Liberal Masquerade: Settler Colonial Pedagogies in Israeli Legal Education

by

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Abstract

The case of the Israeli juridical field poses a puzzle. The political situation in Israel/Palestine deteriorated over the years from a temporary conquest, to an abiding belligerent occupation, and lately, to an apartheid regime. The Israeli juridical field elevated in the opposite direction, from a formalistic arena to a liberal, active, individual-oriented and human rights focused sphere. If the application of liberal law within a repressive political context is conflictual, then the Israeli case would lead to a head-on collision. Yet, reality suggests otherwise. On the surface, liberal law and apartheid regime are necessarily conflictual, as liberal legal philosophy and particularly the principle of the rule of law allegedly stand against repression. However, on the ground, liberal law and repressive political situations work together to complement and reinforce one another. The research interrogates this apparent enigma by using the Israeli legal education enterprise as a case study. It asks how Israeli legal education work to interpellate law students into a liberal juridical field that operates within a repressive political atmosphere. Based on four years of ethnography conducted within an Israeli law school, this inquiry provides a critical account of how law is being taught in Israel. The dissertation exposes several settler colonial pedagogies that are deployed in the law classroom. Silence and utterance allow to mute some areas and aspects of the law while putting emphasis on others. Legal Judaisation works to make sense of the contradictory definition of Israel as a Jewish and democratic state. De jure and de facto distinctions allow to teach the law itself while disregarding reality on the ground. Spatial ambiguity and the fragmentation of space overlook the Israeli apartheid regime through a vague description of the State's territory. These settler colonial pedagogies not only bolster settler colonial logic among future members of the Israeli juridical field, but also bridge the relation between liberal law and apartheid regime.

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Chapter 1: Introduction

The Israeli juridical field poses a puzzle. Israel has been accused by several human rights organisations of carrying out the crime of apartheid, yet, simultaneously, the Israeli juridical field has been lauded by many as a liberal, active, individual-oriented human rights focused sphere.[1] Today, 2.9 million Palestinians are subject to Israeli military control in the West Bank,[2] 2.2 million Palestinians live under an Israeli siege in Gaza Strip,[3] more than two million Palestinians live in Israel and have Israeli citizenship,[4] and another 375,000 are permanent residents in East Jerusalem.[5] These five and a half million stateless people, and another two million second-class citizens,[6] each subject to the Israeli judicial system, challenge Israel's self-definition as a liberal, conscious and progressive legal regime. If the application of liberal law within a repressive political context is conflictual, as it is based on individual rights and liberties, then the Israeli case would lead to a head-on collision. Yet, reality suggests otherwise.

On the surface, liberal law and political oppression appear to be conflictual, as liberal legal philosophy and particularly the principle of the rule of law allegedly stand against repression. For John Locke, the only justification for the establishment of the state is to guarantee and protect individual rights and freedoms.[7] According to John Stuart Mill, liberty is the area

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[1] Al-Haq – Law in the Service of Man and others, 'Joint Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination on Israel's Seventeenth to Nineteenth Periodic Reports' (2019); Michael Sfard, 'The Israeli Occupation of the West Bank and the Crime of Apartheid: Legal Opinion' (Yesh Din 2020); B'Tselem, 'A Regime of Jewish Supremacy from the Jordan River to the Mediterranean Sea: This Is Apartheid' (2021); Omar Shakir, 'A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution' (Human Rights Watch 2021); Amnesty International, 'Israel's Apartheid Against Palestinians: Cruel System of Domination and Crime Against Humanity' (2022).
[2] This figure is calculated by subtracting the number of Palestinian residents of East Jerusalem that is published by the Israeli Central Bureau of Statistics from the number of Palestinians in the West Bank as a whole according to the Palestinian Central Bureau of Statistics; Palestinian Central Bureau of Statistics, 'Indicators' <http://www.pcbs.gov.ps/site/lang__en/881/default.aspx#Population> accessed 27 August 2023; Israeli Central Bureau of Statistics, 'Localities and Other Geographical Divisions (Jerusalem)' <https://www.cbs.gov.il/he/settlements/Pages/default.aspx?mode=Yeshuv> accessed 27 August 2023.
[3] Palestinian Central Bureau of Statistics (n 2).
[4] Israeli Central Bureau of Statistics, 'Population, by Population Group (Table 2.1)' (*Israeli Central Bureau of Statistics*, 2023) <https://www.cbs.gov.il/he/publications/doclib/2023/2.shnatonpopulation/st02_01.pdf> accessed 11 October 2023.
[5] Israeli Central Bureau of Statistics, 'Localities and Other Geographical Divisions (Jerusalem)' (n 2).
[6] Palestinian citizens of Israel are entitled to a limited set of rights compared to Jewish citizens of the State; See section 1.1.4 below.
[7] John Locke, *Two Treatises of Government* (Cambridge University Press 1967).

