

פורום דו-קיום בנגב לשוויון אזרחי
منتدى التعايش السلمي في النقب من أجل المساواة المدنية
Negev Coexistence Forum For Civil Equality

Processes of Dispossession in the Negev-Naqab:
**The Israeli Policy of Counter Claims
against the Bedouin-Arabs**



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EXECUTIVE SUMMARY

This report has been prepared to draw the public's attention to the state of Israel's policy of submitting counter-claims, before the Israeli courts, to lands claimed by the Bedouin citizens. The counter-claiming policy is one of several strategies employed by the Israeli government to further dispossess its Bedouin citizens in the Negev of their ancestral lands.

In the 1970s, Bedouin-Arab citizens of the Negev submitted more than 3,000 land claims as part of the land settlement process in Israel. This process is described in this report as part of a broader context of land dispossession of Arab citizens in Israel since 1948, and is followed by a brief discussion of government measures restricting recognition of Bedouin land ownership rights in the Negev. The report dedicates its focus to a recent policy employed by the Israeli government, namely the counter-claiming policy. Utilizing a biased legal argument, the Israeli Government re-interpreted Ottoman and British legislations, dating as far back as 1858, to deny Bedouin land ownership rights. Bedouin land claims were brought to the court after being filed more than thirty years earlier; thus far, Israeli courts have confirmed the government's legal position, leading to a 100 percent success rate in favor of the Israeli state.

Ultimately, the government's policy exerts serious pressure on the Bedouin to give up their land claims and accept less than fair and satisfactory proposed compensation. Lastly, this report discusses the severe flaws in the State's legal argument and in the counter-claiming policy overall.

INTRODUCTION

Policy of dispossession

Today, approximately 200,000 Bedouin-Arabs live in the Negev, the southern desert region of Israel. They are Israel's most disadvantaged citizens and are struggling for equal rights, the right to own land, for a legal status of their unrecognised villages, as well as recognition of their distinctive culture. About half of the Bedouin-Arab citizens live in seven unsuccessful and impoverished government-planned towns. The other half live in approximately 45 villages that are not recognised by the government, including several newly recognised townships. Bedouin citizens in the unrecognised villages do are denied basic services, such as running water, electricity, roads, proper education, and health and welfare services. In addition, they live under the continuous threat of home demolition, crop destruction and further displacement.

The heart of the prolonged conflict between the Arab-Bedouin citizens of the Negev and the State of Israel is the state's continual denial of Bedouin ownership rights and its policies of dispossession. Most of the state's plans for the Negev region, and particularly its most recent initiative, known as the Praver-Amidror Plan, have failed to address the rights and needs of the Arab Bedouin population. The objective of these plans has been to "settle" the land and housing issues at the expense of the indigenous Bedouin residents, and to forcefully concentrate them in urban and semi-urban townships.

The present situation in the Negev is untenable and demands a comprehensive and just solution, which recognises the right of the Bedouin to live on their own land in dignity and respects their basic human rights to adequate housing, water, and the services afforded to other citizens of the state.

Historical developments

While the vast majority of the indigenous Bedouin-Arabs of the Negev were expelled from, or fled, Israel in 1948, many of the remaining people were internally displaced from the lands they

had lived on and cultivated for centuries. The Bedouin were traditionally a semi-nomadic people, however, from the 1950s onwards, they were dispossessed from their land by means of laws passed by the Israeli Parliament (the Knesset), and implemented, together with other policies, by the Israeli executive and various administrative bodies.

By the mid-nineteenth century, the eight Bedouin clans that had populated the Negev for centuries began to adopt a sedentary lifestyle. They regarded the Negev as their territory and divided the region between themselves, subsisting on dry farming and small cattle, such as sheep and goats. They relied on livestock and cultivated between 2 to 3.5 million dunams of land. Following the establishment of the State of Israel in 1948, which included the Negev, the Bedouin were displaced from most of their lands and only 10 to 15 percent of the original population remained in Israel, numbering about 11,000. The majority of the population was expelled to neighbouring countries.

