

CHAPTER 6

Applying an Australian Native Title Framework to Bedouin Property

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Introduction

[A]lready in the nineteenth-century Bedouin were developing alternative sites for winter and summer abode within their territories, located relative to seasonal grazing needs into different environments around which grazing activities revolved. That is, these sites were recognized as permanent bases. They reflected orderly patterns of grazing migration and camping, with grazing zones and ranges. These were highly constrained by the boundaries of tribal territories or by inter-group treaties and agreements that began to shape up from the mid-nineteenth century.

(Meir, 2009:832)

The property rights of indigenous peoples—such as the Bedouins of the Naqab (Negev) Desert—have always been a conundrum for countries whose land law is rooted in British common law.¹ Israel is one such state, having been the subject of the British Mandate. Indeed, British common law arguably emerged in 1917 with the conquest of Ottoman Syria, which included lands that would become the Palestine Mandate. The Bedouins also survive in other parts of the former Mandate area, such as Syria (Leybourne, 1997) and Jordan (Madanat, 2010).

The Naqab Bedouins are indigenous, semi-nomadic desert peoples characterized since the nineteenth century as semi-sedentary, with activities of a mainly agricultural nature being carried out on their traditional lands. In recent years, about half of them live in villages

considered “illegal,” and have thus been deprived of several basic rights. They have an ancient form of tenure markedly similar to that of indigenous nomads throughout the world, such as the indigenous (also known as Aboriginal) peoples of Australia.

The territories within which Bedouins have exercised their rights are similar to those of other semi-nomadic and nomadic peoples, and unsurprisingly rely on natural boundaries for delineation and the exclusion of others. Within these territories exists a constellation of traditional rights and interests, some of which are analogous to common-law notions of property and some of which are *sui generis* (unique). Confounding this tenurial picture are rights that do not distinguish between the temporal and the spiritual—concepts unknown to modern European societies, which regard land merely as a tradable commodity.

Among indigenous communities, property is not necessarily individually owned; rather, it is often held communally. In fact, individual ownership, and even clan ownership, is frequently eschewed. However, empirical evidence suggests that contemporaneity of tenures is not unknown, with a mixture of communal, joint, and individual landholding modes within particular societies persisting in various parts of the indigenous world. The absence of a taxonomic homogeneous panarchy of indigenous tenures is not unexpected, with subsidiary individualization of tenure possibly an expression of pre-contact possessive individualism, particularly evident in Australian indigenes (discussed below).

Like other indigenous societies, the Naqab Bedouins have seen themselves as part of the land and do not envisage a comfortable separation between themselves and their land. Accordingly, the property rights of the Bedouins are ordinarily not alienable beyond the Bedouin community. This predicament lies at the heart of the conundrum for Anglo-Israeli common-law notions of property, which place a monetary value on all conceivable types of property rights, be they free-

hold, leasehold, licenses, easements, or *profits-à-prendre*. Nevertheless, sales of Bedouin lands to non-indigenes are not unknown, especially during the Ottoman and British Mandate periods, which demonstrate that significant parts of Bedouin society have been in transformation from semi-nomadic to complete sedentarization.

This conundrum of Anglo-Israeli common law, however, is no longer evident in other common-law countries, where the “alien” rights and interests of indigenous semi-nomadic and nomadic peoples have steadily gained recognition. The main thrusts behind such recognition can be found in two jurisprudential developments: firstly, through the International Court of Justice’s (ICJ) 1975 decision demolishing the *terra nullius* notion and, secondly, through benchmark cases, particularly the Australian High Court’s 1992 *Mabo* decision, according the land rights of indigenous peoples the respect deserved in domestic law.² Notwithstanding such jurisprudential developments in other common-law countries, the State of Israel has been unwilling to reach an accommodation similar to that demonstrated by other comparable jurisdictions, such as Australia.

The Israeli government’s visceral unwillingness to undertake a similar approach is arguably a product of the ongoing Israeli-Palestinian conflict, the *leitmotif* (dominant theme) that has stigmatized traditional Bedouin land tenure in the eyes of the state (see Amara and Miller, chapter 2, this volume).

The following sections explore the prospect for recognizing Bedouin property rights, particularly in light of relevant international and comparative law.

Characteristics of Indigenous Property

When Augustus Caesar returned to Rome in 29 BC from Egypt, the restoration of the property rights of the Roman citizenry was crucial for the new but autocratic Augustan Empire because, “[t]o the Romans,

security of tenure was a moral as much a social or economic good" (Holland, 2004:382).

Such action was necessary because much earlier, in 49 BC, Gaius Julius Caesar and his legionaries had crossed the Rubicon, the narrow stream marking the border between the Roman Province of Gaul and Italy. In crossing the Rubicon and illegally marching on Rome, Caesar had overturned such prized values as "private property" and "rights before the law," resulting in the eventual collapse of the Roman Republic (Holland, 2004:xxi).

Figurative re-crossings of the iconic Rubicon to establish yet again such values in modernity were attempted through the French and American revolutions (Holland, 2004:xxii); however, ancient concepts of property (especially those within the aegis of deep property,³ such as indigenous property rights) still remain stubbornly elusive. Indeed, the characteristics of indigenous property are slowly being revealed as imbued with inherent complexity and pervasive cultural baggage. However, indigenous property is not incomprehensible; a unique world of property rights is emerging with a genius that is sometimes indefinable and yet often disconcertingly intelligible in its simplicity. Any attempt to uncover indigenous property rights through the lens of deep property necessitates a peeling of the layers comprising the elemental land property right, many of which remain inchoate.

