>

To summarize this point, it may be noted that in the first case, the Bedouin claimed that they possess land rights. In the court's decision, there is no mention of land rights under customary law, and certainly no recognition of rights under customary law based on the principles of legal pluralism. In the second round of litigation, the Al-Uqbi case, a particularly important change was evident: the emphasis on “customary law” based arguments in various ways. But despite this, the court rejected them all without serious debate from the perspective of “indigenous rights” or legal pluralism.

#### *E. The Failure of Solution Attempts and the ‘Contra’ of the Bedouin Law*

Despite court decisions rejecting Bedouin land rights and declaring the land to be state land that the Bedouin have no rights to, the issue remains unsettled. Both sides are dissatisfied with the current situation. As the Bedouin do not accept the court-based solution, they continue their struggle in other, non-legal ways—refusing to “release” their land for other use or give up possession.<sup>40</sup> For example, they continue to possess their land and prevent even other Bedouin from possessing or using their

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38. On page 22 (section 34), the court noted that: “After examining the arguments of the parties on this issue, I believe that the appellant argument regarding the existence of Bedouin autonomy in the Negev areas prior to the establishment of the state should be rejected. In this context, the Appellants refer to geographically historical studies in which it was noted that the Ottomans and the Mandatory authorities had difficulty controlling the Negev region and the Bedouin tribes living there, and attributed little importance to this area . . . As detailed below, these studies do not substantiate the argument of the Appellants As if the Bedouin had been granted autonomy in the Negev before the establishment of the state, which included official recognition by the authorities of traditional Bedouin law in the sense that the Bedouin were given property rights in the Negev.” *Id.* at 34.

39. *Id.* at 29 (Art. 43). Justice Duvrat stated “The Ottoman regime and the Mandatory government that followed it regarded the Negev as part of the sovereign territory under their control. And the conclusion from all that is stated in paragraphs 33-43 above is that the appellants were unable to prove the existence of legal autonomy for the Bedouin in the Negev before the establishment of the State, in which the aforesaid authorities allowed the Bedouin to acquire property rights in the Negev lands under traditional Bedouin law.”

40. See the case of the village of Al-Araqib, which was demolished and evacuated more than 130 times, but nevertheless the Bedouin refuse to evacuate and leave their land. Farah Najjar, *Israel Destroys Bedouin Village for the 119th Time*, Al Jazeera (Oct. 3, 2017), <https://www.aljazeera.com/news/2017/10/israel-destroys-bedouin-village-119th-time-171003135958243.html>.

disputed land. Recently, the state also discovered that in practice, the Bedouin continue to control their lands even after the court rules that the land is state land or the court decides that the Bedouin lands are “*Mawat*” land and that the Bedouin had no ownership rights whatsoever. In the reality of many cases, the Bedouin determine who uses and who buys or rents their land.

Relying primarily on their customary law, the Bedouin manage to prevent others from using or buying land belonging to them even after expropriation by the state. It has recently become clear that in some places, the Bedouin control a wide range of “power and authority” that allows them to have exclusive control over the disputed land. This control also indirectly affects the planning and development processes within the Bedouin communities, allocation of building lots, construction and use of public buildings, and even their designation. Such *control* can provide the Bedouin with a power capable of blocking the construction of schools, roads, and the development of neighborhoods and other construction projects.<sup>41</sup>

During the planning of the new Bedouin towns,<sup>42</sup> the state discovered that the Bedouin still possess a number of “cards” and that the Bedouin still use them and manage to block any use of the disputed land. This state of reality on the part of the Bedouin freezes and even permanently blocks many projects the state is trying to carry out on their lands, such as expanding towns borders, marketing new building plots, and building public buildings.<sup>43</sup>

The conclusion is that both sides, the state and the Bedouin, control the land simultaneously. As a result of such simultaneous dual control of the disputed land, each side is engaged in efforts to block the use of the other.

41. The legal advisor of the local council of Lakiya village and the engineer Mr. Mansour Al-Sana, told the author that: “The dispute over the land prevents the paving of roads, the development of neighborhoods, soccer fields, youth centers, community center, main road, and another 8 projects with a budget of about NIS 9 million, delayed due to problems and disputes on land between the Bedouin and the state.”

42. Bedouins have always used Bedouin law to control the use of their land. It worked with the Bedouin mainly because they are committed to Bedouin law.

43. HAGIT SOFER-FOREMAN ET AL., PROGRAM TO PROMOTE ECONOMIC GROWTH AND DEVELOPMENT FOR THE BEDOUIN POPULATION IN SOUTHERN ISRAEL (GOVERNMENT RESOLUTION 3708) » BROOKDALE, REPORT NO 1 -- האוכלוסייה הבדואית בדרום (ההחלטת הממשלה 3708): דוח ראשון (2016) [https://brookdale.jdc.org.il/wp-content/uploads/2018/01/714-16\\_Hebrew\\_summary-1.pdf](https://brookdale.jdc.org.il/wp-content/uploads/2018/01/714-16_Hebrew_summary-1.pdf) (last visited Dec. 7, 2018). They state, “Claims of ownership: In the industrial zones in question there are many cases in which development is delayed or even stopped due to land ownership disputes or invasions.” Page V; In the other industrial zones, there are barriers to the use of land relating to claims of ownership...” Page x; “There are transportation projects that are not being implemented or others that delay or require a change in planning due to land ownership disputes.” Page XII; “The dispute over ownership and occupation of land in Bedouin communities, including house demolitions, creates tension between the local population [Bedouin] and the state authorities and makes it difficult to create positive cooperation between them.” Page XVII.

As a result, the disputed land became a “trapped” land that cannot be used by neither the Bedouin nor the state effectively. (a lose-lose situation).

This dual control creates conflicts in many areas, but mainly in the use of land for development. On the one hand, Bedouin’s control of the land does not allow free use of the land by the state (sometimes even if it is for the Bedouin's interest), which blocks the development of many of the Bedouin villages in the Negev. On the other hand, the state's control prevents the Bedouin from using their land, including temporary use for their basic traditional economy.<sup>44</sup> This situation is one of the main reasons for delaying the development of Bedouin villages, especially those that were planned and built on Bedouin lands.

#### *F. The Dilemmas and Shortcomings of the Existing Legal Solution Approach*

The current solution approach of the state is problematic, in that it suffers from several deficiencies. First, reminiscent of the attitude of Western colonial states toward indigenous peoples, it relies on a factually unbalanced side of the story, that of the state, and completely ignores the Bedouin story and narrative. This story is presented from the perspective of the establishment (the state) in a strong and well-established manner, and the legal system adopts the state's version almost without questioning its authenticity. The approach continues to rely on the 50-year-old court's decisions and on a precedent in the matter of Alhawashelah, which rejects the Bedouin’s rights in a sweeping manner.

This sweeping rejection of Bedouin land rights also raises a number of problems, mainly the impression that the approach does not recognize Bedouin land rights on the collective level, nor does it recognize land rights of any Bedouin individually. This approach creates an implied assumption that (1) the Bedouin are not the residents of the locality and (2) a Bedouin individually can have no right to land.

Second, the approach is based on laws and legal constructions such as the *Mawat* doctrine and the definition of a Village from the year of 1858. At the same time, it does not take into account the legal reality of that period, particularly, the claim that the Ottoman legal system of that time recognized “legal pluralism” and strongly adopted many rights under traditional law, called *Alorf*.<sup>45</sup> Third, this approach does not promote a

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44. Regarding the phenomenon of the plowing of Bedouin lands and the destruction of their crops by the State of Israel, see Nir Hasson, *The State Demolished Thousands of Dunums of Bedouin Crops*, RAMALLAH (Feb. 1, 2005), <http://news.walla.co.il/item/664370>.