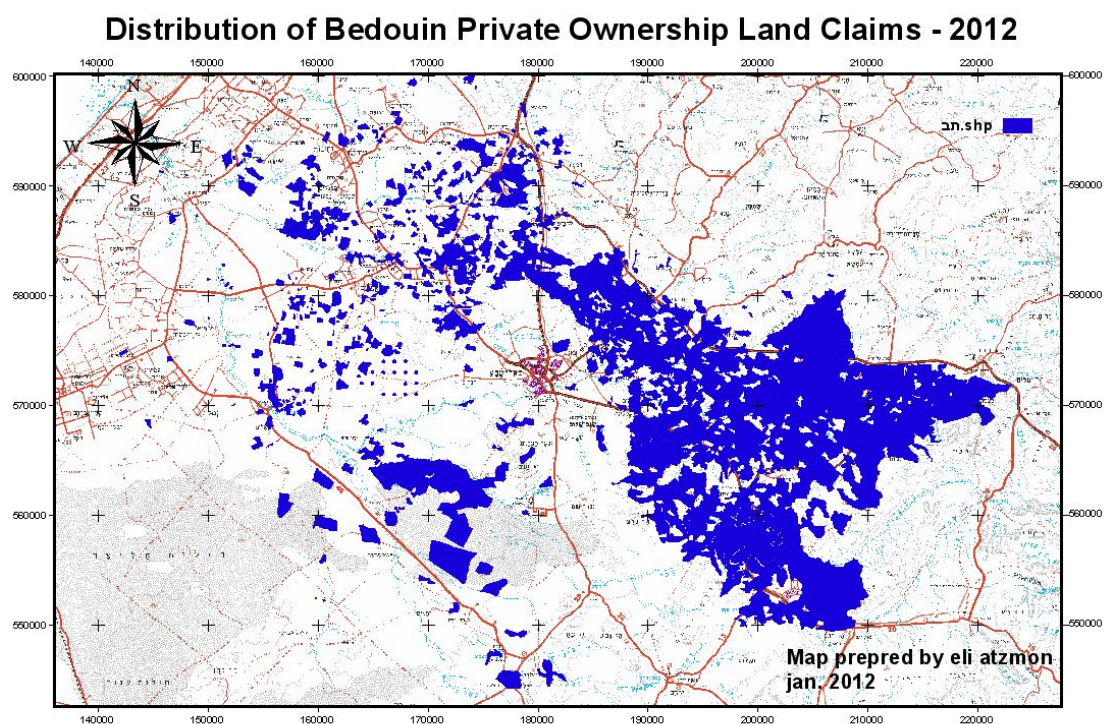
The remaining 11 Bedouin tribes were concentrated in a restricted area came to be known as the “*Siyag*” (Seiaj in Arabic), which means a territory limited by a fence, where some seven other tribes were already living. Bedouin in the *Siyag* were placed under military rule, as was the entire Arab population that remained in the newly-formed Israeli state, until 1966. During this time, Bedouin movement, employment, land use and other aspects of life were controlled by the Israeli Military Governor, and the Bedouin were confined to the *Siyag* unless permitted to leave it by the Military Governor.

Lands of the Bedouin who became refugees, as well as much of the land owned by Bedouin who remained within Israel, were subject to expropriation by the Israeli authorities, under several laws, including the Absentees’ Property Act (1950) and the Land Acquisition Act (1953). Additionally, the state started a policy of forced urbanisation of the Bedouin population, and established three Bedouin townships on the premise that it was modernising the Bedouin and improving their standard of living. Pursuant to new laws, such as the 1965 Planning and Construction Law, most Bedouin land was zoned as agricultural, natural reserves, or military areas, rather than residential land. Therefore, all the existing Bedouin habitation structures were deemed illegal. This is where we can identify for the first time the phenomena of the so-called “unrecognised villages.” Villages

that preceded the State of Israel were not granted any zoning status, thus becoming illegal under the Israeli law.

In 1970, the Israeli Government opened a land settlement process over lands claimed by Bedouin in the Siyag, which enabled the Bedouin to file land ownership claims. A total of 3,200 claims were registered over approximately 991,000 dunams (247,000 acres) of land (see figure 1). In 1975, a governmental committee recommended that the state not examine the land claims and instead negotiate a settlement with the Bedouin claimants, offering compensation (monetary; for instance, 20% of the value of the land claim when it corresponds to more than 400 dunams). The compensation rate changed over the years but remained very low and unsatisfactory to the Bedouin claimants. Thus, until the year 2000, settlements were reached only over 160,000 dunams (40,000 acres) of land. In 2003, the government, in an attempt to pressure Bedouin claimants to settle their claims, began to file counter-claims, which are the focus of this report.

Figure 1: Distribution of Bedouin land claims 2012 (source: Eli Atzmon)



ISRAELI COUNTER-CLAIMING POLICY

The land settlement process

Established in 1928 by the British Mandate Government in Palestine, the land settlement process aimed to identify the owners of every parcel of land in the country. Through a quasi-judicial procedure, it relied entirely upon cadastral and topographical surveys, which divided lands into clearly demarcated blocks and parcels. The registration of these rights would be final evidence of property rights.¹

Land rights and affairs under this process relied on the Ottoman land law, as well as the newly enacted British Mandatory land legislation in Palestine. At the outset of the British Mandate, the British law had adopted all Ottoman law in force, unless it was changed or amended by the British authorities.² Similarly, the newly created Israeli state passed a law in 1948 proclaiming that all laws would remain in force, subject to legal modifications resulting from either the state's establishment or subsequent legislation.³ Thus, a legal continuum of Ottoman, British and new Israeli law dictates Israeli land affairs and their registration to this day. In 1969, the Israeli parliament replaced the Ottoman and British land laws by enacting a new Land Law and a new Land Rights Settlement Ordinance (New Version).⁴ However, the new laws stated that the older Ottoman and British laws would continue to apply for the purpose of land rights settlement.⁵

By April 30, 1947, the total area settled in Palestine, according to the records of the British Mandate Department of Land Registration, totaled 5,243,042 dunams of Palestine's 26 million dunams, of which more than 5 million dunams lay within what became the State of Israel.⁶ Israel

¹ Gavish, Dov and Kark, Ruth (1993) "The Cadastral Mapping of Palestine, 1858-1928," 159:1 *The Geographical J.* 70-80; see also Forman, Jeremy (2002) "Settlement of Title in the Galilee; Dowson's Colonial Guiding Principles," 7:3 *Israel Studies* 61-83. The process followed the Torrens system implemented in South Australia based on the vision of Sir Ernest Dowson.