Importantly, interrogation of these layers may need to occur repeatedly, using different lenses, if we are to understand the characteristics of indigenous property and the reasons for its complexity. Such inquiries may be placed on a seemingly vulnerable theoretical limb on the extremity of current thinking around property and what it means. Yet, in the process of doing so, recent property theory and formal property law are richly extended.

Any inquiry into institutional aspects of the nature and behavior of property rights reveals questionable assumptions derived from the parent discipline of economics. Greater exploration is needed into

theoretical positions outside the mainstream paradigm in order to reveal some of the failures between theory and reality experienced in property. Such institutional aspects of property are key to understanding economic behavior and how it permits inquiry into the nature of property-related institutions.

However, the survival of ancient property-related institutions in settler societies such as Israel demonstrates the aforementioned failure between theory and reality experienced in property. Traditional semi-nomad order, albeit partially transformed, reveals the dyschronous property rights existing in Israel, especially where the Bedouins have adopted a pluralist lifestyle that accommodates both customary and market-based approaches.⁴

Indigenous property-related institutions in other common-law countries, such as Australia, can help shed light on the Bedouins' plight. Australia's indigenous institutions were described with great insight by Justice Richard Blackburn in his ruling in *Milirrpum v. Nabalco Pty Ltd*:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is that shown in the evidence before me.⁵

Hence, an institutional focus inexorably leads to the law and demonstrates the relevance of legal thought to the understanding of property, notably in the context of indigenous property rights.

Interrogating Indigenous Property Rights

Traditional legal research can be distinguished from the research approach used for property rights, which of necessity is at a jurisprudential level indistinguishable as a multidisciplinary part of broader

social sciences, especially for indigenous property rights. Property rights in many post-colonial common-law countries evidence cultural blindness, with fundamental flaws in conceptions of property. To comprehend the complex matrix of property rights requires a multidisciplinary appreciation of colonial history, international law, and the pragmatic responses of post-colonial legal regimes.

Legal research traditionally focuses on the identification of either broad principles or specific *ratio decidendi* (reason for deciding) through statutes, common law, case law, legal commentary, and refereed articles in law journals, and unsurprisingly this positivist⁶ research approach is used for the legal specificity of property.

However, property rights research differs markedly from traditional legal research, notably because positivism can provide only a partial understanding of property rights. Arguably, the often flawed nature of specific property rights can be more adequately canvassed through an interrogation of issues such as the source of property-related laws, their purpose, and their operation. Furthermore, the epistemology of the authority behind specific laws must be uncovered, particularly regarding the reasoning behind the choice of a particular approach over another. In modern nation-states, private property rights are ordinarily protected from arbitrary interference, in particular compulsory acquisition, except by statutory fiat coupled with compensation.

The interrogation of law in this manner invariably uncovers shortcomings and unforeseen consequences after the enactment of a particular law, sometimes many decades later. Nevertheless, examining whether the intent of a specific property-related law is just (or, alternatively, unjust and hence wrong) raises broader definitional issues, which, as stated earlier, can be indistinguishable from broad moral issues of the social sciences. Courts' increasing recognition of customary land tenures is one example of how common law, indigenous customary law, and statute law have coalesced outside of positivism,

incorporating notions of kinship—ideas that are more familiar to anthropologists than to lawyers (Enright, 1991:4).

Increasingly, modern societies expect their law to recognize indigenous or customary title. In Australia, such recognition occurred more than two centuries after British colonization, with the High Court's decision in *Mabo & Ors v. The State of Queensland*.⁷ Recognition of native title has also resulted in indigenous peoples in Australia affirming a connection with their "ancestral lands," seeking to return to those lands in order to pursue "a way of life that is informed by fundamentally different value systems" (Altman, 2009).

In addition, emerging property rights such as Australian native title are slowly transforming statutory law, and in turn being more clearly defined through partial codification. Such codification through statute as a method for resolving indigenous or customary issues has been demonstrated by Australian courts, which have stressed the primacy of legislation whereby the common law gains relevance to the extent that it informs legislation.⁸

With legislation as the starting point for the definition of emerging (but ancient) property rights, such as indigenous customary tenures, the scope of the rights and interests capable of being legally recognized is also established.⁹ Ordinarily, property rights are the expression of a relationship between an individual or group and the land (or other natural resource) in terms of rights and interests. Unsurprisingly, codifying statute law often requires indigenous communities to express their relationship with the land in terms of such rights and interests, and it is this requirement that has presented significant difficulties for the judiciary in recognizing relationships where "the spiritual or religious is translated into the legal."¹⁰

There are certain aspects of indigenous cultural heritage that will not be recognized as customary land tenures, and it is important to note that intellectual indigenous property has been distinguished

from land tenures by the Australian courts.¹¹ Clearly what is and what is not customary land tenure, and when it suffers impairment or even extinguishment, and what might or might not be compensable, are all issues being slowly resolved by the Australian courts. Arguably, the inexorable incorporation of customary land tenures into received and post-colonial property law is a process whereby the common law is encompassing indigenous custom and kinship.