45. RICHARD J. ROSS, *LEGAL PLURALISM AND EMPIRES 1500-1850*, 83–85 (2013); ISMAT ABDEL MEGUID BAKR, *INTRODUCTION TO THE STUDY OF THE LEGAL SYSTEM (IN THE OTTOMAN AND TURKISH REPUBLICS)* 79 (2012).

practical solution to the problem.<sup>46</sup>

Further, this approach suffers from problems on the practical, moral,<sup>47</sup> legal, and justice levels.<sup>48</sup> On the practical level, the rejection of the recognition of Bedouin rights uncovers a systemic problem, namely, unwillingness to recognize the uniqueness of the Bedouin land issue and its impact on a wide range of other very basic rights.<sup>49</sup>

On the level of morality and justice, this approach shows that the state refuses to recognize the minimum rights of the Bedouin in the land, and the legal system has not succeeded, to date, in issuing decisions that can rectify this injustice. A jurisprudence in which the Bedouin always lose is perceived by many Bedouin as arbitrary and depriving that entire Bedouin population recognition of their unique historical facts.<sup>50</sup>

Moreover, the state's attitude toward the Bedouin land rights' issue has many contradictions and inconsistencies. The state implicitly recognizes traditional Bedouin rights on the land, but solely for the purpose of waiving or selling such rights to the State, and for the purpose of receiving compensation.

Support for this observation comes from the following: (1) the state enacted a law to regulate land rights and invited the Bedouin to submit claims for land ownership and prove their rights; (2) the state established a governmental committee to clarify the rights of the Bedouin; and (3) the committee recommended compensation to the Bedouin for their rights (although the matter was paid *ex gratia*), and that the state pay compensation, even granting ownership (land title) of 20% of the land in dispute to the Bedouin who agree to compromise with the state and settle their land claims.<sup>51</sup> However, when it comes to legal recognition of land rights in dispute, the state denies Bedouin land rights.<sup>52</sup>

The fact that Israeli courts did not find a single Bedouin with land rights in the Negev is an outrageous denial and an obliteration of historical facts evidencing many Bedouin land rights. The Bedouin lived in the Negev hundreds and even thousands of years before the establishment of the state. Their land rights were recognized by the Ottomans and the British

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46. For example, most of the Bedouin land has not been settled, despite many attempts by the state, including the settlement process in 1969, counterclaims, and the Goldberg Committee.

47. See SWIRSKI AND HASSON, *supra* note 9 at 21 (the Albeck Committee report in which she stated that it is immoral to dispossess the Bedouin from the land they have occupied for many years without compensation).

48. See generally Ronen Shamir, *Suspended in Space: Bedouins under the Law of Israel*, 30 L. & SOC'Y REV. 231 (1996).

49. SWIRSKI AND HASSON, *supra* note 9, at 32; HUMAN RIGHTS WATCH, *supra* note 26.

50. Alhuzayel, *supra* note 18.

51. Havatzelet Yahel, *Land Disputes Between the Negev Bedouin and Israel*, 11 ISRAEL STUDIES 1, 11–12 (2006). See also the ILA decision No. 858.

52. Morad Elsana, *The Role of the Judiciary in Dispossessing Indigenous Peoples' Land: The Bedouin Case in Israel*, 34 J. JURIS.: CONTEMP. LEGAL THEORY 333, 337 (2017).

Mandate that controlled the region long before the establishment of the Israeli State.<sup>53</sup>

### *G. A Theoretically Intractable Issue*

The Bedouin land rights issue, a crisis in the Israeli-Bedouin relationship, threatens to (1) be intractable and (2) lead to a dead end, which is the equivalent of a conclusion that there is no possible solution acceptable to both sides. History supports such a conclusion, but the historical resilience of the Bedouin people does not concede such a conclusion, nor does it admit to the absence of resourcefulness in addressing an issue of such clear relevance to their history, well-being of their millennially-viable nationhood, and survival.

On the one hand, the state's oppositional approach to Bedouin land claims persists, in that the state continues to file counterclaiming lawsuits against the Bedouin to reallocate ownership of their land. The Bedouin continue to defend their land ownership in court (or to succumb to judgments in their absence) and the courts continue to uphold the state's claims and reject land ownership claims of the Bedouin, abiding by the Alhawashelah precedent which supports Bedouin land expropriation. Finally, the Bedouin continue to challenge court doctrines of rejection by defiantly working to retain possession of their land in multiply inventive ways which, despite the controversy over legality, evidence limited success in protecting their land rights.

As noted above, this situation extensively damages both sides. For example, this prevents economic land development and plowing Bedouin lands, and it also leads to destruction of Bedouin crops. The result is economic damage to both the Bedouin and the state, damage to relations between the state and its Bedouin citizens,<sup>54</sup> and deterioration in both the supportive attitude of Bedouins in the Negev toward their country and in the sense of identity and self-esteem of Bedouin youth.<sup>55</sup>

Throughout recent years—in light of the increasing demands of both sides for use rights to Bedouin land, especially for the development of Bedouin towns—the attempts to move Bedouin communities from their villages and replace them with Jewish settlements has increased the danger and tension caused by the ever worsening Bedouin land rights crisis, pushing both sides to urgently find a solution.

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53. See Morad Elsana JTW, Yiftachel, and Amara.

54. HAGIT SOFER-FOREMAN ET AL., *supra* note 42, at xvii.

55. See Abu Awad, *supra* note 3 (describes the changes on Bedouin student's identity).

### III. RECOGNITION OF THE LAND RIGHTS OF INDIGENOUS PEOPLES

As I have mentioned elsewhere,<sup>56</sup> the dispute over the land rights of indigenous peoples is not unique to the Bedouin in Israel. Many studies show that this issue is common elsewhere in the world, especially where colonial powers encounter indigenous communities. Among the prominent examples are the US, Canada, Australia, New Zealand, and several Latin American countries, to mention just a few.

Unlike Israel's dispute with the Bedouin, in many places in the world, the parties succeeded in finding a solution, particularly New Zealand, Canada, and Australia.<sup>57</sup> In New Zealand, the Parliament established a permanent council and a special court for the land of the Maori People (Waitangi Tribunal) in 1975. This mechanism settled many land claims filed by indigenous people and returned many lands to their original Maori owners. In cases where the state could not return the land, the court ordered the government to pay compensation to the indigenous people.<sup>58</sup> In Canada, following the protests of indigenous Canadians in 1991, the government appointed a committee to examine the indigenous peoples' rights. In 1996, a commission published a report<sup>59</sup> containing recommendations for sweeping changes, including changes in legislation, the establishment of institutions, creation of additional resources, land redistribution, and reconstruction of governments of indigenous peoples. In *Delgamuukw v. British Columbia*,<sup>60</sup> the court accepted indigenous peoples' claims regarding many separate areas in northwest British Columbia.<sup>61</sup> In Australia, in the (*Mabo 2*) case,<sup>62</sup> the High Court recognized the ownership of the indigenous peoples on their land.<sup>63</sup>

While these examples, which are discussed more fully below, are noteworthy and show that many countries have found a way to reach a solution to the indigenous peoples' land right issue, what is important here is not the fact that many countries recognized indigenous rights, but rather

56. Morad Elsana, *Indigenous Peoples' Land: The Case of Bedouin Land in Israel*, 49 CAL. W. INT'L L.J. 61 (2018).

57. HUMAN RIGHTS WATCH, *supra* note 26, at 105-07.

58. *Id.* at 105-06.

59. *Highlights from the Report of the Royal Commission on Aboriginal Peoples*, CANADA.CA (1996), <http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637> [<https://perma.cc/XY2K-JPXR>].

60. *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 - SCC Cases (Lexum), 3 SCC 1010, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do> (last visited May 19, 2018).

61. Gerald A. Beaudoin, *Delgamuukw Case*, THE CANADIAN ENCYCLOPEDIA (Aug. 18, 2017), <https://www.thecanadianencyclopedia.ca/en/article/delgamuukw-case> (last visited Sept. 28, 2018).

62. *Mabo v. Queensland (No 2)* (1992) 175 CLR 1 (Austl.).

63. See Jeremie Gilbert, *Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, 56 INT'L & COMP. L.Q. 583, 591, 594 (2007).



the way they did it.