² See, British Order in Council 1922, in Legislation of Palestine 1918-1925, compiled by Bentwich, Norman (1926), Vol. I. Alexandria: Whitehead Morris Limited, p.1.

³ See, Law of Administrative Ordinance, No. 1 of 5708-1948, Provisional Council of the State of Israel, www.israelawresourcecenter.org (accessed 3 May 2011).

⁴ In the late 1960s and early 1970s, the Israeli law started a process of codification influenced by continental doctrines, replacing the previous laws in force. See, Harris (2002: 14-15).

⁵ Articles 153-155 to the Israel 1969 Land Law.

⁶ *Dunam* is a unit of land area. Four *dunams* equal one *Acre*. Survey of Palestine (1946: 241).

continued the land settlement process after 1948, mainly in accordance with the 1928 British land settlement ordinance, and after 1969, in accordance with the new Israeli land settlement ordinance. As of the year 2007, according to the Israel Land Administration (ILA), the main governmental body on land affairs in Israel, there were only 927,162 dunams that had still did not undergone land settlement, mainly in the Negev.⁷

Under the 1969 Land Settlement Ordinance, the settlement process proceeds as follows. The Minister of Justice publishes a land settlement order to determine the place and borders of the area where the settlement of title ought to take place and what date the settlement of title will begin (art 2). Then, the Minister will appoint a settlement officer and other assistants to register settlement of title (art 4). At least 30 days before the beginning of the process, the officer must publish an announcement notifying that there are plans to conduct demarcation, settlement and registration of land title in the specific area, and include instructions on how to file land rights' claims and warnings about the consequences if claims are not submitted in the given time period (art 5). The announcement must be published in the administrative offices of the district, and the sub-districts, in which the settlement area is located and in appropriate places around the area, and be sent to the district court and the director in charge of the settlement of title process (art 6). During the settlement process, the land officer will publish announcements about the advancement of the process. The announcements will be published in the administrative offices of the sub-district where the settlement is taking place and in the offices or the site camp of the land settlement officer (art 11).

After publishing the announcement, anyone who wishes to submit a land claim must arrive at the time and place determined by the officer and must submit the claim on the correct form (art 17). If the claimant does not show up, any action of settlement of title can be done in his absence (art 18). The settlement officer should prepare and publish a table of land claims (art 34), and at least fifteen days later, the settlement officer shall begin examining the claims (art 38). The settlement officer should prepare a table of land rights after examining the claims (art 55).

⁷ Israel Land Administration (ILA) Annual Report (2007), p.95, text available at <http://www.mmi.gov.il/Osh/Aspx/DownloadTofes.aspx?Maarechet=71&TofesId=109&UserId=323&RO=True>.

It is important to note that the government's land rights will be inspected regardless of whether there are claims made to them, and any land right that is not claimed will be listed as the government's (art 22). Similarly, the officer or district court can act as if a person had submitted a claim in the time permitted if the clerk or court determines that the person has land rights (art 24). In a case of land dispute or conflicting land claims, the settlement officer should refer them to the District Court in which the disputed land exists (art 43). When examining such land disputes, the court should consider equitable land rights as well as legal property rights (art 44a). Article 44b, however, states that the courts should not be bound by the regular procedure that prohibits the courts from hearing cases based on unregistered documents and allows courts to deviate from regular Ottoman evidence rules.

Land settlement and the Negev Bedouin-Arabs

In the early 1970s, the government declared the Northern Negev, including the *Siyag* area where all Negev Bedouin live, subject to the land rights settlement process. All Bedouin citizens were asked, in accordance with the 1969 Ordinance, to file any land rights claims they had. By 1979, the Bedouin had filed 3,220 claims, covering approximately 1.5 million dunams of land, within and near the Siyag area. The 1.5 million dunams included about 600,000 of pasture tribal lands.⁸ They also included about 200,000 dunams of lands claimed by the Azazmeh tribe in the Har-Hanegev area, which have been already registered under the State's name without notifying the Bedouin claimants.

Initiating what would become a familiar pattern of following a bureaucratic-administrative route rather than a judicial-adjudicative one, the government formed a special body in 1975, known as the Albeck committee, to address Bedouin land claims that would otherwise have been dealt with under the (relatively short) timeline of the 1969 Ordinance.⁹ The Albeck committee reaffirmed the

⁸ State of Israel, Ministry of Justice (1975), *Summary Report of the Experts Team on Land Settlement on the Siyag and the Northern Negev*. Jerusalem, October 20 1975, p.3 (in Hebrew), copy with the authors (hereafter, Albeck Report).

⁹ The obligations of the land officer under the Ordinance are to be executed between several days up to several months, depending on the obligations, which include for example, declare the land boundaries under settlement; prepare a list of claims, and then a list of rights and then to publicize such documents.

government position (originally developed in the Galilee area in Israel)¹⁰ that the Bedouin land was in fact *mawat* land – dead land – and therefore could be classified as state land, as dictated, according to the Albeck claim, by the 1858 Ottoman Land Law and the 1921 Mawat Land Ordinance.¹¹ This conclusion suffers from a number of legal flaws, in addition to political ones.