Importantly, property rights in many common-law countries are the legacy of a historical colonial process creating flawed property rights. Research on how these legal property rights were formed in the colonial (settler) milieu reveals that these rights have been either reinforced or modified by subsequent post-colonial statutes and case law. Furthermore, property rights in some common-law countries can be culturally blind, often resulting in fundamentally flawed property relationships between the state and its citizens, such as Israel and the Naqab Bedouins.

As demonstrated above, an extraordinary depth of research is required to comprehend the complex matrix of property rights in many post-colonial common-law nations, including Israel. This approach necessitates a multidisciplinary appreciation of colonial history, international and comparative law, and the seemingly pragmatic response of post-colonial societies to specific property issues.

A Common-Law Framework for Indigenous Property Rights

At the outset, property rights appear to be a homogeneous legal notion in both the developed and developing world. However, this apparent homogeneity as a legacy of colonialism is grossly misleading, in much the same way as the world's current enchantment with the chimera of a homogeneous economic and legal framework for international

business investment. Similarly, the conventional view of unlocking “dead capital” in the developing world, as proposed by Hernando de Soto, urges the creation of homogeneous “formal property” (de Soto, 2000:15, 231). However, this view has been criticized as too simplistic and grossly overestimating the cadastral and bureaucratic capacity of most developing countries (Molebatsi et al., 2004:151).

Property rights in the developing (and developed) world are “paperised” (Molebatsi, 2004:149) in ways that suggest a significant misunderstanding of the specific needs of states’ indigenous peoples, highlighting deeply embedded flaws in notions of property rooted in colonial legacies. However, there was no misunderstanding by the colonizers that dispossession hinged on the use of law to create or negate property rights such that

[o]ne relatively constant element of dispossession has been the use of law in effecting and/or normalizing the outcome. The central role of legislation in such situations derives from the fact that the provision, or, alternatively, the transformation or negation of property rights, is invariably institutionalized by some type of law. It is surprising, then, that the role of legislation in the dispossession of displaced ethnic and national groups has not received greater academic attention. (Forman and Kedar, 2004:810)

Not only does the negation of indigenous property rights and the transfer of control to colonizers confirm the imported property rights regime, but also

[s]ettlers’ law and courts attribute to the new land system an aura of necessity and naturalness that protects the new status quo and prevents future redistribution. Formalistic legal tools play a meaningful role in such legitimization. Courts apply “linguistic semantics, rhetorical strategies and other devices” to disenfranchise Indigenous peoples. (Kedar, 2003:415)

More so, the property of the conquered is often regarded as “public land” (Kedar, 2003:414), which can be utilized by the state without consulting the traditional owners. For example, during Israel’s 2005 withdrawal from the occupied Gaza Strip, the government disregarded traditional Palestinian owners of the lands of the Jewish Israeli settlements.¹²

Using the Lens of International Law

The surviving traditional property rights of the Naqab Bedouins present a significant concern for the state because, as Israeli citizens, Bedouins can draw on applicable comparative law, such as Australian native title jurisprudence, in their claims for tenure recognition. Israel became a common-law country in 1917, when the British Army occupied Palestine after defeating the Turks. Israel thus shares the common law with Australia and other former British colonies and possessions.

This historical judicial connection also draws Anglo-Israeli law to “another formal and highly important source of law” (Tamir, 2006)—namely, judicial precedents from other common-law countries, such as Australia. In particular, crucial decisions such as *Mabo* (described above) in which the Australian High Court reexamined established notions of Anglo-Australian property rights. This reexamination was the culmination of a series of significant jurisprudential developments, particularly the aforementioned ICJ advisory opinion in the *Western Sahara* case on the concept of *terra nullius* under international law. In this opinion, the ICJ also commented on issues surrounding Western Sahara’s self-determination during the decolonization process, specifically its legal ties with Morocco and Mauritania.

Broadly, international rules regarding territorial sovereignty are based on Roman law provisions governing ownership and possession, and the different methods of acquiring territory under international law are derived from Roman rules of property (Schoenborn, 1929:333). Roman law notions of property, however, are quite different from

property concepts within the common law, a distinctive English legal system originating in the twelfth century that arose primarily from case law based on very old local customs. Arguably, the common law drew little influence from Roman law.

Nevertheless, the concept of territorial sovereignty finds its roots in the notion of title, or the factual and legal conditions under which territory is deemed to belong to one particular authority or another. In other words, it refers to the existence of those facts required under international law to entail the legal consequences of a change in the juridical status of a particular territory (Brownlie, 1990:123–124).

The ICJ has noted that the word “title” encompasses any evidence that may establish the existence of a right and the actual source of that right.¹³ In this sense, title to territory under international law is a very fact-specific inquiry.

International law does recognize a category of territory—*terra nullius*—over which there is no sovereign. The expression *terra nullius*, like other concepts of territorial sovereignty under international law, derives from classical Roman law, under which the doctrine of *occupatio* (seizing) conferred ownership to the discoverer of an object that was *res nullius* (belonging to nobody). Such seizing must be performed by the state, must exercise effective control, and must be intended as a claim of sovereignty over the area (Shaw, 1997:333). In post-Renaissance Europe, this doctrine was conveniently applied to states’ acquisition of territory. Territory that was *res nullius* could be lawfully acquired by a state through simple occupation, and uninhabited territory was always uncontroversially classified as *terra nullius*. Over time, the categories of territory that were considered *terra nullius* were expanded to include certain kinds of inhabited territory. Whether or not inhabited land was included within such expanded notions of *terra nullius* depended on the degree of political development and other characteristics of the inhabitants of the land in question.

