

# Review Essay

## ***The Life of the Law in Palestine***

### ***The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory***

Orna Ben-Naftali, Michael Sfard, and Hedi Viterbo. Cambridge: Cambridge University Press, 2018. 580pp.

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*Through an accumulation of laws rather than by military means, a particular misery is intensified and entrenched. This slow violence, this cold violence, no less than the other kind, ought to be looked at and understood.*

(Cole 2015: 19)

In September 2018, Israel's Supreme Court confirmed that the planned eviction and demolition of the small West Bank village of Khan al-Ahmar, originally authorized by the Court earlier in the year, should go ahead. The residents of that village are Palestinian Bedouin who had been expelled by the Israeli state in 1952 from their original lands in the

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Naqab desert. Six decades on and that state, as a colonizing regime in occupied territory, asserts that the community can no longer stay in the home they had made in Khan al-Ahmar. The community maintains that this home is on land owned by Palestinians long pre-dating Israel's entry to the West Bank in 1967. The Supreme Court refused to accept these ownership credentials, and instead upheld the government's position that the land had become "state-owned." As such it can be designated for civilian colony usage should the state so wish. The Israeli state had announced a plan in 2012 to relocate the community elsewhere, and demolished a number of structures in the village between 2015 and 2017. Khan al-Ahmar is of particular significance because of its location in the "E1" corridor which, if settled, would allow a contiguous Jewish-Israeli presence to stretch from Jerusalem all the way across the center of the West Bank. After the Supreme Court ruling, Israeli settlers descended on the area singing in triumph at having redeemed the land. Defense Minister Avigdor Lieberman similarly approved: "Khan al-Ahmar will be evicted! I commend the judges of the court for a brave and necessary decision in the face of hypocritical attacks orchestrated by Abu Mazen, the left and European countries. No one is above the law. No one will prevent us from exercising our sovereignty."<sup>1</sup>

Which is simply to say that the law remains central to colonial violence and expansion. Beyond the state's foundational law-making and law-preserving violence, in this context we also see its annexationist (law-expanding) violence at work. The life of the law is embedded in the processes through which the settler state is created, and through which settler sovereignty is reified, maintained and stretched at the frontier. In 2018, the target is Khan al-Ahmar. Before that, Sheikh Jarrah in East Jerusalem and Susya in the south Hebron Hills and Khirbet Tana in the Jordan Valley, and many more Palestinian communities besides. The Israeli legal system has been central to the advancement and legitimization of some of the core tactics of settler-colonialism: appropriation, eviction, demolition, and displacement.

Indeed, life in Palestine is stilted and suffocated and strangled through law—from everyday mundanities to political gravities, from deliberately arbitrary administrative rabbit holes to the systemic segregation and ghettoization that defines racialized rule over a subordinated population. The law's function has long been clear to the Palestinians who constitute that population, and becomes evident soon enough to anyone who spends time there. Teju Cole travelled to and around the West Bank for the Palestinian Festival of Literature in 2014, and in his reflections neatly captured the nature of the law's slow, cold

violence. It complements—yet is clearly discernible from—the hot violence of intermittent military salvo: “the viciousness of the law must be taken as seriously as the cruelties of war. ... Israel uses an extremely complex legal and bureaucratic apparatus to dispossess Palestinians of their land, hoping perhaps to forestall accusations of a brutal land grab. No one is fooled by any of this” (Cole 2015: 23).