*Mawat*¹² land is defined under the 1858 Ottoman Land Code (OLC) as vacant and unoccupied land, which lies beyond the reach of a loud human voice, at a distance of 30 minutes walking, or 1.5 miles from an inhabited area (article 6). Under the Ottoman Code (Article 103), anyone who revived such lands, i.e., made it cultivable, would gain a title to it, even if he had done so without a permit from the Ottoman authorities, who sought to increase land cultivation and thus collected taxes on cultivated lands. In 1921, the British, in an attempt to increase their control over public lands in Palestine, enacted the *Mawat* Land Ordinance, which amended article 103 of the Ottoman Code, and required prior permit to cultivate such lands, less the cultivation be considered trespassing. The British allowed a two-month registration window for those who claimed rights to such lands.

The Israeli government's Mawat legal argument

Unlike the Ottomans and the British, the Israeli government and judiciary decided to apply the *mawat* formal law differently and incorrectly. The substantive changes made by the Israeli government and the courts to the *mawat* law were, by their application to Bedouin lands, done by re-interpreting the requirements for *mawat* land.¹³ The Israeli Supreme Court interpreted the requirements of *mawat* land in increasingly broad ways while narrowing the definition of *miri* land, which is entitled to the possessor with prescriptive title.

Firstly, in the 1961 *Badaran* case of land rights settlement in the Galilee, of the three factors in determining distance – namely, the reach of voice; thirty minutes walking; or 1.5 miles from the

¹⁰ See for example, Forman, Jeremy (2002) "Settlement of Title in the Galilee; Dowson's Colonial Guiding Principles," 7:3 *Israel Studies* 61-83; see also, C.A. 518/61, *The State of Israel v. Salach Badran*, 16(3) P.D. 1717.

¹¹ State of Israel, Ministry of Justice (1975), *Summary Report of the Experts Team on Land Settlement on the Siyag and the Northern Negev*. Jerusalem, October 20 1975, (in Hebrew), copy with the author (hereafter, Albeck Report).

¹² The term is originally in Arabic for "موات" thus there are different transliterations including, Mevat, mawat, mewat, mawat.

¹³ See Kedar (2001); Forman (2002).

outskirt of “settlement,” – the Israeli Supreme Court chose the 1.5 mile distance as the formal condition.¹⁴

Secondly, while the Ottoman Land Code (OLC) referred to the distance to be measured from a ‘town’ or ‘village’ or from ‘inhabited places’, it included no definition for these terms.¹⁵ By 1956, the Supreme Court had narrowed down the definition of “settlement,” ruling that only an established city or village could be used as the baseline for the 1.5-mile distance requirement. The District Court explicitly determined that a Bedouin encampment would not constitute a village for these purposes.¹⁶

Thirdly, in *Badaran*, Justice Berenson ruled that a settlement, for distance measurement purposes, had to have existed “before the enactment of the 1858 OLC, which is the determining date for this matter.”¹⁷ This requirement was completely new; neither Ottoman nor British laws had included such a temporal boundary. The Negev was always, and exclusively, inhabited by Bedouin until the early 20th century. In 1900, already 42 years after the enactment of the OLC, Beersheba was the only city to be established in the region.

Fourthly, the Israeli courts imposed further restrictions on the type and admissibility of evidence with regard to proving adverse possession. While the actual possession of land was given significant evidentiary weight during the British Mandate, mostly proved by oral evidence,¹⁸ its evidentiary purchase has declined dramatically in Israeli judicial decisions. Possession of land did not really assist the land holder, and the Israeli Courts preferred to rely upon memoirs of foreign travelers in the region rather than the testimonies of elderly Palestinians about the possession of land and the geography of the region.¹⁹ A higher standard of proof for demonstrating cultivation

¹⁴ C.A. 518/61, *The State of Israel v. Salach Badran*, 16(3) P.D. 1717.

¹⁵ The Ottoman Land Code (1858), Articles 6, 103.

¹⁶ C.A. 323/54, *Ahmad Hamda v. Al Kuatli*, 10(2) P.D. 853, 854.

¹⁷ *The State of Israel v. Salach Badran*, at 1720.

¹⁸ See for example, Civil Appeal (C.A.) 80/1939, *Khalaf Kirret v. Silim Ghannam el Sane et al.* (P.L.R.), pp. 515-516; C.A. 1/1936, *Haj Hassan Hammad v. Mgr. Barlassina*, P.L.R. 340-353.

¹⁹ Kedar (2001:974).

of the land was also imposed.²⁰ The Israeli Courts introduced a new condition – a minimum (50 percent) cultivation requirement for the claimed land – that did not exist during the British Mandate. The court relied, per the government’s request, upon Mandate-era aerial photos taken in 1944-1945 by the British as proof of lack of cultivation, despite the fact that such photos do not really tell us much about land cultivation, which varied considerably depending on the season. In addition, the court rejected tax payment records issued by the Ottoman or the British authorities as evidence of possession and cultivation.²¹ Finally, the courts made official registration in the land registry in 1921, during the British Mandate, as the sole guarantee for establishing land rights.²² Above all, the burden of proof was placed on the claimants, although it is the state that was initiating the denial of ownership to lands possessed or cultivated by the Bedouin.