For example, in 1885, states attending the Berlin Conference declared most of the African continent as *terra nullius*, on the basis that the continent's inhabitants were supposedly incapable of governing themselves. The ICJ, in a case concerning South Africa's sovereign right to control South West Africa (now Namibia), declared the characterization of African territory by the Berlin Conference participants as *terra nullius* a "blunder." The Court noted that as early as the sixteenth century, Vitoria had written that Europeans could not obtain sovereignty over the Indies by occupation because the Indies were not *terra nullius*. Similarly, the African peoples had "founded states and even empires of a high level of civilization," and thus much of the African continent could not be considered *terra nullius*.¹⁴

This issue of whether a particular territory had been *terra nullius* at the time of its colonization was raised in the ICJ's *Western Sahara* case. Spain's colonization of Western Sahara had begun in 1884, when Spain claimed a protectorate over Río de Oro, although Spain had established a presence in the territory during the fifteenth and sixteenth centuries. Western Sahara remained a Spanish colony—the Spanish Sahara—until 1976. In 1966, the United Nations (UN) General Assembly encouraged the territory's decolonization on the basis of the right to self-determination, and it invited Spain, in consultation with neighboring states Mauritania and Morocco, to "determine . . . the procedures for the holding of a referendum under UN auspices with a view to enabling the indigenous population of the territory to exercise freely its right to self-determination."¹⁵ After some delay, Spain agreed to hold a referendum in the Spanish Sahara under UN supervision in 1975. Then King Hassan claimed the territory of Western Sahara for Morocco on the basis of "historic title" predating Spain's colonization of the territory. Mauritania made a similar and overlapping claim. In order to assist in the process of resolving these competing claims and

proceed with decolonization, on December 13, 1974, the UN General Assembly requested that the ICJ provide an advisory opinion on the following questions:

- At the time of its colonization by Spain, was Western Sahara (Río de Oro and Sakiet al-Hamra) land belonging to no one (*terra nullius*)?
- If not, what legal ties existed between this territory and the Kingdom of Morocco and the Islamic Republic of Mauritania?

The ICJ clearly saw its role as establishing whether international law at the time of colonization would have considered Western Sahara *terra nullius*. There is an emphasis that *terra nullius* was a legal term used in connection with the mode of territorial acquisition known as “occupation,” viewed legally as an initial peaceful acquisition of sovereignty over territory otherwise than by cession or succession. The Court noted that state practices during the period of colonization indicated that territories inhabited by tribes or peoples having a social or political organization were not regarded as *terra nullius*.¹⁶ It should be noted, however, that the ICJ’s interpretation of international law at the time of Spanish colonization ran counter to the beliefs of some writers during that period (see Lindley, 1926:11–20; Westlake, 1894:141–142). It should be further emphasized that the Court did not reject the legal concept of *terra nullius* in its entirety—rather, it simply determined that this concept was not applicable to the territory of Western Sahara at the time of its colonization, based on specific facts indicating a certain level of social or political organization by the indigenous inhabitants.

Of particular relevance to the Naqab Bedouins is the ICJ’s view that Western Sahara was being utilized almost exclusively by nomads, pasturing their animals or growing crops where conditions were favor-

able, and that common rights of pasture were enjoyed by the occupants. However “some areas suitable for cultivation, on the other hand, were subject to a greater degree to separate rights” such as water holes, which were considered property of the tribe that “put them into commission,” although they were open to all for use.¹⁷ The Court found that “at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.”¹⁸ The Court also emphasized the actions and subjective beliefs of the colonial state. It found that Spain, in colonizing Western Sahara, was not attempting to establish its sovereignty over a *terra nullius* but rather “taking the Rio de Oro under his [Spain’s] protection on the basis of agreements which had been entered into with the chiefs of the local tribes.”¹⁹ Thus, the Court stressed that Spain had recognized independent tribes of this territory and did not rely on any claim to the acquisition of sovereignty over a *terra nullius*.

For territories inhabited by tribes or peoples having a social or political organization, the acquisition of sovereignty was thus not generally considered as effected unilaterally through “occupation” of *terra nullius* by original title but rather through agreements concluded with local rulers. Although the word “occupation” was used by Spain, it was used in a non-technical and non-legal sense:

[It] did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an “occupation” of a *terra nullius* in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual “cession” of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terra nullius*.²⁰

Therefore, in the eyes of the Court, European colonizers exploited the notion of *terra nullius* not only for questionable assertions of sovereignty but also as a legal device to ignore the pre-existing property rights of the indigenous people of Western Sahara, and indeed elsewhere throughout the world. *Terra nullius* created a category of title to property that wholly favored the settler society at the expense of indigenous inhabitants. As a result, the 1975 Advisory Opinion of the ICJ was approved in the 1992 *Mabo* decision providing crucial background for rejecting any notion that Australia was unoccupied at the time of British arrival.²¹