where the individual is free and protected from external interference.[8] Ronald Dworkin maintains that the justice system is the guardian of individual rights under democratic rule, protecting the individual from the state.[9] However, on the ground, liberal law and repressive political regimes seem not only to operate in tandem, but at times to even complement and reinforce one another. This has been the claim of several Marxist legal scholars, from Pashukanis who claimed that liberal 'law represents the mystified form of a specific social relation',[10] to Louis Althusser who maintained that the law serves both as a Repressive and Ideological State Apparatus through which it exercises state power and domination.[11] The Israeli case study provides fertile grounds in which to interrogate the relation between liberal law and an oppressive rights-abusive regime.

One significant instance where this relation manifests itself is violence. It has been well established that the liberal human rights regime speaks against violence, but as Robert Cover has shown liberal law excludes specific sorts of violence from its ban.[12] While Cover concentrates on the presence of violence within the liberal regime, my research questions the different ways liberal law is able to coexist with illiberal regimes. This question has been addressed by several scholars who focused their attention on the international arena, showing the significance of imperialism to the evolution of international law,[13] the connection between laws of war and the increasing use of voluntary and involuntary 'human shields',[14] and the use of force in humanitarian interventions, in the name of liberal and democratic values.[15] My research asks to shift scrutiny to the domestic sphere in order to reveal the processes through which illiberal violence that is supposedly unjustifiable within a liberal framework is in effect justified. I am less interested in the manners in which liberal law contains evident and extreme violence, in its legalisation of abusive acts and protection of

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[8] John Stuart Mill, *On Liberty and Other Essays* (Oxford University Press 1998).
[9] Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985).
[10] Evgeny Bronislavovich Pashukanis, *The General Theory of Law and Marxism* (Transaction Publishers 2003) 79.
[11] Louis Althusser, *On Ideology* (Verso 2008) 17.
[12] Robert M Cover, 'Violence and the Word' (1986) 95 The Yale Law Journal 1601.
[13] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004).
[14] Neve Gordon and Nicola Perugini, *Human Shields: A History of People in the Line of Fire* (University of California Press 2020).
[15] Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press 2003).

their perpetrators, but rather in how it constitutes the violence as rational, legitimate and therefore unchallengeable.

My research interrogates this apparent enigma by using the Israeli legal education system as a case study. It probes the processes through which Israeli law schools inculcate new members within the judicial field and examines the effects of these processes. More specifically, it asks how legal education works to interpellate[16] law students into a liberal juridical field that operates within an illiberal political regime where one ethnic group dominates another group.

Deploying the settler colonial paradigm to comprehend the formation of the State of Israel,[17] from the late nineteenth century to present day, this research describes the meeting between liberal law and the Israeli regime, demonstrating how the encounter requires an ongoing sensemaking process. *This process, I maintain, works to constitute the Israeli settler colonial logic as compatible with liberal law, and simultaneously to teach students how to utilise liberal law to bolster settler colonialism.* Referring to this process as 'settler colonial pedagogy', I show how legal education is mobilised to facilitate the Judaisation of land, while justifying Palestinian dispossession and Israeli domination.[18]

Settler colonial logic is an ongoing structural effort to dispossess and eliminate the indigenous population,[19] carried out in a variety of ways.[20] In the context of the Israeli settler colonial apartheid regime, assimilation had never been a real option, as the Palestinian Indigenous community could not have become part of the Jewish settler group.[21] Therefore, central methods of elimination used by Zionists and later on by the State of Israel included

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[16] Marxist theorist Louis Althusser defines interpellation as a process in which: 'ideology "acts" or "functions" in such a way that it "recruits" subjects among the individuals (it recruits them all), or "transforms" the individuals into subjects (it transforms them all)'; Althusser (n 11).