### A. *Recognition of Indigenous Rights*

Approaches and methods of recognizing indigenous rights vary. Among the various methods, one can point to two dominant approaches: (1) recognition of indigenous rights through legislation, and (2) recognition of rights through court rulings (a form of judicial activism).

Recognition of indigenous rights in legislation has been introduced in several countries around the world.<sup>64</sup> Canada and many Latin American countries have included in their constitutions or other legislation clauses that recognize indigenous peoples' rights. Argentina, Bolivia, Brazil, Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, and Venezuela adopted this approach and recognized indigenous rights in their constitutions.<sup>65</sup> In Canada, Article 35 of the Constitution of 1982 provides protection for indigenous peoples' rights.<sup>66</sup>

Recognition of indigenous rights in legislation has led to legal consequences, including reliance on indigenous legal systems to define and interpret such rights.<sup>67</sup> It should be noted that diversity in the indigenous world played a key role, in that each state recognized indigenous customary law in a different way. Colombia has adopted the doctrine of indigenous legal autonomy recognized in a Special Indigenous Jurisdiction (SIJ).<sup>68</sup> This method was also adopted in Ecuador and Tanzania.<sup>69</sup> Recognition of traditional law is spreading in many countries around the world, most notably in Latin America. According to Schmiegelow, many countries in Latin America "are accepting the premise that traditional legal systems have a rightful place within the modern state."<sup>70</sup>

64. Fajardo, Seider, Borrows.

65. Mireya Maritza Peha Guzman & Sten Schaumburg-Müller, *Legal Pluralism as an Approach to Indigenous and Tribal Peoples' Rights*, 2003 HUM. RIGHTS IN DEV. Y.B. 45, 75 (Lone Lindholt & Sten Schaumburg-Muller, eds., 2003).

66. Canadian Constitution Act, 1982, *being* Schedule B to the Canada Act 1982 (U.K.), 1982, Article 35.

67. Guzman, *supra* note 64 at 54.

68. *Id.* at 80 ("Indigenous peoples legal autonomy has been recognized in Colombia under the form of the so-called Special Indigenous Jurisdiction (The SIJ); *see also* Justin Shore, *Indigenous Jurisdiction and Human Rights*, HUM. RTS. BRIEF (Mar. 28, 2011), <http://hrbrief.org/2011/03/indigenous-jurisdiction-and-human-rights/>).

69. David Pimentel, *Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique*, 14 YALE HUM. RTS. & DEV. L.J. 59 (2011), <http://digitalcommons.law.yale.edu/yhrdlj/vol14/iss1/2>.

70. Helen Ahrens, *Access to Justice in Latin America: Challenges to Classifying Legal Development in the Region*, in *INSTIT. COMPETITION BETWEEN COMMON L. AND CIVIL L.: THEORY AND POL'Y* 237, 237 (Michele Schmiegelow & Henrik Schmiegelow eds., 2014).

However, in cases where legislation was not available as a method for recognition of their rights, indigenous people turned to courts to get recognition of their land rights.<sup>71</sup> Surprisingly, in several cases the courts did not disappoint them and granted their requests. In Australia, for example, while for many years the law did not recognize Aboriginal rights, after many appeals to the courts, recognition of such rights was achieved.<sup>72</sup>

Indigenous rights to traditional lands of the *Mayagna (Sumo) Awas Tingni* Community in Nicaragua<sup>73</sup> were recognized by the Inter-American Court based on their customary law.<sup>74</sup> In *Richtersveld Community v. Alexkor Ltd.*, 2003,<sup>75</sup> the Supreme Court of South Africa recognized indigenous rights according to the customary law of the Richtersveld community.<sup>76</sup>

Judicial recognition of indigenous rights was also based on and recognized customary law, even if indirectly. In Australia, recognition of indigenous rights was found to inhere in, and was confirmed under, customary law. In *Mabo v. Queensland (1992)*, the court relied on indigenous customary law to recognize a source of indigenous property rights.<sup>77</sup> In that case, the court created a new legal doctrine in property law, and called it a Native Title.<sup>78</sup> Through the new doctrine of Native Title, which is based primarily on land rights under indigenous customary law, the Australian court was able to recognize land rights indigenous peoples enjoyed prior to the discovery of Australia.<sup>79</sup>

In *Mabo*, the Supreme Court adopted portions of the customary law of indigenous people. It noted that the customary law of indigenous people

71. See Yuksel Sezgin, *Theorizing Formal Pluralism: Quantification of Legal Pluralism for Spatio-Temporal Analysis*, 50 J. OF L. PLURALISM AND UNOFFICIAL L. 101, 102 (2004); Sherman Jackson, *Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?*, 30 FORDHAM INT'L L.J. 158, 158 (2006).

72. See *Mabo v. Queensland (No 2)* (1992) 175 CLR 1 (Austl.).

73. *Mayagna Community of Awas Tingni v. Nicaragua, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, (Aug. 31, 2001).

74. Morad Elsana, *The Recognition of Indigenous People's Land: Application of the Customary Land Rights Model on the Arab-Bedouin Case in Israel*, 7 GEO. J. L. & MOD. CRITICAL RACE PERSP. 45, 50 (2015).

75. *Richtersveld Community v. Alexkor Ltd.*, 2003 (2) SA 27 (SCA) (S. Afr.).

76. BRENDAN TOBIN, *INDIGENOUS PEOPLES, CUSTOMARY LAW AND HUMAN RIGHTS – WHY LIVING LAW MATTERS* 113 (2014).

77. See Noel Pearson, *The Concept of Native Title at Common Law*, AUSTRALIAN HUMAN. REV., <http://www.australianhumanitiesreview.org/archive/Issue-March-1997/pearson.html> (last visited Apr. 14, 2018).

78. Although some land rights were recognized in a few states in Australia prior to *Mabo* (No. 2), the decision introduced for the first-time judicial recognition of Aboriginal land rights. See HAZLEHURST, *supra* note 11.

79. PETER H. RUSSELL, *RECOGNISING ABORIGINAL TITLE: THE MABO CASE AND INDIGENOUS RESISTANCE TO ENGLISH-SETTLER COLONIALISM* 257 (2005).

is a fundamental characteristic of indigenous property and constitutes the basis for recognizing indigenous property rights. Critical to the court's ruling was the fact that "indigenous peoples were living on land controlled by their 'judicial system' at the time of colonization," which was found to constitute a "defining characteristic" of native property rights.<sup>80</sup>

The court's decision in *Mabo* not only recognized the Aboriginal customary law but also recognized it as a *legal source of land rights*, i.e. for Native Title.<sup>81</sup> As Jessica Weir points out, a native property doctrine created by the court recognizes the laws, customs, and connection of indigenous peoples to their land.<sup>82</sup> The doctrine thus allows recognition of the rights of indigenous peoples according to their own tradition,<sup>83</sup> indirectly recognizing customary law.<sup>84</sup>

Through court rulings, common law relied on Aboriginal customary law to recognize land rights, confirming that the Australian legal system recognized Aboriginal customary law as one of Australia's legal sources. *Mabo* is a very important ruling critical to recognition of legal pluralism in Australia, which is defined as diversity of legal sources to recognize indigenous peoples' rights.

#### *B. The Recognition of Customary Law in Other Countries: The Richtersveld Case in South Africa:*

In recent years, the recognition of customary law as a basis for indigenous rights became a global phenomenon.<sup>85</sup> Many countries adopted this approach to recognize the land rights of their indigenous communities. As noted above, in South Africa, courts relied on the customary law of the local community to recognize traditional rights.<sup>86</sup> In the well-known decision of *Richtersveld Community v. Alexkor Ltd*, the court accepted the appeal of the community based on interests acquired under customary law.<sup>87</sup> The court found that the Richtersveld community had land rights based on customary law, notably,<sup>88</sup> that "an interest in land

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80. *Id.* at 269.