Early U.S. Jurisprudence

In addition to the 1975 Advisory Opinion of the ICJ, the High Court of Australia was influenced significantly by the much earlier decision of the U.S. Supreme Court in *Johnson v. M'Intosh*,²² a case from 1823 in which the exclusive right of a discovering sovereign to extinguish Native Americans' interests in their land was recognized under common law by the Court. In *M'Intosh*, the Supreme Court explored the issue of conflicting rights of settlers and aboriginal peoples, and adopted a compromise now known as "native title" or "aboriginal title" under the common law. In this case, the Court upheld a grant by the United States over the claims of a private purchaser from the Native American tribes of the same lands, holding that "discovery gave title" to the discovering nation.²³ The Court recognized that these lands had been inhabited at the time of discovery, but rejected the use of legal doctrines of conquest, instead creating a "new and different rule."²⁴ The Court recognized Native Americans as "rightful occupants of the soil" but held that the state had an "absolute title . . . to extinguish that right" and might even "grant the soil, while

yet in possession of the natives."²⁵ The Court did not suggest that this arrangement was "just" but rather noted that it was the only possible or pragmatic accommodation of the interests of both settlers and Native Americans.²⁶ Thus, the pragmatic compromise between settler and indigenous interests necessitated an inferior and subordinate status for native title and denied the indigenous inhabitants equality before the law (see Bartlett 1995:285).

M'Intosh established two levels of property rules governing rights in American lands: the discovery rule that regulated inter-European claims and the rules to regulate relations between discoverers and the natives. The discovery rule itself prevented Native Americans from selling to other colonizing states. Native Americans were not stripped of all property rights but retained what Chief Justice John Marshall labeled the "Indian title of occupancy," which could be extinguished only by purchase or conquest. The precise content of the Indian title of occupancy under *M'Intosh* is not entirely clear, however. Included in this title of occupancy was the power to sell to the discovering sovereign lands that a tribe had previously conveyed to someone else. But the most important question for the Native Americans, given that they could sell full title only to the U.S. government, was whether they could refuse to sell. The Court ultimately determined that the United States could divest the natives of title only via purchase or conquest. The word conquest was subsequently limited to "defensive wars" or those fought for some other "just cause."²⁷

After India, the United States is arguably the second largest common-law country in the world; it was thus unsurprising that the Australian Court, in *Mabo*, recognized the importance of the 1823 *M'Intosh* decision. Both the 1975 ICJ opinion and the *M'Intosh* decision underpin *Mabo*, although the subsequent enactment of Australia's 1993 Native Title Act created "a pathway to recognition less difficult than" (French, 2008:3) expending a decade to obtain a common-law judgment, as was the case in *Mabo*. Thus, both case law and statute

have contributed to the establishment of the conception of property, known as “native title,” into the existing matrix of proprietary interests in land under Anglo-Australian law.

The Content of Native Title

The recognition of surviving native title in Australia created a need to also recognize the likely content of these indigenous rights and interests in Australia as a bundle of legal rights that may or may not be capable of separate existence,²⁸ especially when only partially commuted or impaired by the state. Under current native title jurisprudence, such indigenous rights can constitute contemporaneous communal, joint, and individual titles:

The community, the largest possible native title owning entity, is in fact the society whose laws and customs are in question. The group is smaller, and will ordinarily have a fluctuating membership (so, of course, will the community). The individual is the smallest possible native title owning entity.²⁹

There is currently only limited understanding of how indigenous rights and interests can be characterized within Anglo-Australian law, and hence made more readily approachable legally. Nevertheless, the suggested native title content of communal, joint, and individual titles³⁰ constitutes a familiar tenurial approach (Rigsby, 1998:35). However, if only for the narrow purposes of compensation, an urge exists to overcome any conceptual property strictures, a reality described by Justice Robert French as a need to “shake off the difficulties of . . . [native title] origins in a common law judgment” (French, 2008:4).

In order to assess the impact of violations of indigenous property rights, and in turn determine appropriate compensation for such violations, it is necessary to disaggregate these rights. To ascertain the content of a specific native title, disaggregation simply involves a stu-

dious examination of the various rights (communal, joint, or individual) in the bundle of indigenous property rights. Approaching the core of native title in this manner is also consistent with other collectively held property rights in Anglo-Australian property law. Arguably, indigenous rights are analogous to the entitlement of an association to compensation for the use of its land by individual association members. In such cases, the association's rules would permit individual members to use the land for different purposes and with differing intensity, sometimes contemporaneously. Adopting a core native title allows compensation to be assessed at the subgroup or individual level—in other words, separately from compensation for the collective. To avoid difficulties with orthodoxy, it is necessary to note the *sui generis* nature of native title, which arguably permits disaggregation.

Assisting this disaggregation approach, case law throughout the common-law world over the past two centuries has addressed the multifaceted nature of compensation arising from compulsory state acquisition of non-indigenous property rights. Importantly, various Australian courts have awarded compensation for the loss of intangible rights and usufructs, evidencing an empathetic approach to entitlement and compensation. In *March v. City of Frankston*, for example, the Victorian Supreme Court held that additional compensation in the manner of *solatium*³¹ was warranted as “some amount to cover inconvenience and in a proper case distress caused by compulsory taking.”³²

Subsequently, in *RK Morgan Holdings Pty Ltd v. Melbourne & Metropolitan Board of Works*, the Court stated that “a claim is made for *solatium* founded on intangible or non-pecuniary disadvantages.”³³