[17] Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8 Journal of Genocide Research 387.

[18] Judaisation of land is an ongoing project carried out by the Israeli regime, to take over Palestinian lands, within the 1949 armistice line, and in the occupied territories. It involves the dispersing of Jewish citizens and establishment of Jewish settlements while reducing Palestinian citizens and noncitizens' control over land; Ghazi Falah, 'Israeli "Judaization" Policy in Galilee' (1991) 20 Journal of Palestine Studies 69; Oren Yiftachel, 'Bedouin Arabs and the Israeli Settler State: Land Policies and Indigenous Resistance' in Duan Champagne and Ismael Abu-Saad (eds), *The Future of Indigenous Peoples: Strategies for Survival and Development* (University of California Press 2003).

[19] Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (Cassell 1999) 163.

[20] Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 17) 402.

[21] Catherine Rottenberg, 'Dancing Arabs and Spaces of Desire' 19 TOPIA 99.

violent expulsions and killings,[22] as well as Judaising the land and dispossessing Palestinian citizens and noncitizens while increasing the Jewish population, through legal and political mechanisms.[23] These processes were carried out largely by utilising the law itself and different legal mechanisms, that worked to rationalise the racialised forms of governance informed by the settler colonial project. The settler colonial logic continues to inform the operation of the Israeli juridical field, advancing the erasure of the Palestinian indigenous population, promoting Jewish supremacy, and furthering Israel's territorial expansion.

Based on four years of ethnographic research conducted within an Israeli law school during my LLB studies, this thesis provides a critical account of how law is being taught in Israel, focusing on its form, content and tacit assumptions. Combining two qualitative methods: participant observation, and analysis of legal texts and learning materials, this study interrogates the manner in which legal education constructs and then deploys an imaginary political reality that not only interpellates and inculcates students within the Israeli juridical field but also helps bridge the relation between liberal law and a settler colonial apartheid regime.

Studying liberal law in such a setting means studying the law of the settlers, which applies to Israeli citizens only, and treats Jewish citizens differently. It means accepting Jewish privilege through studying the laws that constitute the supremacy of Jewish citizens and noncitizens over non-Jews. Furthermore, it involves accepting such laws as legitimate laws, uncontradictory of democratic principles, and practically equal. It means not learning anything about the law that applies to noncitizen Palestinians, and not hearing about the Military Court System, even though it is, in fact, part of the Israeli legal system. More generally, studying liberal law in a settler colonial apartheid setting means studying law in an illegal reality, while constantly making sense of the normality and legality of this situation.

This chapter offers a brief introduction of the main domains this dissertation engages with. It asks to equip the reader with relevant historical background, understanding of the Israeli legal field, and awareness as to the political context in which this scrutiny is carried out. The chapter opens with a historical overview, from the late nineteenth century through Ottoman

[22] Patrick Wolfe, 'Purchase by Other Means: The Palestine Nakba and Zionism's Conquest of Economics' (2012) 2 Settler Colonial Studies 133, 133–136.
[23] Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 17) 401.

and British rule to the foundation of the State of Israel and its occupation of the Palestinian territories. It then turns to introduce the legal systems that operate between the Jordan River and the Mediterranean Sea, including the Israeli domestic system and the legal system in the Occupied Palestinian Territories. The chapter briefly touches upon two main concepts, apartheid and settler colonialism, underscoring their relevance to the Israeli/Palestinian reality. It ends with an account of the evolution of Israeli legal education and its current status.