81. See Gilbert, *supra* note 62 at 591.

82. Jessica K. Weir, *Country, Native Title and Ecology*, COUNTY, NATIVE TITLE AND ECOLOGY 6 (2012).

83. *Native Title Act 1993* (Cth) (Austl.).

84. Elsana, *supra* note 73, at 48.

85. JÉRÉMIE GILBERT, *INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW* 66 (2006).

86. See Hallie Ludsin, *Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law*, 21 BERKELEY J. INT'L L. 62 (2003).

87. Yvette Trahan, *Richtersveld Community & (and) Others v. Alexkor Ltd.: Declaration of a "Right in Land" through a "Customary Law Interest" Sets Stage for Introduction of Aboriginal Title into South African Legal System*, 12 TUL. J. INT'L & COMP. L. 565, 567 (2004).

88. *Id.* at 567.

held under a system of indigenous law is thus expressly recognized as a “right in land,” whether or not it was recognized by civil law as a legal right.”<sup>89</sup> In *Richtersveld*, the court recognized customary law as an integral part of the law of the state. It found that “While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law.”<sup>90</sup>

### C. *The Case of Mayagna (Sumo) Awas Tingni Community in Nicaragua*

Another case of the recognition of indigenous land rights, according to traditional law, can be found in the decision of the Inter-American Court of Human Rights in the case of the *Mayagna (Sumo) Awas Tingni* of Nicaragua in 2001. The case presents the link to indigenous peoples’ customary law as a necessary basis for the recognition of indigenous rights also on the international level (regional-international level). In that case, the court recognized indigenous peoples’ rights mainly based on customary law.

In the same decision, the court ruled that the right to property also includes the right of all indigenous peoples and the protection of their traditional land.<sup>91</sup> The court noted that the right to property under Article 21 of the American Convention on Human Rights<sup>92</sup> also includes property rights held collectively by indigenous groups under customary law.<sup>93</sup> A decision that recognizes customary law of the *Mayagna (Sumo) Awas Tingni* was found to be a source of land rights.<sup>94</sup>

To conclude this point, it can be said that these cases clearly indicate a practice of recognizing indigenous land rights based on their customary law. The Australian Court, the South African Court, and the Inter-American Court of Human Rights all have had to rely on customary law of the indigenous peoples to find the legal source of the indigenous land rights and be able to recognize it. Therefore, as Toubin notes, “[t]he

89. *Richtersveld Community v. Alexkor Ltd.*, 2003 (2) SA 27 (SCA) at ¶ 9 (S. Afr.)

90. *Id.* at ¶ 51.

91. S. James Anaya, *Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend*, 16 COLO. J. INT’L. ENVTL. L. & POL’Y 237, 245 (2005), <https://scholar.law.colorado.edu/articles/843>.

92. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

93. *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment*, Inter-Am. Ct. H.R., (Ser. C) No. 79, at ¶ 164 (Aug. 31, 2001).

94. See also INTER-AM. COMM’N H.R., INDIGENOUS AND TRIBAL PEOPLES’ RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES (2010), <http://cidh.org/countryrep/Indigenous-Lands09/Chap.V-VI.htm>; Andrés E. Montalvo, *Reservations to the American Convention on Human Rights: A New Approach*, AM. U. INT’L L. REV. 16, no. 2, 269-313 (2001), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1236&context=auilr>; HUMAN RIGHTS WATCH, *supra* note 26, at 105-06.

widespread of the recognition of native title demonstrate[s] a clear state practice of recognizing customary law as the basis for the identification and adjudication of IP land rights.”<sup>95</sup> In this regard, John Borrows notes that “[t]he Australian High Court has also recognized that the Common law draws on Aboriginal legal sources: ‘[n]ative title has its origin in[,] and is given its content by[,] the traditional laws acknowledged by and . . . observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.”<sup>96</sup> These views are shared by Prof. Oren Yiftachel, who notes: “[t]he *Awas Tingni* (indigenous Mayagna community) decision represents the ongoing development of the indigenous land rights perception that [are] based on their local culture and their traditional legal norms.”<sup>97</sup>

#### IV. LEGAL PLURALISM: RECOGNITION OF INDIGENOUS LAND

Legal pluralism has always been relevant to the rights of indigenous peoples. In recent years, however, many scholars have rediscovered its virtues as a special approach to understanding and embracing the rights of indigenous peoples that started pointing to the potential it has for recognizing indigenous peoples’ rights.<sup>98</sup>

Before discussing the matter, it important to remember that the meaning of legal pluralism, according to the leading scholar, John Griffiths, is “the presence in a social field of more than one legal order.”<sup>99</sup> In other words, legal pluralism can exist when several legal systems apply to different groups in one country.

Like Griffiths, June Prill-Brett notes that “[l]egal pluralism refers to the existence of different bodies of law within the same sociopolitical space, which compete for the loyalty of a group of people subject to them.”<sup>100</sup> David Pimentel also presents a similar definition. He notes that Legal pluralism is defined as a situation in which “more than one legal system

95. TOBIN, *supra* note 75 at 113 (“The widespread recognition of native title demonstrates a clear state practice of recognizing customary law as the basis for the identification and adjudication of Indigenous peoples’ right over their lands.”).

96. John Borrows, *With or Without You: First Nations Law (in Canada)*, 41 MCGILL L. J. 629, 636 n.30 (1995) (quoting *Mabo v. Queensland* (1992), 107 A.L.R. 1 at 42, 175 C.L.R. 1 (H.C.)).

97. Oren Yiftachel, GOLDBERG COMMITTEE AND BEDOUINS IN THE NEGEV - CHANCE OR RISK? (תגדה השמאלית) : סיכוי או סיכון? – סיכוי או סיכון? – סיכוי או סיכון? : הגדה השמאלית (HAGADA HASMALIT, ועדת גולדברג והבדווים בנגב – סיכוי או סיכון? : הגדה השמאלית), <https://goo.gl/QTt7uh> (last visited Dec. 12, 2018).

98. See June Prill-Brett, *Indigenous Land Rights and Legal Pluralism among Philippine Highlanders*, 28 L. & SOC’Y REV. 687 (1994); Pimentel, *supra* note 68; Ludsins, *supra* note 85; Guzman, *supra* note 64.

99. John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 1 (1986).

100. Prill-Brett, *supra* note 97, at 687.

operate(s) in a single political unit.”<sup>101</sup>

Jan Goldberg elaborates that “legal pluralism basically means two things. From a legal angle, it is referred to as a state's recognition in legislation of a multiplicity of legal sources. From a socio-legal perspective, it is meant to be a plurality of social fields producing interacting norms.”<sup>102</sup>

Keith Richotte defines legal pluralism (in an American context) and notes: “[t]he concept of legal pluralism, as explained by legal historian Hendrik Hartog, is the recognition that there is not one uniform, monolithic American law to which all of us ascribe but rather that the law can be defined differently by different people and that it can hold more than one meaning at a time.”<sup>103</sup>

Ludsin notes that legal pluralism: “[l]egal pluralism is the recognition within any society that more than one legal system exists to govern society and maintain the social order.”<sup>104</sup> According to de Sousa Santos, legal pluralism is defined as a situation in which “more than one legal system operate(s) in a single political unit.”<sup>105</sup>

Put simply, legal pluralism is a legal diversity that allows for understanding and “adoption” and the use of other legal principles that can “see” and “understand” the rights and the legal needs of other groups living in one sociopolitical field but are normatively outside the group that dominate and determines the main discourse.

#### *A. Indigenous Peoples and Legal Pluralism: From Exclusion to Recognition*

In the context of indigenous peoples, David S. Clark notes that “Legal pluralism occurs when indigenous systems of customary law survive in spite of the superimposition of ‘modern’ national legal norms and institutions.”<sup>106</sup>

Legal pluralism is not new, but rather has strong roots in history.<sup>107</sup> In

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101. Pimentel, *supra* note 68, at 59 (quoting BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION* 89 (2nd ed. 2002)).