Arguably, an approach to assessing the worth of indigenous rights and interests could utilize analogies from non-indigenous property rights, such as *profits-à-prendre*. There would of course be a need to enhance such analogies to account for the spiritual and cultural dimensions embedded in indigenous rights, perhaps by way of additional compensation in the form of *solatium*. Eight years prior to the *Mabo*

decision, the spirituality of indigenous property rights was addressed in *Hackshaw v. Shaw*,³⁴ which described this aspect of the indigenous world as “inherited spiritual custodianship” (Sir William Deane cited in Stephens, 2002:48). Subsequently, in *Gerhardy v. Brown*,³⁵ the Australian High Court advanced the following useful explanation of this spirituality:

To the extent that one can generalise, their society was not institutionalised and drew no clear distinction between the spiritual and the temporal. The core of existence was the relationship with the responsibility for their homelands which were neither individual or clan “owned” in a European sense but which provided identity of both in a way which the European settlers did not trouble to comprehend and which the imposed law, based on an assertion of *terra nullius*, failed completely to acknowledge, let alone to protect . . . almost two centuries on. (Stephens, 2002)

However, caution must be exercised in constructing analogous compensation entitlement enhanced for spirituality and culture, as there is no agreement on the survival of “intense spirituality” (Duffy, 2005), which today can realistically be asserted only by a minority of indigenous Australians who still view their land with enchantment rather than as a commodity. Nevertheless, an analogical approach inexorably leads to the view that *solatium* may be the closest equivalent to spiritual value within Australian property compensation law. Current awards of compensation based on the notion of *solatium* are pitifully small,³⁶ and any proper analogy to spirituality would require *solatium* to be significantly increased. Such action would clearly be necessary in order for *solatium* to properly account for spiritual values.

The above Australian discourse, while preponderantly structuralist in form, seeks to avoid any attempt to rigidify indigenous rights and interests. Jurisprudential language is still ill-equipped to describe the multifarious and often exotic indigenous notions of culture and spiri-

tuality embedded in native title. The unanticipated but overdue recognition in *Mabo* of indigenous rights and interests has so outpaced property theory and practice that improvisation drawn from compensation analogies is almost obligatory when considering compensation for the violation of native title.

Such an analogical approach mirrors the familiar habitual improvisation through which the common law has been informed and developed over centuries. Again, this chapter does not suggest that this approach is unassailable; merely, it assuages the need for novel theory in favor of an arguably more comfortable structuralist approach. Ironically, such a proposition appears to be germinating almost wholly on Australian soil, which is somewhat surprising given the extremely late recognition in Anglo-Australian law of indigenous rights and interests.³⁷ Any prospect for a comprehensive formulaic approach appears to be at risk because indigenous rights and interests do not have consistent incidents as evident in more familiar Australian tenures, such as freehold. While there may be a core of indigenous rights and interests generally recognized across continental Australia, this kernel may not burgeon into a fulsome analogical approach. Realistically, *profits-à-prendre* or usufructs may or may not be analogous to all indigenous rights to hunt and gather.³⁸

Conclusion

The familiar bundle of common-law property rights now potentially embraces an unfamiliar universe of exotic incidents called Australian native title, previously unknown to lawyers or compensation assessors. Physical determinism³⁹ lies at the heart of the majority observation proficiencies utilized in assessments of compensation arising

from compulsory acquisition by the state. However, such an approach is found wanting when ephemeral values such as spiritual and cultural attachment are encountered. Topographical features can be easily ascertained, but metaphysical circumstances (such as sacred sites indistinguishable from the surrounding countryside) may be invisible to even the most skilled non-indigenous observers. There is often a risk that such observers may mistakenly assume that particular spiritual or cultural features are absent, due to a lack of physical evidence.

As a result, history suggests that treaties and agreements were not sufficiently cognizant of indigenous spiritual and cultural values, revealing the historic gulf between the settlers and the indigenes in all common-law countries, including Australia and Israel. Perfunctory values are ascribed to indigenous property rights, confirming that the pre-colonial lands were regarded as economically undeveloped and hence of minimal value. This physical determinism remains embedded in current property law and practice throughout the common-law world, inhibiting the metastasis required to deal with indigenous spiritual and cultural values.

Within the common-law framework, the rights and interests asserted by the indigenous Naqab Bedouins are closely allied to those asserted by semi-nomadic and nomadic Australian indigenes. Sadly, however, the Bedouins are also in a markedly similar position to the indigenous peoples of Australia prior to the *Mabo* decision: the Bedouins suffer minimal recognition of their property rights by the State of Israel. Yet, the Bedouins can draw on groundbreaking Australian native title law to support the assertion that traditional semi-nomadic and nomadic land tenure is not illusory but a very real tenure capable of comfortable recognition.