Not being fooled is one thing. Fully unpicking the depth and breadth of the workings of that complex legal and bureaucratic apparatus is quite another. In *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory*, Orna Ben-Naftali, Michael Sfard and Hedi Viterbo provide a dense and detailed analysis of this heavily legalized control regime. The legal scholarship on the nature and mechanisms of Israel’s rule over the Palestinians continues to be extensive. This includes significant recent contributions from Mazen Masri on the modes by which Israel’s constitutional order downgrades its Palestinian citizens and excludes them from certain legal privileges (Masri 2017a), from Yael Berda on the overbearing bureaucracy of the permit regime in the West Bank (Berda 2017), as well as Noura Erakat’s forthcoming appraisal of how the strategic deployment of law at certain key junctures has shaped current conditions in the question of Palestine (Erakat 2019). There is no shortage of critical analysis of the myriad legal aspects of the situation in Palestine. Ben-Naftali, Sfard and Viterbo’s book is nonetheless a timely and significant addition. Presented in a lexicon format of 26 full-length chapters, it is both intricate in its technical analysis and expansive in its theoretical horizons. The chapters, each individually written by one of the three contributors, span an alphabet of titles that vary in aperture to encompass specific legal mechanisms in some instances, more general thematic categories of law in others, as well as broader conceptual lenses. It is worth reciting the list to illustrate its range: Assigned Residence, Border/Barrier, Combatants, Deportations, Export of Knowledge, Future-Oriented Mechanisms, Geneva Law, House Demolitions, Investigations, Jewish Settlements, Kinship, Lawfare, Military Courts, Nomos, Outside/Inside, Proportionality, Quality of Life, Regularization Law, Security Prisoners, Temporary/Indefinite, Usufruct, Violence, War Crimes, X Rays, Youth, and Zone. There are, by nature, certain categories or headings omitted. No doubt another set of authors would have chosen to organize such a book by a very different set of chapter themes. But the sheer volume of material covered under the headings that the book did deploy renders it as extensive as a single text could hope to be.

The variety in scope and approach of the chapters—and the somewhat eclectic mixture at times of theory and method, of doctrinal and critical analysis—reflects the interests and experiences of the three authors. Ben-Naftali is one of Israel’s prominent international law scholars and theoreticians. She has written extensively on legal aspects of Israeli practices, including an influential article framing the situation in the West Bank and Gaza as “Illegal Occupation” (Ben-Naftali, Gross, and Michaeli 2005). Sfard has been one of the most active Jewish-Israeli human rights lawyers arguing Palestinian cases over the last two decades, while also remaining an engaged intellectual who has published thoughtful pieces reflecting on his experiences as a practitioner and on the role of the law in stabilizing and normalizing the Israeli occupation (Sfard 2009; Sfard 2018a). Viterbo is a legal academic trained in Israel and Britain who has done significant research—among other things—analagizing elements of North American, Australian and Israeli settler colonialism (Viterbo 2017). The common denominator between them is an intimate knowledge of the Israeli legal system and its judicial renderings.

From this standpoint, they embark on a detailed exploration of Israel’s occupation policies and practices since 1967. The core threads of analysis running through the book converge to demonstrate how law has played a significant role in the making and maintaining of the reality of this occupation. The authors suggest that “the Israeli control of the OPT is possibly the most legalized such regime in world history” (2). This is based on the profusion of law that has been generated over the lifetime of the occupation and the extensive involvement of government lawyers, military judges and Israel’s Supreme Court in governing Palestinian lives. In their theoretical framing at the outset, Ben-Naftali, Sfard and Viterbo position this in relation to conceptual debates around the nature of a “law–rule–exception relationship,” and Israel’s life-long state of emergency. Like much of the scholarship on the state of exception, they do this with reference more to Carl Schmitt and Giorgio Agamben than to the literature on colonial emergency governance, which in some respects may be more apposite (Hussain 2003; Kostal 2005; Anghie 2009; Kolsky 2010). They are clear in asserting, however, that “far from being a lawless or extralegal space, the state of exception brims with law—with legal texts, procedures, mechanisms, and discourses” (19). This gestures to the idea of the norm/exception distinction as somewhat of a liberal fiction.