102. Jan Goldberg, *Legal Pluralism in the Arab World*, 15 *J. L. AND RELIGION* 447, 447 (2001) (book review).

103. Keith Richotte, *Legal Pluralism and Tribal Constitutions*, 36 *WILLIAM MITCHELL L. REV.* 447, 447-48 (2010), <https://open.mitchellhamline.edu/wmlr/vol36/iss2/6>.

104. Ludsin, *supra* note 85, at 65 (citing Brian Z. Tamanaha, *The Folly of the 'Social Scientific' Concept of Legal Pluralism*, 20 *J.L. SOC'Y* 192-93 (1993)).

105. Pimentel, *supra* note 68, at 59 (citing BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION* 89 (2nd ed. 2002)).

106. David S. Clark, *Legal Pluralism in Latin America Dedication*, 1 *ARIZ. J. INT'L & COMP. L.* 27, 27 (1982).

107. Lauren Benton, *Historical Perspectives on Legal Pluralism*, 3 *HAGUE J. RULE L.* 57, 57-59 (2011).

the not-too-distant past, pluralistic legal systems were particularly common in colonial countries, where traditional legal systems continued to exist alongside colonial legal systems, albeit with difficult limitations.<sup>108</sup> At that time, the idea was that certain subjects—such as commercial transactions—would be governed by colonial law, while other issues such as personal status would be governed by traditional law. The English, for example, as Pimentel points out, used to respect customary law as long as it did not violate the rules of justice.<sup>109</sup> While Ludsin notes that colonial regimes recognized customary law systems subject to the repugnancy clause.<sup>110</sup>

### 1. Exclusion of Customary Law:

Later, especially in the era of the modern national state, most of the countries of the modern world, particularly the Western World, have abandoned legal pluralism in favor of legal monism that provides centrality and greater power to the state.<sup>111</sup> Despite this, however, legal pluralism continued to exist in quite a number of countries such as India, Tanzania, Israel, and more.<sup>112</sup>

Although studies show that in many places, like India and Africa,<sup>113</sup> Western colonialism has left native law in place, in other places, like Australia<sup>114</sup> and the United States (colonial-settlement countries), customary law has been excluded and these countries refuse to recognize indigenous rights under customary law.<sup>115</sup> This was especially evident in cases of land rights and natural resources.<sup>116</sup> Canada and Australia, for a

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108. *Id.* at 00.

109. Pimentel, *supra* note 68, at 67, 73.

110. Ludsin, *supra* note 85, at 65–66 (“Colonial governments recognized customary law and the authority of traditional leaders and headmen to try customary law cases to varying degrees throughout the regions that now make up South Africa. The amount of recognition typically depended on the number of indigenous people located in a region, although eventually customary law was recognized everywhere . . . The British, however, would apply customary law only when customary law did not clash with the ‘general principles of humanity observed throughout the civilized world.’ This repugnancy clause was applied strictly in hopes of ‘civilizing’ the indigenous population.”).

111. Pimentel, *supra* note 68, at 59.

112. *Id.* at 59.

113. *See* Ludsin, *supra* note 85.

114. In India, for example, the British approved customary law. *See* Benton, *supra* note 106, at 61.

115. In Australia, “Justice Blackburn acknowledged it ‘as a system of law’ while rejecting land rights in *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia*, (1971) 17 FLR 141 at 268.” Brad Morse, *Indigenous Peoples and the Law Australia and Canada*, 8 LEGAL SERVICE BULL. 104, 108 (1983).

116. B. A. Keon-Cohen, *Native Justice in Australia, Canada, and the U.S.A.: A Comparative Analysis*, 7 MONASH U. L. REV. 250, 252 (1980) (“In Australia and Canada, native customary laws, especially those concerning violent punishments, family arrangements and land have rarely, if ever, been legally recognized.”).

long time, refused to recognize indigenous rights under customary law, and only later, after a protracted struggle, did modern states begin to include in their legal systems the legal systems of the indigenous population (or part thereof).<sup>117</sup> Australia, for example, did not recognize traditional Maori law until recently, after the *Mabo* decision, when it began to recognize that part of customary law needed to recognize traditional land rights.<sup>118</sup>

The exclusion of indigenous law has often been one of the most sophisticated and cunning ways to exclude indigenous peoples from the public discourse and to deny their rights.<sup>119</sup> Many colonial states ignored indigenous law and refused to recognize its existence, and thereby refused to recognize indigenous rights that are protected by their law.<sup>120</sup>

One has to notice that the forms of denial of indigenous law did not follow one pattern and were varied from one place to another. Some countries denied the mere existence of indigenous law in a total manner and some did so only partially.<sup>121</sup> The reasons and excuses on which these countries relied were diverse, and included many claims, such as the argument that indigenous law is a primitive law, or that it is an unwritten law. However, the most prevalent excuse was that indigenous customary law was inconsistent with basic principles of international human rights law or principles.<sup>122</sup> Other reasons also included traditional colonial interests, such as denial of indigenous rights. Moreover, in some cases, there were even ideological reasons that led to the denial of the indigenous law. For example, Gilbert notes that: “[t]he liberal ideology of the ‘State Law’ led to the exclusion of the indigenous peoples from the national

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117. Guzman, *supra* note 64 (describing legal pluralism in Latin America).

118. Morse, *supra* note 114, at 107 (“Aboriginal customary law is still not recognised here as having any force in its own right, although its existence has been accepted by numerous courts and it is now influencing criminal sentencing policies in some parts of Australia.”).

119. See TOBIN, *supra* note 75, at 26 (“The application of the doctrine by the British denied Indigenous peoples the normal protection of the law and imposed English law without any recognition of Indigenous peoples’ own customary legal regimes.”); ROSALVA AÍDA HERNÁNDEZ CASTILLO, NATIONAL LAW AND INDIGENOUS CUSTOMARY LAW: THE STRUGGLE FOR JUSTICE OF INDIGENOUS WOMEN IN CHIAPAS, MEXICO (2007) (unpublished manuscript, The University of Texas at Austin), <https://repositories.lib.utexas.edu/handle/2152/4083> (last visited May 20, 2018).

120. Generally, colonial states recognized some rights for indigenous peoples according to their customary law. Such as their personal status, their ownership of livestock, and their possessions on other property. However, as for land and natural resources rights, they applied Western legal theories and refused to recognize their land. It is clear that this was done for purposes of settlement and the establishment of a new colonial state.

121. See HARRY BLAGG, CRIME, ABORIGINALITY AND THE DECOLONISATION OF JUSTICE 153 (2008).

122. See Mikano Emmanuel Kiye, *Conflict Between Customary Law and Human Rights In Cameroon: The Role Of The Courts In Fostering An Equitably Gendered Society*, 36 AFRICAN STUDY MONOGRAPHS 75 (2015), <https://repository.kulib.kyoto-u.ac.jp/dspace/handle/2433/200274> (last visited Apr. 7, 2018).



identity and the dominant political-legal order.”<sup>123</sup>

Moreover, in some places, states have not only ignored and refused to recognize the indigenous customary law, but have also even punished the use of customary law.<sup>124</sup> For example, some of the narcotics smoking for religious and worshiping purposes were banned from American Indians.<sup>125</sup> The Palestinian Authority not only prohibited the use of Bedouin customary law, but also threatened to punish the use of Bedouin tribal law, fearing that it would weaken the status of official law and the status of the newly established Palestinian Authority.<sup>126</sup> In South Africa, witchcraft (part of the local culture) was banned on the grounds that it contravenes Western law and violates human rights principles.<sup>127</sup>

The consequences of the denial were disastrous, and they affected the lives of indigenous people in all spheres and in all areas, but especially in the areas of land rights, natural resources, and cultural rights.<sup>128</sup> They also discriminated against indigenous peoples in the official legal system and excluded them from the public discourse. In this context, Rene Paul Amry notes that “[t]he monistic and ethnocentric view of the law has led to massive discrimination of cultural differences, by enforcement on a population that does not live in the same cultural reality as Ladinos.”<sup>129</sup>

## 2. The Recognition of Indigenous Peoples’ Law

In the second half of the twentieth century, indigenous peoples were among the most disadvantaged groups in the world. During that time, many indigenous groups engaged in protracted struggles for recognition of their rights. During the second half of the 19th century their struggle

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123. Gilbert, *supra* note 84, at 257 (quoting Rachel Sieder & Jessica Witchell, *Advancing indigenous claims through the law: reflections on the Guatemalan peace process*, CULTURE AND RTS: ANTHROPOLOGICAL PERSPECTIVES (Jane Cowan, Marie-Benedicte Dembour & Richard Wilson eds., 2001)).