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NOTES

1. "Common law" refers to a type of legal system developed in England and passed on to other countries through British occupation, whether through colonization or other means, such as the Mandate. The common-law model differs from the Western European legal system of civil law, which is derived from Roman law. See, e.g., Stein (1999).
2. *Western Sahara* case, ICJ Reports, 1975, 12; 59 ILR, 14; *Mabo & Ors v. The State of Queensland* (No. 2) (Mabo) (1992) 66 ALJR 408.
3. Deep property describes a more comprehensive theory of property, which has great or specified extensions of the elemental conventional land property right familiar in property law.
4. For a useful discussion on a similar pluralism adopted by Australian indigenouses, see Altman (2009).
5. *Milirrpum v. Nabalco Pty Ltd* ((1971) 17 FLR 141) at 264–268.
6. Positivism is described as a "school or theory of jurisprudence which defined law as rules or commands laid down or posited by the State." See, e.g., Enright (1991:3).
7. *Mabo & Ors v. The State of Queensland*, *supra* note 2.
8. *Western Australia v. Ward* (2002) 1901 ALR 1 per majority at 16, 25.
9. The definition of "native title" is set out in the Native Title Act 1993 (Cth), sec. 223.
10. *Western Australia v. Ward*, *supra* note 8, at 14.
11. *Ibid.* at 57–64.
12. As one Palestinian landowner reported, "the [Israeli] settlers lived here for 35 years and they were compensated when they left and it's not even their land. Our ancestors have been planting this land for hundreds of years. Who will compensate us for the houses and land that the Israelis destroyed" ("People of Gaza discover their land," 2005).
13. *El Salvador v. Honduras*, case concerning *Land, Island and Maritime Frontier*, judgment (September 11, 1992), ICJ Reports, 1992, 351, 388; 97 ILR 266, 301.
14. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion* (June 21, 1971), ICJ Reports, 1971, 55.
15. United Nations General Assembly, Resolution 2229, G.A.O.R., 21st Session, Supp. 16, p. 72 (1966).
16. *Western Sahara*, *supra* note 2, paras. 79–80.
17. *Ibid.*, para. 87.
18. *Ibid.*, para. 81.
19. *Ibid.*
20. *Ibid.*, para. 80.
21. (1992) 66 ALJR 408, 422 per Brennan.
22. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

23. *Ibid.* at 574, 592.
24. *Ibid.* at 591. The rejection of the application of the legal concept of conquest is significant, given that Chief Justice John Marshall, the author of the opinion, later recognized the private rights of inhabitants of conquered or ceded territories (*U.S. v. Percheman*, 8 L. Ed. 604 (1883)).
25. *Johnson v. M'Intosh*, *supra* note 22, at 588.
26. *Ibid.* at 588, 591.
27. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); see also Robertson (2005).
28. See, e.g., *Harrington-Smith on behalf of the Wongatha People v. Western Australia* (No. 9) [2007] FCA 31.
29. *Ibid.* at 1135.
30. *Ibid.* at 1135.
31. *Solatium* is described as consolation or compensation as solace for injured feelings. See, e.g., Hyam (2004:378–383).
32. *March v. City of Frankston* (No. 1) [1969] VR 350 at 356; see, e.g., Hyam (2004:380).
33. *RK Morgan Holdings Pty Ltd v. Melbourne & Metropolitan Board of Works* (1992) 77 LGRA 102 at 115.
34. *Hackshaw v. Shaw* (1984) 155 CLR 614.
35. *Gerhardy v. Brown* (1985) 159 CLR 70.
36. For example, the compensation awarded was 3% in *RK Morgan Holdings Pty Ltd*, *supra* note 33, at 115.
37. The *Mabo* decision was handed down by the High Court in June 1992.
38. For a useful discussion of the protection of indigenous hunting and gathering post-*Mabo*, see Havemann et al. (2005).
39. Physical determination refers to activity-based approaches to identifying rights.

Abstract

This chapter explores the case for recognizing the property rights of the Bedouins, as indigenous peoples of the Naqab (Negev). Israel is a common-law country resulting from the British Mandate and is a member of the group of multicultural states, such as former British colonies Australia and Canada, that have indigenous peoples residing within their national boundaries. The developing native title jurisprudence in settler states, particularly Australia, provides a comparative legal framework for Israeli courts, which, thus far, have been unwilling to recognize Bedouin claims to property.

The chapter argues that the State of Israel commits an arguably fundamental jurisprudential error when it attempts to look back beyond the country's common-law heritage to earlier Ottoman laws. The law immediately preceding Israel's creation—and not a raft of multifarious laws and legal regimes reaching much further back—is recognized by international law as comprising the body of law of the newly established state. The chapter subsequently demonstrates that significant advances in common-law native title jurisprudence, including the watershed 1992 *Mabo* decision and subsequent cases of the Australian High Court, represent a persuasive body of case law that should inform Israeli jurisprudence in the area of Bedouin property.