Time and again through the book, legalism is exposed as the underwriter of the control regime and the enabler of its violence. Law, as Ben-Naftali puts it in her chapter on

the interplay between international humanitarian law and the administering of Israel's occupation, "is part of the problem. Too much of it exacerbates the problem" (160). The authors deftly illustrate the mechanics of this when it comes to home demolitions, population displacement, family separation, land appropriation, military impunity, and much more. The book shows that law is not merely used instrumentally in service of power; it is itself a form of power. In Sfar's analysis of the legalised extraction of natural resources from the occupied territory, "plunder is passed off as benefiting the occupied. It drives their economy. This is the ultimate colonialist argument and state of mind: the subjugation and exploitation of the occupied is rationalized by the court in the best tradition of colonial apology for conquest and the superiority of the conqueror" (430).

The role of the Supreme Court in constructing the *nomos* of Israel's control regime is a recurring theme through the book. The Court interprets and applies legal rules against the backdrop of a narrative framework that it has consistently advanced, particularly since the initiation of the second Palestinian *intifada* in 2000. The narrative is that of the civilised in the face of the barbaric, evoking Theodor Herzl's characterization of a Jewish state in Palestine as "a rampart of Europe against Asia, an outpost of civilization as opposed to barbarism" (Herzl 1896: 18). It is the narrative of a difficult situation for a freedom-loving democracy engaged in a defensive war, doing what it can to weigh the rights of the othered population against its own security needs. The law thus becomes a game of balance and proportionality. In this equation the Israeli state is the victim of, rather than the perpetrator of, the denial of Palestinian self-determination. The subjective perspective of the military commander is, more often than not, the lens through which the Supreme Court views the question before it. This narrative of defensive democracy leads Ben-Naftali to wonder "if it is indeed the democracy which is defending itself, or rather the hegemonic Jewish ethnos, safeguarding exclusively the freedom of the Jews, including their freedom to settle in the OPT at the expense of Palestinian individual and collective human rights, thus defending its ethnocratic and not its democratic regime" (41).

That question goes to the core of the conundrum of Palestine/Israel. Sfar's chapter on "Jewish Settlements" frames the transfer of Jewish-Israeli civilians into the West Bank as having "transformed" the occupation from a military operation into a project of settler-colonialism. The book limits its mandate to the occupied territories, and does not systematically address the underlying nature of the Israeli state itself. Palestinian scholarship diligently seeks to remind us that this state is a settler-colonial enterprise, and

that settler-colonialism is indeed a fundamental feature of the Israeli legal system (Masri 2017b). The settler colonial analytic is “an essential lens to understand the myriad forms of dispossession experienced by Palestinians from the late nineteenth century” and one that allows us to historicize the colonization of Palestine as a process that began long before 1948 (Bhandar and Ziadah 2016). Mainstream international legal discourse, by contrast, continues to cling on to the fiction that the military occupation of Palestinian territories can be seen as distinct from, and analysed in isolation from, the constitutional structures of the Israeli state. The settler-colonial nature of those structures is seen most starkly in Israel’s citizenship, residence and immigration laws, which coalesce to subordinate Palestinian citizens inside Israel and keep Palestinian refugees outside. This has been recently reinforced in a new constitutional statute in the form of the 2018 Basic Law: Israel as the Nation-State of the Jewish People, which has generated widespread condemnation even among some Zionist Israelis. While the law is for the most part a constitutional restatement of long-existing reality of Jewish privilege vis-à-vis non-Jewish citizens and residents in Israeli law, it lifts the veil on liberal Zionism’s claim that Israel can be both the exclusive state of the Jewish people and a democratic state at the same time. Israeli jurists and legal scholars who have circulated to and from Europe and the Anglophone settler colonies over recent decades, presenting Israeli constitutionalism as a progressive template, have produced “a kind of monoracial echo chamber—that can only see the Nation-State Law as a betrayal of Israel’s promise rather than a sadly predictable fulfillment of it” (Li 2018). And while many commentators issued assurances that this Basic Law was only a symbolic piece of legislative performance which would not have any practical effect, it has already been interpreted and applied by an Israeli court in a manner that implies an overt discrimination between Jewish and non-Jewish victims of crime in Israel (Abraham 2018).