Handling the Bedouin land claims

Although the Albeck committee confirmed the government’s position that Bedouin have no legal rights to the land, it expected the Israeli Supreme Court not to approve of the eviction of the Bedouin without compensation. Thus, it recommended that the government act in “good will” and go beyond the strict formal law,²³ by granting Bedouin some compensation through negotiations, on the condition that claimants give up any claim to the land and move to one of the state-planned townships.²⁴ The government, acting in accordance with the committee’s recommendations, then started a process of negotiations and concurrently froze all land claims.²⁵ The negotiations were conducted by the ILA using the Albeck compensation scheme as a basis for negotiating the Bedouin claims.²⁶ As of 2008, according to the Goldberg Committee report,²⁷ 380

²⁰ C.A. 182/52, *The CAP v. Zalman David*, 10(1) P.D. 776, 782.

²¹ Kedar (2001:973-984)

²² See, *The State of Israel v. Salah Badran*, see also, C.A. 298/66, *Qasis and 32 others v. State of Israel*, P.D. KA (1) 372.

²³ Albeck Report (1975:1).

²⁴ By this point, there were two Bedouin townships.

²⁵ Swirski and Hasson (2006: 16-19).

²⁶ Roughly speaking the Albeck compensation scheme offered a variety and a combination of compensation by alternative land, money and water for agriculture. Claimants are entitled to receive monetary compensation equal to 65% of their claimed land (Land value is assessed based on its value in 1948, not in the time of the payment). Alternatively, for a claim above 400 dunams, claimant may get 20% of the claim in alternative land; or receive one dunam for claims between 100-199; 2 dunams of claims between 200-299; or three dunams for claims 300-399. Albeck Report (1975: 2-3). The recent official proposal is within resolution 1028 of the council of ILA. Previous resolutions were, 813; 932; and 996, see, Israel Land Administration, www.mmi.gov.il (accessed 11 July 2011).

²⁷ A committee founded by the Israeli government to recommend on solutions to the land and housing issues of the Negev Bedouin-Arabs, see Israel Government Resolutions 631 (July 15, 2007), 1999 (July 15, 2007), and 2491 (October 28, 2007). On the

land claims out of 3,220 (12 percent of the total land claims) had been settled, covering an area of 205,670 dunams (about 18 percent of the total claimed lands). Thousands of claims, however, remained unsettled, while a large number of the ‘settled claims’ (80,000 dunams), it should be noted, were forcibly settled in accordance with a law known as the Peace Law, following the peace agreement signed between Israel and Egypt and the relocation of a military airport to a Bedouin area.²⁸

The state has amended the amount of compensation offered to the Bedouin several times. It was clear to the government, however, that Bedouin claimants viewed the compensation as insufficient and unjust.²⁹ Although the Israeli government determined not to decide on these 3,000 land claims, it treated these disputed lands as state land, and not lands under an ownership dispute.

In 2004, following a government decision³⁰ and the adoption of a new development plan for the Negev, the State Attorney’s office of the Southern District and the ILA begun submitting “counter-claims” in court against 30-years worth of 3,000 remained unsettled land claims that were left frozen since 1970s. In other words, the State began submitting land claims to the same land that was claimed by Bedouin claimants since the 1970s. According to the ILA, “Israel is committed to safeguarding its land reserves for the benefit of the whole population” and counter counter-claims were “in line with its strategy of protecting state resources.”³¹

Goldberg Committee, see Amara Ahmad (2008), “The Goldberg Committee: Legal and Extra-Legal Means in Solving the Naqab Bedouin Case,” 8:2 *Hagar Studies in Culture, Polity and Identities* 227-243; see also, Goldberg Committee Report (2008). See Goldberg Committee (2008) Final report of the Committee to Propose a Policy for Arranging Bedouin Settlement in the Negev, December 11, <http://www.moch.gov.il/spokesman/pages/doverlistitem.aspx?listid=5b390c93-15b2-4841-87e3-abf31c1af63d&webid=fe384cf7-21cd-49eb-8bbb-71ed64f47de0&itemid=42> (Hebrew; accessed April, 15, 2010);

²⁸ See Goldberg Committee (2008) Final report of the Committee to Propose a Policy for Arranging Bedouin Settlement in the Negev, December 11, <http://www.moch.gov.il/spokesman/pages/doverlistitem.aspx?listid=5b390c93-15b2-4841-87e3-abf31c1af63d&webid=fe384cf7-21cd-49eb-8bbb-71ed64f47de0&itemid=42> (Hebrew; accessed April, 15, 2010); see also, The 1980 Negev Land Acquisition Law (Peace Treaty with Egypt); see also, Hasson & Swirski (2006: 19-21). The government then used the land to build, in addition to the Nevatim airbase, the state-planned townships of Kseife and A’ra’ra for Bedouin families displaced from the site. The Law included a compensation formula, but the amount of compensation offered for the expropriated land was much less than that given to Jewish settlers removed from the Sinai at the same time. The GOI designated an amount of NIS 245 million (at 2005 value) for the evacuated 7,000 Bedouins, while the cost of the evacuation of approximately 5,000 Jewish settlers from Sinai was NIS 3.4 billion (at 2004 value) for paid compensation and another NIS 2.1 billion for their resettlement in about 19 agricultural localities.

²⁹ The recent official proposal is within resolution 1028 of the council of ILA. Previous resolutions were, 813; 932; and 996, see, Israel Land Administration, www.mmi.gov.il (accessed 11 April 2011).