1.1 Historical overview

The political context in which Israeli law students receive their legal education is complex, as it involves various components characterised by extreme inconsistency. The overriding context is the occupation and colonisation of the West Bank, the siege on the Gaza Strip, the unilateral annexation of East Jerusalem and Golan Heights, the denial of collective and some individual rights to the Palestinian citizen of Israel, and the Palestinian refugee problem. The dominance of these aspects in Israeli reality, as well as in Israeli courts, is, however, not reflected within the curriculum of the country's law schools. Another essential component is the Israeli regime itself, including the tension between the State's Jewish and democratic characteristics as well as the State's intricate relationship with its Palestinian citizens. Also relevant is Israel's position in the international arena, including the tension with some of its neighbouring states, and the growing criticism of government policies. The following section offers a thumbnail but focused description of the history of the Israeli-Palestinian conflict, serving, as it were, as background for the discussion on settler colonial pedagogies within Israeli law schools.

1.1.1 1881-1947

The starting point of the Israeli-Palestinian conflict can be traced back to the late nineteenth century, when European Jews began immigrating to Ottoman Palestine.[24] The main stimulant behind the emergence of Jewish national aspirations, along with the wider national revival in Europe, was the sense of rejection within local communities in Europe and the rise of

[24] Walid Khalidi, 'The Palestine Problem: An Overview' (1991) 21 Journal of Palestine Studies 5, 7.

antisemitism across the Eastern Europe.[25] Towards the end of the nineteenth century, blood libels and conspiracy theories against Jews were published across Russia, leading to an anti-Jewish wave of pogroms beginning in 1881 and ending only around World War I.[26] These events were a central catalyst for the founding of movements that aimed to resettle Jews in Ottoman Palestine.[27] In the Kishinev Pogrom of 1903, over the course of three days, 49 Jews were killed and 1,500 properties were plundered and destroyed.[28] Between 1905 and 1906, 657 pogroms took place in Eastern Europe, leading to the death of more than 3,000 Jews.[29] Along with popular and official antisemitism, Jews in Eastern Europe were frustrated, not only by the inability to assimilate within their societies and become equal citizens, but also from the indifference of progressive forces towards their situation.[30] While Jews all across Europe were influenced by national ideas following the revolutions of 1848, and specifically in Eastern Europe where many witnessed the Balkan national awakening, until World War I, the vast majority of those who emigrated headed to the United States, and only two to three percent out of about 2.5 million travelled to Ottoman Palestine.[31]

In the late nineteenth century, Ottoman Palestine was inhabited mainly by Arabs. Before the waves of Jewish immigration began, there existed a relatively small Jewish population concentrated in the four cities that were considered holy—Jerusalem, Hebron, Tiberias and Safed.[32] According to the Ottoman census of 1881-1889, the whole population in Palestine

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[25] Yaacov Shavit, 'The New Yishuv (1882-1917): The Historical Framework and Principles' in Yehoshua Ben-Arieh and Israel Bartal (eds), *The History of Eretz Israel: The Last Phase of Ottoman Rule (1799-1917)* (Keter Publishing House 1983) 260; Khalidi, 'The Palestine Problem: An Overview' (n 24) 6; Anita Shapira, *Land and Power* (Am Oved Publishers 1992) 21–23; Ilan Pappé, *The History of Modern Palestine: One Land, Two Peoples* (Cambridge University Press 2004) 36.

[26] Heinz-Dietrich Lowe, 'From Improvement to Discrimination: New Tendencies in the State Jewish Policy (1881-1914)' in Ilia Lurie (ed), *History of the Jews in Russia: From the Partition of Poland to the Fall of the Russian Empire 1772-1917* (The Zalman Shazar Center for Jewish History 2012) 26–27.

[27] Yossi Goldstein, 'The Zionist Movement and its Currents in Russia' in Ilia Lurie (ed), *History of the Jews in Russia: From the Partition of Poland to the Fall of the Russian Empire 1772-1917* (The Zalman Shazar Center for Jewish History 2012) 216.

[28] Gur Alroey, *The Quiet Revolution: Jewish Emigration from the Russian Empire 1875-1924* (The Zalman Shazar Center for Jewish History 2008) 46–47.

[29] ibid 47.

[30] Shavit (n 25) 260.

[31] ibid 259–260.