With its focus on appraising the occupation’s law, Ben-Naftali, Sfar and Viterbo’s book does not attempt to fully delve this deep into Israel’s constitutional make-up. Another entire alphabet would perhaps be needed to do justice to the modes by which the ideologies and constructs of settler-colonialism, race, nationhood and citizenship are instituted and constituted in Israel’s juridical order (and filtered on both sides of the Green Line in similar and divergent ways, as well as deployed to patrol the borders of historic Palestine). The book does nonetheless allude to the impacts of the foundations upon which Zionism is predicated. One structural-legal paradigm which it illustrates particularly clearly within the context of the occupation is that of apartheid as a racialized system of

discrimination, segregation and domination.

The apartheid paradigm (Davis 2003; Soske and Jacobs 2015; Pappé 2015; Clarno 2017) is explicitly discussed at times, and implicitly permeates the analysis almost all the way through the book, describing what is effectively a dual legal system in the West Bank: “one code for settlers, another for Palestinians ... applied in a setting in which the colonized are dominated by the colonizers, with a clear intention of maintaining that domination” (Sfard 2018c). Two prominent examples of this are seen in Ben-Naftali’s reflections on a form of segregated road system instituted in parts of the occupied territory, and Sfard’s analysis of the “seam zone” permit regime.

Ben-Naftali tells the story of Road 443 as one of apartheid and annexation: “The story of the physical road epitomizes the the long and winding judicial road from Israel to Greater Israel, a state the effective sovereignty of which incorporates the West Bank” (152). A Palestinian teachers’ cooperative society bought some land north of Jerusalem in the 1970s, and successfully applied for permission from the Israeli authorities for the construction of a teachers’ housing complex. When they began building, Jewish industrialists operating nearby informed the military commander. The building permits were suspended and then cancelled. This decision was upheld by the Supreme Court, which rejected the teachers’ plan on grounds of its proximity to an Israeli industrial zone and security plantations in the West Bank, and its location within an area slated for expropriation for the purpose of road construction.

The teachers’ cooperative then continued its legal struggle against said road construction. In 1982, the Supreme Court ruled that the expropriation of private land by the military commander was not only permissible but necessary to uphold the obligations of the occupying power. This was on the basis of an assertion that a road in this area was needed to serve the Palestinian population. According to Ben-Naftali, however, the military authorities “presented no evidence that the needs of the local occupied population were motivating the planning of the road. In fact, documents dating back to the mid-1970s disclose the political motivation behind it: to enlarge Jerusalem and construct a wide Jewish strap cutting through the West Bank. The state, thus, was misleading the court, and the court allowed itself to be misled” (155).

Road 443 was constructed and initially served both Israelis and Palestinians until the early 2000s, when Palestinians were banned by military order from accessing it. A Palestinian petition to the Supreme Court contested the legitimacy of this ban on the

grounds that it was counter to the original justification for the construction of the road (as previously presented to the Court) and that it amounted to a form of apartheid. In its 2009 decision,<sup>2</sup> the Supreme Court ruled that the military commander had exceeded his authority in banning Palestinians completely from using Road 443. Ben-Naftali notes that the judgment is exceptional—both because “the court rarely accepts petitions against decisions of the military commander,” but also because it ruled against the commander at the same time as it “significantly expanded the scope of the military commander authority” (156). The Court’s judgment extended that authority to the protection of illegal settlers even though they are not protected persons under occupation law, and to the state security of Israel itself rather than merely to security needs within the occupied territory. For Ben-Naftali, this judicial construction of a much broader scope of authority for the military commander reflects Israel’s expansionist drive and amounts to the translation, by law, of the political theology of a “Greater Israel” (with sovereignty over the West Bank territory, though not necessarily any social contract with its Palestinian inhabitants) into a normative reality.