³⁰ Government Decision no. 216 (Arab 1) “A plan for the Bedouin sector in the Negev” 14.4.2003

³¹ The Bedouin of the Negev Israeli construction and housing, (2007) p.8, Israel Land Authority web site, retrieved April 11th 2011. <http://www.mmi.gov.il/Osh/Aspx/DownloadTofes.aspx?Maarechet=71&TofesId=74&UserId=323&RO=True>

When a land claim is counter-claimed, the land officer is required under article 43 of the Land Rights Settlement Ordinance of 1969 to transfer the conflicting claims to the relevant District Court, in our case the Be'er Sheva District Court.³² State land rights are being taken up at the behest of the land settlement officer, regardless of whether the state submitted a claim to a specific parcel of land. Through this process, the state, represented by the ILA and its Bedouin Development Administration, submit counter land claims, which then places the onus on the Bedouin to prove ownership over land claims initiated by the land settlement officer. It seems that the State prefers that the District Court examine state land rights rather than the land settlement officer, since this process legitimizes the state's opposition to Bedouin land ownership, and the expropriation of such lands.

Official ILA figures from 2007 indicate that the ILA has submitted 401 counter land claims, covering an area of 175,000 dunams, and by then, had won cases over an area of 50,000 dunams.³³ According to the testimony in May 2008 of Ilan Yishoron, former Director General of the Bedouin Development Administration of the ILA, the state had submitted about 450 counter-claims (of the about 2,840 remaining land claims) to the land settlement officer, who transferred 223 of them to the Beersheba District Court. The court, by 2008, had ruled in favor of the state in 80 cases, leading many Bedouin to lose faith and boycott this judicial process.³⁴ According to a recent statement by Ilan Yishoron, in his new position as the Deputy Director of the Authority responsible of Bedouin land and housing matters (which replaced the Bedouin Development Administration), the State has won about 200 counter-claims over about 70,000 dunams of land.³⁵

³² Under the British settlement process as dictated by the 1928 Land Settlement Ordinance, it is the land officer who examines the conflicting claims and gives a decision. The Israeli Ordinance requests the land officer to refer the conflicting claims to the District Court.

³³ ILA Annual Report (2007), p.76.

³⁴ The counter-claims cover an area of 180,000 dunams, and the 80 decisions that the state won (62 through court rulings and 18 through out-of-court agreements) brought 50,000 dunams under state control. See testimony of Ilan Yishoron before the Goldberg Committee, General Director of the Bedouin Advancement Administration before the Goldberg Committee, May 20th, 2008, P.123-126, minutes of the Goldberg Committee (copy with the author). According to Havatzelet Yahel, as of 2006 the State won about 40 cases over 25,000 dunams and in few cases there was a settlement outside the court over an additional 4,000 dunam, see, See, Havatzelet, Yahel (2006) "Land disputes between the Negev Bedouin and Israel." 11:2 *Israel Studies* 1–22, pp.13-14.

³⁵ At the annual conference of the planners union, Ilan Yeshoron, Deputy Director of the Authority responsible of Bedouin land and housing matters spoke during a special panel, "Going forward to solve the Bedouin problem" at Ben-Gurion University, February 10th 2011.

Under the counter-claim policy, the Israeli government switched from the “negotiation” approach to a confrontational one with the Bedouin. Bringing the claims to the court does not only help legitimize the state’s actions and policies, but aims at exerting serious pressure on the Bedouin to accept the solution offered by the government. As noted by Havatzelet Yahel, the head of land settlement unit in the State Attorney Office in the Negev regarding the counter-claim policy, “as history shows, and according to my experience, the parallel method of implementing the legal procedure is essential as it encourages compromise and agreed-upon settlements.”³⁶ According to the Israeli State Comptroller, the government sought to speed up the process in order to increase the chances of gaining title to Bedouin lands, stating that “the greater the delay in registering the lands in the name of the state, the greater the risk of losing the titles to such lands”³⁷

Legal flaws in the counter-claiming policy

This is not the place to address all the problematic legal interpretations and manipulations undertaken by the State,³⁸ however, the counter-claim process is an example of a number of rights violations and improper implementation of even the Ordinance itself. Some of these violations are briefly presented below:

I. The land counter-claim process violates some basic principles of Israeli public and administrative law, such as reasonableness and undue delay, unreasonable decision-making criteria, and the denial of a citizen's right to an administrative hearing. Section 11 of Israel’s Interpretation Law of 1981 requires all authorities exercising administrative authority to act in due time.³⁹ Generally speaking, this provision means that the authority must take action within a reasonable

³⁶ Yahel (2006:14).

³⁷ Israel State Comptroller, Report 52B, 2001, <http://www.mevaker.gov.il/serve/contentTree.asp?bookid=235&id=153&contentid=&parentid=undefined&sw=1366&chw=698> (in Hebrew) (accessed 12 April 2011), at 116.

³⁸ For more see, Swirski, Shlomo, and Hasson, Yael (2006) “Invisible citizens: Israel government policy toward the Negev Bedouin.” Tel Aviv, Adva Center, <http://www.adva.org/UPLOADED/NegevEnglishFull.pdf>.

³⁹ 35 Laws of the State of Israel (LSI) 370.

timeframe, according to the circumstances of the case, and any action undertaken must be completed without undue delay.⁴⁰

The manner in which Israel has frozen Bedouin land claims and undertaken an extra judicial procedure that was protracted for more than 30 years does not comply with these principles. Particularly, the government decided in 2004 to submit counter-claims, and it is not clear what criteria these counter-claims are based on. It is also clear that the quality of evidence presented before the court suffers due to the great time delay and by extension, the many deaths of elderly Bedouin who lived and cultivated the lands before 1948.