[32] Adel Manna, 'From an all-Islamic Identification to the Beginning of the National Movement: The Challenge of Westernization and Zionism' in Yehoshua Ben-Arieh and Israel Bartal (eds), *The History of Eretz Israel: The Last Phase of Ottoman Rule (1799-1917)* (Keter Publishing House 1983) 189; Gershon Shafir, 'Zionist Immigration and Colonization in Palestine until 1948' in Robin Cohen (ed), *The Cambridge survey of world migration* (Cambridge University Press 1995) 406.

amounted to about 425,000 people,[33] 24,000 or six percent of whom were Jewish.[34] In general, the relations between Arabs and Jews under the Ottoman regime were positive, but the first wave of Jewish immigration was to erode these relations.[35] Zionism, a movement that began with the aspiration to bring the Jewish people to Ottoman Palestine and establish an independent Jewish national entity there,[36] slowly altered the relations between Jews and the Arab population, who through the encounter with Zionists began identifying as Palestinians.[37] Some Palestinians and Jews tried to cooperate, many Jews employed Palestinian workers, and trade connections were established, but the ongoing land purchases that were carried out by Zionist groups damaged those relations.[38]

Jewish immigration to Palestine before May 1948 is usually divided into five waves beginning with the first wave, between 1881-1904 and ending in the fifth wave, from 1933 to World War II.[39] Zionist leaders immediately understood that control over land was vital if they were to create a Jewish state and, from the outset, purchased plots of land from Palestinians and Ottomans.[40] Despite the fact that hundreds of thousands of Palestinians lived in Palestine and the vast majority of the land belonged to them, the Zionist movement described Palestine as 'a land without a people for a people without a land'.[41] Whether the slogan meant that the territory was empty, or that the native population did not count, it served as justification for the colonisation of land and the Zionist land acquisition enterprise.[42] The Zionist policy was one of organised land purchase, and by 1914 Zionist individuals and groups managed to purchase about two percent of the land, an estimated

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[33] Gershon Shafir, *Land, Labor, and the Origins of the Israeli-Palestinian Conflict, 1882-1914* (University of California Press 1996) 41.
[34] Shafir, 'Zionist Immigration and Colonization in Palestine until 1948' (n 32) 406.
[35] Manna (n 32) 189–190.
[36] Shavit (n 25) 262; Khalidi, 'The Palestine Problem: An Overview' (n 24) 6; Shapira (n 25) 22–23; Elia Zureik, *Israel's Colonial Project in Palestine Brutal Pursuit* (Routledge 2016) 58–59.
[37] Manuel Hassassian, 'Historical Dynamics Shaping Palestinian National Identity' (2001) 8 Palestine-Israel Journal of Politics, Economics and Culture 1.
[38] Baruch Kimmerling and Joel S Migdal, *Palestinians: the Making of a People* (Keter Publishing House 1999) 30–31; Manna (n 32) 190.
[39] Hizky Shoham, 'From "Great History" to "Small History": The Genesis of the Zionist Periodization' (2013) 18 israel studies 31, 32.
[40] Shafir, *Land, Labor, and the Origins of the Israeli-Palestinian Conflict, 1882-1914* (n 33) 41–42.
[41] Benny Morris, *1948: A History of the First Arab-Israeli War* (Am Oved Publishers 2010) 17.
[42] Edward W Said, *The Question of Palestine* (Vintage Books 1980) 24; Nur Masalha, 'The 1967 Palestinian Exodus' in Ghada Karmi and Eugene Cotran (eds), *The Palestinian Exodus 1948-1998* (Ithaca Press 1999) 66.

418,000 dunams in Ottoman Palestine, and a further 100,000 in Trans-Jordan and the Golan Heights.[43]

In 1917, in the midst of World War I, the British government published the Balfour Declaration, stating that: 'His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country'.[44] While the declaration did affirm the rights of the non-Jewish population in Palestine (who remain unnamed), it was a clear statement of British support for the Zionist enterprise,[45] promising the Jews a 'national home', when in fact, the Palestinians comprised more than ninety percent of the population in Palestine and owned the vast majority of the land.[46] The Zionist Movement saw in the declaration a historical breakthrough, whilst the Palestinian community understood it as no less than betrayal.[47]