124. BIRZEIT UNIVERSITY, *INFORMAL JUSTICE: THE RULE OF LAW AND DISPUTE RESOLUTION IN PALESTINE*, NATIONAL REPORT ON FIELD RESEARCH RESULTS 31-32 (2006).

125. *Id.* at 31–32.

126. *Id.*

127. *See* Ludsin, *supra* note 85.

128. *Id.* (describing the deprivation of cultural rights in Africa).

129. Rene Paul Amry, *Indigenous Peoples Customary Law and the Peace Process in Guatemala*, L. & ANTHROPOLOGY: INT’L YEARBOOK FOR LEGAL ANTHROPOLOGY, 58 (René Kuppe & Richard Potz eds., 1999) (“The monistic and ethnocentric view of the law has led to massive discrimination of cultural differences, by enforcement on a population that does not live in the same cultural reality as Ladinos, and of poverty, by particularly harsh punishment of crimes usually committed by the poor. Striking examples of this situation are the bad preparation of translators and judges for cases involving Mayas who cannot speak Spanish, provided there is any interpreter at all, or the fact that persons who cannot afford to be bailed out stay in prison for years before judgment.”); *see also* TOBIN, *supra* note 75, at 26 (“The application of the doctrine by the British denied Indigenous peoples the normal protection of the law and imposed English law without any recognition of Indigenous peoples’ own customary legal regimes.”).

had also reached the international arena.<sup>130</sup> As a result, and after many years of exclusion, leaders in the international community began to call upon many countries to recognize the rights of indigenous peoples and, *inter alia*, to recognize the indigenous legal systems.<sup>131</sup> Noteworthy here is the Special Rapporteur on the rights of indigenous peoples (his title at the time), Mr. Rodolfo Stavenhagen, who stated: “[c]ountries that have succeeded in integrating traditional law into their formal legal systems have found that justice is done more effectively.”<sup>132</sup> A similar position introduced the Human Rights Council in 2012.<sup>133</sup>

As Guzman describes, the multiculturalism that took place in the 19th century in many countries led to a change in the approach to the law of indigenous peoples, and it created legal pluralism.<sup>134</sup> Guzman further notes that in the ‘90s, in particular, as a result of changes in the world order and the changes in the world view of the relationship between the state and minority groups and as a result of the new vision that sees multiculturalism as the optimal way of civil co-existence, many countries have begun to “reassess” their attitudes towards minorities, including indigenous peoples.<sup>135</sup> Multiculturalism has led to changes at all levels. One of these changes is legal pluralism; i.e. recognition of the legal systems of other groups.

In recent years, many countries have concluded that recognition of indigenous law is necessary to build a “modern, multicultural and equal state,”<sup>136</sup> to preserve indigenous peoples and their culture, and to do historical justice that would benefit the state and the natives on many levels.<sup>137</sup> Many countries, particularly countries that have and welcome large immigrant populations such as Canada, have come to see legal monism as an obstacle to recognition of indigenous rights. They discovered that legal pluralism was essential to understand and embrace the rights of other national, religious, and cultural groups in the country.

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130. See Special Rapporteur, *Indigenous peoples and their relationship to land*, U.N. SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS, E/CN.4/Sub.2/2001/21 (June 11, 2001) (by Erica-Irene A. Daes), <https://www.refworld.org/docid/3d5a2cd0.html>; S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2nd ed. 2004).

131. Special Rapporteur, *supra* note 129.

132. STAVENHAGEN, *supra* note 1, at 59.

133. Special Rapporteur, *supra* note 129.

134. Guzman, *supra* note 64, at 48–50 (describing the states that recognized indigenous peoples' legal rights).

135. *Id.*

136. Guzman, *supra* note 64.

137. See the example of the problems surrounding Bedouin's lands because of the State's inability to recognize their customary law and the Bedouin's refusal to give up their rights under the State's law. See also in this context how the state (forbids bigamy) but the Bedouin continue to practice a polygamous lifestyle. This is not the best example, but the best example is the actual control of the Bedouin over their lands in their villages despite the State's law that do not recognize their land rights.

These changes have been translated in several fields; in the legal sphere, as Guzman points out, they were “translated” by legal pluralism.

This legal pluralism offered a “voice” to groups that were weak and disadvantaged. And, as part of the granting of that voice, advancing legal pluralism also recognized rights of these groups, rights that were not recognized in the official law of the state. As part of these changes it also granted recognition of indigenous rights.<sup>138</sup> On the practical level, Guzman writes, “[l]egal pluralism is one of the phenomena related to the adaptation of [legal] service to indigenous peoples within local legal systems through a multicultural policy.”<sup>139</sup> Similar arguments can be found in Svensson's article (quoted in Brill-Britt), where he states that “[f]or indigenous minorities in the Cordillera, the use of legal pluralism was a necessary tactic; without it, claims to ancestral lands and domains would have appeared less legitimate and highly irrelevant.”<sup>140</sup>

#### V. LEGAL PLURALISM IN ISRAEL

The State of Israel is an ingathering of the Jewish diaspora from many parts of the world; it is a collection of Jews who came from Western Christian countries, from Eastern Muslim countries, or other different places. These diverse populations in geographical transition brought with them different norms, different rights according to the law of their previous homeland, and different rights according to the cultures they came from. Therefore, from the very beginning, it was clear that legal monism would not be able to provide an appropriate answer to the cultural-religious diversity of the country, and very soon monism was forced to step aside and make room for legal pluralism.<sup>141</sup>

Legal pluralism in the State of Israel applies to all levels and all parts of the country. It includes horizontal pluralism, that is, the pluralism of different legal systems, and vertical pluralism, which consists of differing legal systems from the past and present. The most obvious examples of bringing systems from the past into the legal system that exists in Israel today are laws from the Ottoman legal system as well as from the legal system that governed the British Mandate. Also, legal pluralism in Israel

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138. NATAN LERNER, RELIGION, SECULAR BELIEFS AND HUMAN RIGHTS: SECOND REVISED EDITION 150 (2012).

139. Guzman, *supra* note 64, at 51, 54 (“I shall argue that the implementation of legal pluralism illustrates a way to accommodate indigenous peoples' aspirations about law within States, thereby effecting interaction between international human rights law and indigenous peoples' law.”).

140. Prill-Brett, *supra* note 97, at 695 (citing Svensson 1990) (For indigenous minorities in the Cordillera, the use of legal pluralism was a necessary tactic; without it, claims to ancestral lands and domains would have appeared less legitimate and highly irrelevant).

141. For a discussion of legal pluralism in Israel, see Sezgin, *supra* note 70, at 101, where, in the first sentence he states, “Israel is a legally pluralistic society.” See also Ruth Halperin; Yedidah Stern.

includes Western norms and norms from the Eastern world. In short, the legal system governing Israel today is an amalgamation of diverse legal systems that one is hard pressed to find anywhere else in the world.