Further, the court places the burden of proof on the Bedouin claimants, although it is the State which is disputing their claims to the land. The Court, as well as the State Attorney's office's position, is that the default rights of the State are always guaranteed in the Ordinance and thus the burden of proof is always on the claimants. The Ordinance is silent about the burden of proof, however, when the State is the party that is disputing a specific claim, more than 30 years later after it chose not to undertake the process of land settlement. The State ought to be the party that carries the burden of proof. Claimants were left unsure of the status of their claims for more than 30 years. Such a delay constitutes a tremendous injustice, both in terms of the Bedouin having to rely on disputed title and face the possibility of eviction for decades and also in making it difficult, if not entirely impossible, to properly prepare a case against the Israeli government's recent counter-claims.⁴¹

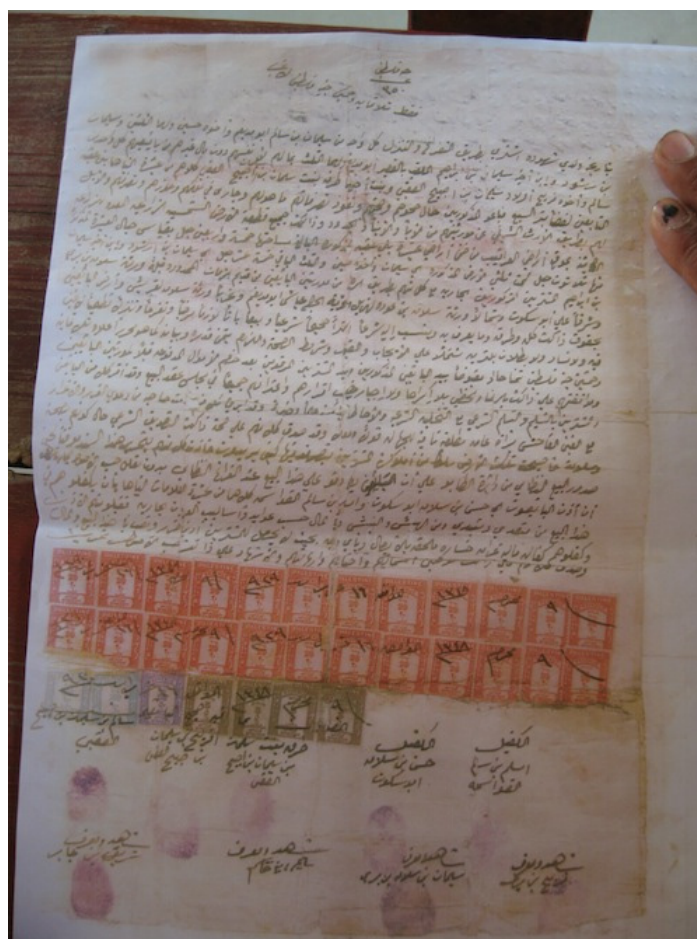
II. The legal position of the Israeli government, confirmed by the Israeli Courts, (in particular with regards to the application of the 1969 Land Settlement Ordinance in relation to the counter-claims) contains a number of legal flaws and misinterpretations of legal provisions. For instance, the courts seek the formal registration of Bedouin land rights in the Ottoman or the British land registry and disregards other internal or traditional documents that were in use or in possession of

⁴⁰ Itzhak Zamir, Administrative Law, in Itzhak Zamir and Allen Zysblat, *Public Law in Israel*, Oxford University Press (1997) at 27-28.

⁴¹ Such claim could be countered with the state's claim that Bedouin had no legal basis and on the fact that Bedouin did not cooperate with the state to resolve the situation.

Bedouin claimants, such as land sale contracts (see figure 2), mortgage contracts or land/crops' tax payments that they paid to the British and/or the Ottoman authorities. Further, the court disregards the weight of oral testimonies of Bedouin elderly and instead relies on accounts of European travelers and missionaries in relation to the nature of the claimed land, and its possession and cultivation.

Figure 2: A Sealed Land Sale Contract between Bedouin families (Abu Medigem and Al Okbi families), 16 February 1929



Finally, the Israeli Courts did not include any considerations based on equity and equitable land rights, although the Bedouin, as an indigenous population, lived, possessed and cultivated lands in the Negev from time immemorial, and enjoyed de-facto recognition and autonomy under the Ottoman, and then the British, authorities. Due to the unique circumstances involved in proving historical land rights, as well as the special treatment that the Bedouin of the Negev enjoyed throughout the years, Article 44 to the 1969 Ordinance requires the courts to act differently and gives room to provide for a different legal practice.

The Israeli 1969 Ordinance maintained many of the British 1928 Ordinance provisions that should be followed by the courts when handling land settlement cases. The above-mentioned article 44 of the 1969 Land Settlement Ordinance is the equivalent of article 10(3) of the 1928 Ordinance, which maintained the same contents of this legal provision except that the jurisdiction is to the courts instead of the land officer (and dropped the wording “or by any enactment issued by the British Military Administration”).⁴² Article 10(3) to the Land (Settlement of Title Ordinance) 1928, reads:

(3) A settlement officer shall apply the land law in force at the date of the hearing of the action: Provided that he shall have regard to the equitable as well as legal rights to land and shall not be bound by any rule of the Ottoman law or by any enactment issued by the British Military Administration prohibiting the courts from hearing evidence contained in the Ottoman Code of Civil Procedure or the Ottoman Civil Code.