INDIGENOUS (IN)JUSTICE

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and Oren Yiftachel

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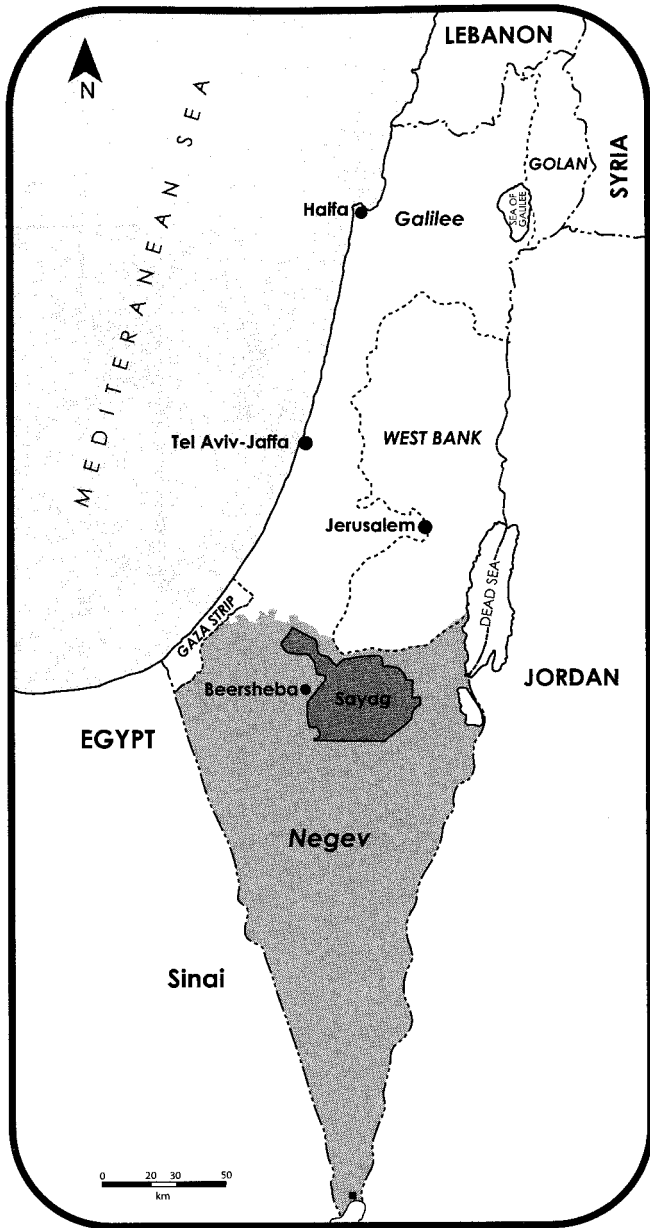
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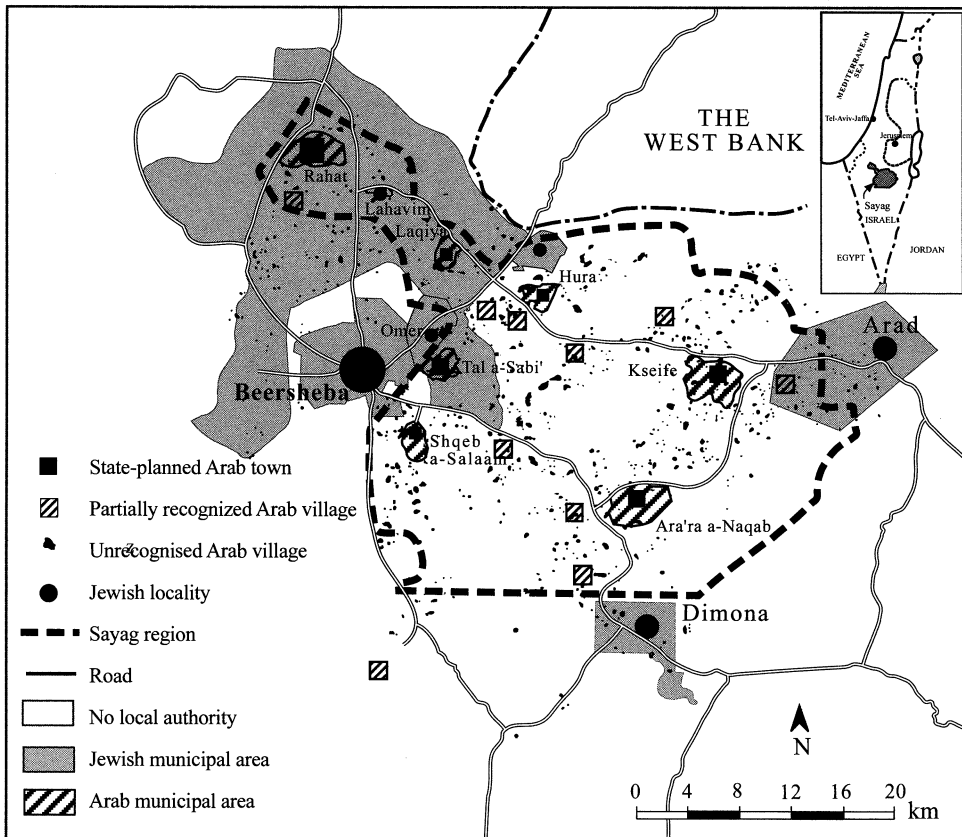
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Map I: Israel Palestine – The Naqab/Negev and the Sayag (Siyag) Area

Map II: Bedouin Arab Settlements in the Sayag (Siyag) Area



Source: Based on Ministry of Interior data and aerial photograph analysis.

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Indigenous (In)justice is the first book to analyze the struggle of the Bedouin Arabs in Israel's Negev/Negot region through the lens of indigeneity, and to link this struggle to the global mobilization of such minorities in settler societies. The book presents a range of multidisciplinary contributions—drawing on law, human rights, history, geography, and politics—each of which analyzes the Bedouins' struggle to attain their rights after decades of forced removals, discrimination, and dispossession.

Indigenous (In)justice fills a void in the literature, which has largely overlooked the Bedouins' struggle to protect their land, identity, and autonomy as an important part of Palestinian mobilization and identity within Israel.

Indigenous (In)justice examines the tensions that have been on the rise in response to the Israeli state's efforts to forcefully urbanize rural Bedouins and nationalize their lands. It offers an in-depth, contextualized account of the current struggle, with a view not only toward providing much-needed knowledge but also toward helping attain long-overdue indigenous justice.

Handwritten Arabic text, likely a review or endorsement, covering the lower half of the book cover. The text is dense and difficult to read due to the cursive script and some fading.



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