Several articles published recently by Israeli scholars on the subject confirm these statements. They attest that legal pluralism is well established and is a reality in the current legal system of Israel.<sup>142</sup> One of the leading articles in this field was written by Ruth Halperin-Kaddari in 1996, followed by two articles by Assi (Issachar) Rosen Zvi, and a third by Halperin-Kaddari. Both writers describe and analyze legal pluralism in Israeli law. Ruth Halperin presents and analyzes several recent decisions<sup>143</sup> of the Israeli Supreme Court.<sup>144</sup> Halperin's analysis demonstrates that legal pluralism in living action is alive and well in Israel.<sup>145</sup>

In addition, Yedidia Stern (From the Democracy Institute (2010)), published an article named "Tzedek Shelly Tzedek Shelkha" ("My Justice, Your Justice"), in which he elaborates and documents in detail legal pluralism in Israel. Stern shows that legal pluralism exists in multiple legal fields in Israel, that is, civil, criminal, and administrative.<sup>146</sup>

But even without these articles, a comprehensive look shows that the legal system in Israel is a pluralistic one. It includes several legal systems that apply to different groups living in the country: the official state law, rabbinical law for Jews, Sharia laws for Muslims, laws for Christians, and laws for Druze.<sup>147</sup>

#### A. Can Legal Pluralism Promote Bedouin Rights?

The premise underlying this article is that the answer to the question— whether legal pluralism in the State of Israel can provide a solution to the rights of the Bedouin—must clearly be in the affirmative. Although the answer is not easy and requires discussion, this article can only start it. This article mentions several important points that determine the limits of discussion on this matter. The following perspectives are

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142. See Issachar (Issi) Rosen-Zvi, *The Subject, Community and Legal Pluralism*, 23 TEL AVIV U. L. REV. 539 (2000); Ruth Halperin-Kaddari, *Rethinking Legal Pluralism in Israel: The Interaction between the High Court of Justice and Rabbinical Courts*, 20 TEL AVIV U. L. REV. 683 (1996); Ruth Halperin-Kaddari, *More on Legal Pluralism in Israel*, 23 TEL AVIV U. L. REV. 559 (2000); Sezgin, *supra* note 70; Yedidia Z. Stern, MY JUSTICE, YOUR JUSTICE, <https://en.idi.org.il/publications/6697> (last visited Dec. 6, 2018).

143. HCJ 1000/92 Bavli v. Great Rabbinical Court, PD 48(2) PD 221 [1994] (Isr.) (hereinafter Bavli case); HCJ 3919/92 Lev v. The Regional Court in Tel Aviv-Jaffa, PD 49 (2) 491 (hereinafter Lev Case).

144. See Bavli case, *supra* note 142; and Lev Case, *supra* note 142.

145. Halperin-Kaddari, *supra* note 143.

146. Stern, *supra* note 143.

147. Halperin-Kaddari, *supra* note 141 at 718–19. For more information about legal pluralism in Israel see also Stern, *supra* note 143.

instructive.

First, legal pluralism in Israel is not a product of the modern multiculturalism such as that which Guzman describes as characteristic of Western democracies but, rather, at the very least, is one which is inherited from the Ottomans and the British Mandate. More specifically, at a minimum, legal pluralism in Israel is the result of the adoption of the Ottoman legal system or the British Mandate judicial system by virtue of Article 51 of the Royal Order in the Council on Palestine, 1922-1947.<sup>148</sup>

Second, this Israeli pluralism has special characteristics. The most prominent of which is that it recognizes pluralism only in religious legislations that focus primarily on personal status issues (first-generation legal pluralism). Thus, it is fundamentally different from the modern Western pluralism that came as a response to the needs of multiculturalism. In the legal field, it was translated into legal pluralism, as Guzman describes.<sup>149</sup> This Israeli “first generation legal pluralism” has evolved to be responsive mainly in the field of religious legislation and religious rights, which came in response to the “religious diversity” or multi-religious society during that historical time. Therefore, because this pluralism lacks a multicultural pigment of the kind that Guzman had in mind which would support inclusion of other legal systems, such as traditional legal systems of indigenous peoples, and given the jurisprudence by which the Israeli court system has thus far rejected efforts to achieve recognition of Bedouin land rights, it would be hard under the limited legal pluralism to recognize a Bedouin legal system or “see” Bedouin rights through it.

This is why the litigation of Bedouin rights in the Israeli courts in the current format, i.e. the search for their rights within the official legal system, is not solving the problem. The Bedouin rights are simply not there in the state legal system but, rather, they are in Bedouin customary law. Just as the rights of the natives in Australian and Canada are in their customary law, the same logic applies for the personal status rights of Jews for matters of marriage and divorce that are found only in Jewish law. Along with the rights of the personal status of Muslims that are found only in Muslim law, until recently. A clear proof of this idea can be found in the Mabo judgment, in the Richardville judgment, and in many similar decisions that recognize indigenous peoples' rights.

Notwithstanding the foregoing perspectives applicable to the Israeli legal system, it cannot be denied that, by reviewing the experience of other peoples, there is a growing understanding that the recognition of indigenous law is the basis for the recognition of indigenous rights.<sup>150</sup>

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148. Halperin-Kaddari, *supra* note 141, at 688–89.

149. *See generally* Guzman, *supra* note 64.

150. *See* TOBIN, *supra* note 75, at 113.

This basic assumption has been understood and accepted in many places where there is more than one culture or legal system. However, it is clear that the “rights” of indigenous peoples does not exist in the official legal system of the State of Israel, but in another legal system: the legal system of indigenous peoples. Only in the indigenous peoples’ legal system can the right and the source of the right be found. Without recognition of the source of the right, it is not practicable to expect recognition of the right of Indigenous peoples.

*B. In Israel & the Negev*

In Israel all state institutions accept, as a working assumption, the premise that the Bedouin have rights to the land by virtue of their customary law.<sup>151</sup> While it is recognized that customary law cannot be ignored in dealing with Bedouin land matters, Bedouin customary law is not officially recognized in Israel’s legal system. For example, in the course of working on Bedouin land rights, the authorities accept the assumption, and thus acknowledge, if only implicitly, that a certain land claimed by a member of one Bedouin tribe is “his land,” meaning such person or tribe is the “legal owner” of the land, by some law not identified. By virtue of the foregoing, such member has many important rights and privileges. This acknowledgement opens the door to negotiations with the State on compensation for money (and even land), ownership of building plots, and determination of the identity of third parties to whom the building plots will be sold. This reasoning process proceeds upon a denial of reality where ownership is not officially recognized. It is a logical inconsistency that defies explanation. This leads to the conclusion that, in practice, the state recognizes Bedouin land rights according to customary law (albeit in a limited manner), but not sufficiently to support official (or judicial) recognition of these rights.

Those who oppose the recognition of rights by virtue of customary law would argue that the state does not need to indulge itself into recognizing Bedouin rights under customary law.

Indeed, recognition of Bedouin rights under customary law may bring about a great deal of change in the legal realm, mainly on the practical level. Such recognition, at the legal level, will translate principles of multiculturalism and equality into the legal sphere, as Guzman points out. On the practical level, recognition of Bedouin rights according to their

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151. See SWIRSKI AND HASSON, *supra* note 9, at 21 (citing Plia Albeck (Chair), Oct. 20, 1975. Final Report of the Team of Experts on the Issue of Land Settlement in the Siyag Area and the Northern Negev. Jerusalem. (Hebrew)); MINISTRY OF CONSTRUCTION & HOUSING, GOLDBERG REPORT (2009) (Isr.), [http://www.moch.gov.il/SiteCollectionDocuments/odot/doch\\_goldberg/Doch\\_Vaada\\_Shofet\\_Goldberg.pdf](http://www.moch.gov.il/SiteCollectionDocuments/odot/doch_goldberg/Doch_Vaada_Shofet_Goldberg.pdf).

custom, done secretly and informally, will become public, and established in a formal and legal manner.

Such recognition will benefit the Bedouin beyond members of specific tribes. It will lead to changes in the conception of a land market which does not exist among the Bedouin in the Negev. It will promote a solution to the controversial issue of land use, especially the issue of “trapped land” in the Bedouin villages. It will liberate the “trapped lands” in these communities and allow them to be used for all residents, and not only for members of the tribes who own this land according to Bedouin customary law.