The judiciary’s unease with suggestions of apartheid are evident in the assertions of then President of the Court, Dorit Beinisch, that the apartheid analogy is an extreme argument which “it is essential to avoid.” So the rationale of the judgment was based on an assessment of the degree of authority that the military commander possesses, rather than on the substantive principle of whether segregation is permissible. While the military commander’s expanded authority was not constructed by the Court as unlimited, and while this ruling went against the occupying forces on paper, the Court did not order Israel to provide any specific remedy to the situation. It left it up to the state to come up with its own solution to comply with the judgment. That “solution” involved nominally opening up the road to Palestinian traffic, but was followed by closures of most of the junction points between road 443 and the Palestinian villages that it passes. The result, for Ben-Naftali, is that “for all intents and purposes, the road remains virtually segregated” (159) and judicial discourse participates in the making of an apartheid reality.

Around the same time as Palestinian access to Road 443 had been barred in the early 2000s, Israel had also begun construction of the Wall and its associated infrastructure in the West Bank. In the context of a series of litigation contesting the legitimacy of this infrastructure, Sfard filed a petition in 2004 against the permit system that the Israeli authorities deployed to restrict Palestinian movement in and out of the “seam zone”

between the Wall and the Green Line. This permit regime “was designed in such a way as to absolve Israelis—defined as Israeli citizens and permanent residents, people eligible under Israel’s Law of Return, that is, anyone who is Jewish...of the need to obtain a permit” (332). They are free to travel in and out of the zone whenever they wish. Whereas the other group defined in the military order closing the area (“in practice: Palestinians”) require all sorts of permits to enter the zone, work in it, remain in it overnight, and exit the zone, rendering the system “clearly a legal regime of separation and discrimination based on nationality/ethnicity” (332).

The petition implored the Court to acknowledge the reality this creates: “Let us correctly define the legal structure described above by its full name: the web that the declaration and the orders have spun in the seam zone is an intolerable, illegal, immoral legal apartheid” (Sfard 2018a: 286–87). Sfard recounts that this was, to the best of his knowledge, the first time Israeli actions were referred to in the Supreme Court as apartheid, describing the amended 2006 version of the petition as “perhaps the boldest I had ever written. An entire section was dedicated to a description of the Pass Laws that restricted travel by black people in apartheid South Africa. We argued that there was a lot of similarity between the Israeli seam zone permit system and the disgraceful Pass Laws of that dark era. In that case, as in this one, the freedom of movement of a certain group of people was restricted and made subject to permits. ... For this reason we used the word ‘apartheid’ explicitly” (Sfard 2018a: 331).

In the hearings, Beinisch was again “clearly uncomfortable” with the thought of having to address that argument and its implications, and in the eventual 2011 judgment<sup>3</sup> duly “drowned our grave allegations of institutionalized discrimination, collective punishment, and apartheid in a gluey puddle of ‘proportionality.’” The Court did not dispute the existence of discrimination per se, but indicated that even discrimination is a question of proportionality and found there to be a legitimate security “rationale for treating Palestinians differently” (Sfard 2018a: 333). In a similar fashion to that by which racism is treated in certain media and socio-political terrains as “debatable”—that what counts as racism and who gets to define it can be mobilized as a subject of debate (Titley 2016) and thus often explained away as (not racist, but) “legitimate concerns”—codified racial discrimination in the legal terrain here is something that can be balanced and justified. For Sfard, institutionalised and absolute discrimination of this manner cannot be considered in the realm of a cost-benefit analysis of rights versus security, and is equivalent to the

apartheid regimes in southern Africa and the regime of racial segregation that existed in the southern United States. Beyond the specifics of this case, he has written more generally that “a person would have to be unconscious not to pick up the whiff of apartheid everywhere there is a settlement. Israel has created not only an occupation that has persisted for generations but also a regime where one group discriminates against the other for the sole purpose of preserving its control and supremacy. This is the very core of the legal definition of apartheid” (Sfard 2018a: 127).