The term equity refers to general principles of fairness as embedded in English common law, incorporated into Israeli law through Article 46 of the Palestine Order in Council.⁴³ Although the article is very clear in its liberal position on deviating from Ottoman evidence law or allowing

⁴² The Hebrew text of the Israeli Ordinance reads as follows:

44. (א) בית המשפט ידון לפי דיני המקרקעין שהם בתוקף בשעת הדיון, ויתחשב בזכויות המקרקעין הן לפי הדין והן לפי הישור.
(ב) בית המשפט לא יהא חייב לנהוג לפי כללי החוק העותמני האוסרים על בתי המשפט לדון בתביעות המבוססות על מסמכים שלא נרשמו או לפי דיני הראיות העותמניים.

⁴³ Joshua Weisman, Land Law, 1969: A Critical Analysis, 5 Isr. L. Rev. 380 (“whenever the solution to a question of law is not to be found in the local law, reference must be made to the rules of the common law and the principles of equity prevailing in England as a complementary source.”).

unregistered documents, the Israeli Court took a strict formal implementation in interpreting some legal provisions.

The Negev and its Bedouin inhabitants have always enjoyed large autonomy under both Ottoman and British rule, including maintaining their traditional property system. For many centuries, Bedouin were the sole sovereigns of the desert and enjoyed almost full autonomy in their daily lives. According to Clinton Bailey, “up to the end of the Ottoman Empire in 1918, government confined their presence to imperial or provincial capitals located at the edges of the desert.”⁴⁴ Until the twentieth century, the imperial government’s interests and interference focused on securing trade routes and safeguarding their administrative cities in the edges of the desert, as well as in some cases collecting taxes, a function carried out by enlisting some tribal chiefs.⁴⁵

The special history of the Negev Bedouin-Arabs, and the autonomy and recognition they enjoyed for many years under the Ottoman and British rules, requires a different and equitable approach that did not convert their existence on the land and its use for centuries to a crime of trespassing. The Bedouin practiced their land and property relations based on a traditional and tribal property system that operated and was binding for centuries. The Jewish National Fund, Palestinians and others, purchased about 100,000 dunams from the Bedouin until 1948, although these Bedouins did not have their lands registered by the State’s land registrar’s offices (see figure 3).

Figure 3: JNF (in black) and Jewish lands and settlements in the Negev-Naqab until April 1947 (source, in Hebrew: Kark, 1974)⁴⁶

⁴⁴ Bailey, Clinton (2009), *Bedouin Law from Sinai & the Negev: Justice without Government*. New Haven: Yale University Press, p. 9.

⁴⁵ Bailey (2009), p. 9-10.

⁴⁶ Karak, R. *The Pioneer settlement in the Negev until 1948*, Hakibbutz Hameuchad Publishing House, p. 98.

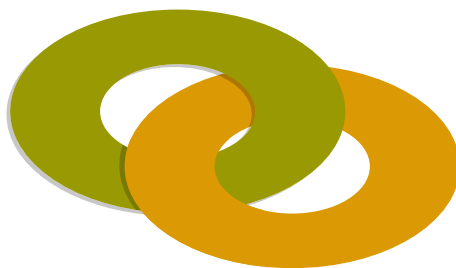
CONCLUSION

The counter-claiming strategy had severe implications for the Bedouin claimants, many of whom withdrew from (or altogether avoided) court hearings due to the impossibility of winning their case in the court and challenge the State's legal position. The high legal costs, "lack of trust in the legal system", or lack of formal documentation, have all contributed to the avoidance of courts' proceedings.⁴⁷ The counter-claiming strategy serves the interests of the Israeli government by both increasing the speed of resolution of Bedouin land claims and encouraging a perception in the Bedouin community that the Israeli court system would offer little or no opening to Bedouin claims compared with the proposed compensation.

Israeli policy towards the Bedouin-Arab land rights in the Negev marks a sharp deviation from previous Ottoman and British policies. The abuse of laws dating back more than a century, a delay of approximately 35 years before submitting counter-claims (after many Bedouin elders, who can testify on land possession and cultivation, have died), the non-application of the legal framework that accommodates equitable rights and allows unregistered documents and oral testimonies as required by the law, and the fact that the JNF purchased 66,000 dunams of unregistered Bedouin lands from Bedouin sellers before 1948 and that the British authorities allowed their registration under the JNF name, are but a few of the flaws in the Israeli counter-claim process that render it illegal and unjust.

Lastly, in conjunction with a variety of other tactics, Israel's counter-claim measures reinforce the image of the Bedouin as illegal claimants without title to the land or appropriate 'modern' evidence of ownership. The construction of a legal argument that makes it impossible for Bedouin to prove land rights, and the State's 100 percent success rate in court cases, alienates the Bedouin from the law, the judiciary and from a state that should serve them equally as citizens. In retrospect, British colonial rule proved to be more favorable to the colonized Bedouin than their own "democratic" state.

⁴⁷ Negev Coexistence Forum for Civil Equality, "The Bedouin-Arabs in the Negev-Naqab Desert: Response to the Report of the State of Israel on Implementing the Covenant on Civil and Political Rights" (Aug. 2009), at 17-18.



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