Granting legal recognition of Bedouin land rights will allow Bedouin “landowners” to trade their land and sell it to other Bedouins.<sup>152</sup> This will allow them to sell land they do not need to people who are desperately in need of such land. It will solve a separate problem of finding land for Bedouin who have no land and cannot get such land.

Recognition of customary rights will promote other changes on several levels: (1) on the legal level, it will bring about adoption of a legal pluralism for a “second generation” of multiculturalism in an egalitarian democratic regime; (2) on a social moral level, it will promote a transition from a colonial-national approach to a more democratic, multicultural, egalitarian approach that grants legal status to other groups according to the “language” of their law; and (3) on a personal level, it will promote recognition of rights under different legal systems including law of the Bedouin, thus adopting as a general universal principle the requirement of respect for and recognition of indigenous rights according to customary Bedouin law.

Recognition by the state of the “first generation” of legal pluralism will facilitate recognition of rights under another legal system. By similar analysis, the legislation of the Tribal Courts Regulations<sup>153</sup> (article 45 of The Palestine Order-in-Council of 1922-1947), which continues to be part of Israeli legislation, may also constitute another catalyst to facilitate the adoption of Bedouin rights by virtue of their customary law.<sup>154</sup>

Of course, adopting the Bedouin law or parts of it is not an easy challenge both in principle and in practice. In principle, this is a traditional tribal legal system that is completely different from the legal system in Israel (which is considered a Western legal system). It includes several

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152. Notably, the Bedouin have no problem selling the surplus land to other Bedouin. Historically, the Bedouin traded in their land and sold it to Bedouins and Jews. See Noa Kram, *The Naqab Bedouins: Legal Struggles for Land Ownership Rights in Israel*, INDIGENOUS (IN)JUSTICE: HUM. RTS. L. AND BEDOUIN ARABS IN THE NAQAB/NEGEV 137 (Ahmad Amara et. al. eds., 2012); Yiftachel, Kedar, and Amara, *supra* note 8, at 108 (citing the same example of Al-Uqbi tribe selling land to a Jewish organization in 1913).

153. Tribal Court Regulation of 5715, 1937, KT 483, 123 (Isr.).

154. Elsana, *supra* note 73, at 61–62.

legal principles that are not acceptable by many modern legal systems, such as collective responsibility for individual actions, women rights, and blood feud.<sup>155</sup>

But at the same time, one has to remember that the Bedouin legal system includes elements (laws and legal rules) that are acceptable to most of the Bedouin society, and it continues to serve the Bedouin population in the Negev,<sup>156</sup> especially in areas such as conflict resolution and the establishment of various rights in the areas of personal status and property rights.<sup>157</sup>

Such challenges exist wherever countries have recognized customary legal systems. In the United States, the American legal system recognized the traditional legal system of the Native Americans, permitting them to apply it in their own legally defined boundaries but with the limitations that such indigenous systems will be subordinated to fundamental doctrines set forth in the American Constitution, including “the right to due process [of law], equality, and other principles protected by the US Constitution.”<sup>158</sup>

At the same time, institutionalizing customary legal systems often push native populations into a path of change and adaptation to the development of traditional societies, which are naturally not static and change mainly as a result of exposure to modernization processes. Most important is that they would be subordinated to various societal or institutional forms of legal supervision that could ensure justice and prevent extreme decisions that deviate from basic principles of justice. See for example, the recent scandalous decision, *Al-Naami vs. Alatrash* in the Negev in 2014. In that case, a tribal court ordered one of the parties to pay a compensation of 235,000 Jordanian dinars, an amount equal to more than NIS 1 million, only because Mr. Al-Naami shared a post on Facebook that Mr Alatrash claimed to have slandered him.<sup>159</sup>

The results of such societal or institutional legal supervision may be very positive and may prevent undesirable acts such as honor killings, blood feuds among the Bedouin, or the expulsion of tribes from their

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155. CLINTON BAILEY, *BEDOUIN LAW FROM SINAI AND THE NEGEV: JUSTICE WITHOUT GOVERNMENT* 60 (2009).

156. *Id.* at 7.

157. *Id.* at 60–67.

158. James Poore, *The Constitution of the United States Applies to Indian Tribes*, 59 MONT. L. REV., 51, 51 (1998), <https://scholarship.law.umt.edu/mlr/vol59/iss1/4> (“The extent of Indian jurisdiction, both regulatory and judicial, is hotly contested because of the general perception that Indian tribes and their courts are not subject to the United States Constitution, and thus due process, equal protection, and other constitutional protections are not available to the constituents and litigants. This article addresses the validity of that perception.”).

159. Yasir Al-Uqbi, *A Precedent- Share" on Facebook costs 235 thousand JD*, BLDTNA (Oct. 28, 2014) سابقاً: “شیر” علی الفیسبوك يكلف 235 ألف دينار) سابقاً (2014), <https://goo.gl/wA7kmM>.



homes as part of collective punishment among Bedouins. Supervision of these matters (even if not by the state, i.e. the supervision by an acceptable people's council of the Bedouin) will restrain the decisions of the tribal courts and end the era of “wild law without supervision” as it is today.

## VI. CONCLUSION

Generally, as the examples presented in this article show, advocacy of indigenous rights from within the official monistic state legal system often fails to achieve recognition of their rights. One of the main reasons for this failure is that traditional rights of indigenous peoples, especially land rights, do not exist in the judicial system of the state (which is, generally, a colonial justice system that, for long time, was based on values and interests of colonialism). The modern state legal systems usually do not include the values/norms of indigenous peoples and thus fail to serve their needs, especially their legal needs, and therefore they do not recognize them.

The Bedouin case in Israel shows that even when legal pluralism exists, it is not enough to recognize indigenous peoples' rights. To recognize their rights, there is a need for a modern legal pluralism: a second generation of legal pluralism, which is a part of multiculturalism whose real purpose is to provide a legal service for all groups according to their own culture and law.

Therefore, to solve the problem of rights recognition, there is a need for a fundamental change, both in principle and in technical levels, in the approach of the parties (especially the establishment, i.e. the state) about the subject. A change is needed that aims at abandoning the narrow legal monism and moving forward toward real legal pluralism that answers the needs of the indigenous groups, according to the new view of multiculturalism taking place in the modern Western world.

On the specific level of Bedouin land rights in Israel, this article shows that the current way Bedouin seek a solution to their problem of land rights recognition through the Israeli legal system has not worked. In other words, it fails to bring recognition to their land rights. It also shows that the continuation of the litigation to recognize the rights of the Bedouin from within the current Israeli legal system (monistic or semi-pluralistic) will not solve the problem. Therefore, to recognize the Bedouin right to land claimed or potentially claimed by both Bedouins and the state, the Israeli legal system has to change its current approach and must start acting according to the principles of legal pluralism (not only in the judiciary but also in the legislature—the Knesset).

In addition, this article shows that despite the many studies showing that legal pluralism exists in Israel, the legal pluralism in Israel is “semi-

pluralism,” an “old fashion of legal pluralism,” which the State of Israel inherited from the Ottoman legal system that ruled the region from the beginning of the 12th century. This legal pluralism is a narrow pluralism because it is based on a religious legal pluralism, recognizing such pluralism in cases of religious legal systems, and is therefore different from the modern legal pluralism that occurs in the Western world as part of the changes that are taking place as part of the development and recognition of multiculturalism. Such recognition of multiculturalism aims to recognize the rights of all various groups. Not only on religious diversity, but also on a broader basis, which includes mainly cultural differences, and differences based on ideology and gender.

Therefore, evaluating the situation based on the present status of legal pluralism in Israel, would be very difficult if not impossible for Israeli law to recognize Bedouin land rights. It will take, and needs to take, a courageous step that changes the legal system and expands the existing legal pluralism from a narrow religion-based legal pluralism to a modern “real” liberal legal pluralism that includes all the other cultural groups and their legal systems operating in the country, and recognizes the rights of the various groups as part of multiculturalism taking place in the world.