That international legal definition is of course based on (but not specific to) the experiences in southern Africa. There were three dominant features or “pillars” of apartheid in South Africa (Dugard and Reynolds 2013). The first entailed racial categorization and discrimination between different groups of the population, institutionalized in law and systemic in discriminating between them in all spheres of life, from labor rights and political participation to education, housing, movement and residence, all the way down to segregated access to public transport, parks, and beaches (what was referred to as “petty apartheid”). The second pillar was the fragmentation of South Africa into different geographic areas, which were allocated by law to different racial groups. This was the basis for the policy of “grand apartheid” which provided for the establishment of “Bantustans” in which denationalized black South Africans were to be forced to reside, in order to preserve white supremacy over the rest of the territory of South Africa. These segregationist policies were propped up by the third pillar of apartheid, a web of so-called security laws and policies that were widely employed to suppress any opposition to the apartheid regime and to reinforce the system of racial domination, by providing for administrative detention, censorship, banning, torture and extrajudicial killing. In all of this, the law was omnipresent.

Given the weight of history and suffering, ‘apartheid’ is not a term that the African National Congress or any other movement that struggled against institutionalized racist domination in southern Africa will use lightly. In South Africa, forced evictions and the pass laws were two cogs in the racial-legal machine that were of profound material significance and enduring symbolic weight. The significance of an ANC-led South African government describing Israeli practices as reminiscent of apartheid cannot be underestimated: Israeli military order 1650 is “reminiscent of pass laws under apartheid South Africa,”<sup>4</sup> policies of Jewish settlement and forcible displacement of Palestinians are “reminiscent of apartheid forced removals.”<sup>5</sup>

As I conclude this essay in mid-October 2018, Israel's military has surrounded Khan al-Amhar and its bulldozers have begun to level the ground around the village in preparation for its demolition.<sup>6</sup> The image of the colonial frontier is vivid: "the leadership of the Israeli civil administration, the Israeli body which administers the occupied territories, were seen on a nearby hilltop with maps in their hands."<sup>7</sup> The only lingering hope for the community is that through their own steadfastness and the visibility of the solidarity they have received, they may be able to prevent the destruction of the village by disobedience of the law. For in the story of Palestinian displacements, the role and reality of Israel's law is clear. Territory is occupied by force and earmarked for settlement. Land is recategorized by legal order of the military. The Supreme Court rules that the village should be evicted and demolished. Such processes illustrate the collusion of law as the companion of force in the colonization of land. As Sfard (2018b) puts it: "The occupation is built on three cornerstones: the gun, the settlement, and the law. The law is what props up the edifice of occupation and prevents it from crashing down." Viterbo's chapter on "Lawfare" offers an interesting exploration of the tactical possibilities that remain through engaging in legal work, and there are pressure points in international law that may yet contribute to Palestinian emancipation and equality. But what is most evident from Ben-Naftali, Sfard and Viterbo's intervention is that in Israel/Palestine dismantling the structures of occupation and apartheid requires political imagination and articulation beyond the lexicon of law.

#### NOTES

1. <https://twitter.com/AvigdorLieberman/status/1037246663155441664> (5 September 2018).
2. H CJ 2150/07 *Abu Safiyeh v. Minister of Defence* (2009) 63(3) PD 331 (judgment 29 December 2009).
3. H CJ 9961/03 *HaMoked—Center for the Defence of the Individual v. Government of Israel* (judgment 5 April 2011).
4. South African Department of International Relations and Cooperation, Media Statement: Israeli Infiltration Order 1650 (21 April 2010).
5. South African Government Information, South Africa's response to latest Israeli settlement activities in East Jerusalem (24 November 2009).

6. Israel bulldozers enter Khan al-Ahmar in advance of demolition. *Al-Jazeera* (16 October 2018).
7. Israel deploys army to Khan al-Ahmar. *Middle East Monitor* (11 October 2018).

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