A year later, in 1918, the British Empire finally conquered the entire territory of Palestine, after 400 years of Ottoman rule.[48] Following four years of British military occupation, in 1922, the Council of the League of Nations entrusted the Palestine Mandate to the British government.[49] According to article 22 to the Covenant of the League of Nations, control of Palestine, like any other territory that had been under the domination of defeated empires, was transferred to the British government, until such time as the inhabitants of Palestine would be ready to be granted independence.[50] The directories of the Mandate on Palestine explicitly mentioned the Balfour Declaration as a central goal for His Majesty to achieve.[51] At this point in time, the Jews comprised only ten percent of the population of Palestine, and yet,

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[43] Shavit (n 25) 271.
[44] Arthur James Balfour, 'The Balfour Declaration'.
[45] Pappé (n 25) 64–68.
[46] Elia Zureik, *The Palestinians in Israel: A Study in Internal Colonialism* (Routledge and Kegan Paul 1979) 47.
[47] Morris (n 41) 24; Rashid Khalidi, *The Hundred Years' War on Palestine: A History of Settler Colonial Conquest and Resistance, 1917-2017* (Metropolitan Books 2020) ch 1.
[48] Pappé (n 25) 72.
[49] The Council of the League of Nations, 'The Palestine Mandate' (1920) <https://avalon.law.yale.edu/20th_century/palmanda.asp> accessed 20 November 2020.
[50] The League of Nations, 'The Covenant of the League of Nations' (1919) <https://avalon.law.yale.edu/20th_century/leagcov.asp> accessed 16 November 2020.
[51] The Council of the League of Nations (n 49).

the Palestinians were not even recognised as a people or as a national group in the document, only referred to as non-Jewish communities whose individual rights should be guaranteed.[52]

The British Mandate on Palestine lasted for 25 years, until May 1948. During that period, Zionist plans became more ambitious, demanding that the British lift restrictions on Jewish immigration and land purchase that had been imposed to protect the rights of local inhabitants.[53] Thus, during those years, tensions between Jews and Palestinians exacerbated with waves of Jewish immigration continuing to arrive to Palestine alongside sporadic violent attacks and riots between Palestinians and Jews.[54] Violence reached a peak in the 1929 events, when Palestinian attacks were carried out against Jewish communities across the country.[55] At that time, the Jewish population was clearly seen as an enemy aiming to take over Palestine, and had been targeted for this reason.[56] The violent events had a devastating outcome, 133 Jews and 116 Palestinians were killed, and another 341 Jews and 232 Palestinians were injured.[57] The Palestinian national movement was struggling against both the Zionist movement and the British government, but simultaneously, some Palestinians decided to cooperate and collaborate with the Zionist and British forces.[58] This continued throughout British rule.[59]

In April 1936, the Arab Rebellion erupted.[60] The main Palestinian demands to the British government were to permanently stop Jewish immigration to Palestine, prohibit lands sales to Jews, and transfer the British administrative bodies in Palestine to its Palestinian majority.[61] That same year, Britain appointed the Peel Royal Commission, to assess future options for Palestine.[62] In its report, published July 1937, the commission found that the Jews and the Palestinians cannot live together in one state, and recommended that Mandatory Palestine be

[52] Rashid Khalidi, *The Iron Cage: The Story of the Palestinian Struggle for Statehood* (Van Leer Institute Press 2010) 68–69.
[53] Kimmerling and Migdal (n 38) 37.
[54] Morris (n 41) 26.
[55] Hillel Cohen, *1929: Year Zero of the Jewish-Arab Conflict* (Keter Books 2013) 390.
[56] ibid 392.
[57] ibid 20.
[58] Hillel Cohen, *Army of Shadows: Palestinian Collaboratortion with Zionism, 1917-1948* (University of California Press 2008) 259.
[59] ibid 260.
[60] Kimmerling and Migdal (n 38) 92.
[61] ibid 98.
[62] Morris (n 41) 32.

divided between them, leaving the holy cities, Jerusalem and Bethlehem under British rule.[63] The Palestinians, who owned most of the land in mandatory Palestine and constituted the majority of the population, did not accept these recommendations and continued the revolt. Only in 1939, after the British government published a White Paper, which in effect accepted most of the Palestinian demands, did the revolt subside. On the ground, however, little changed.[64]

British rule in Palestine began disintegrating in the mid-1940s when Zionist paramilitary groups started attacking British targets, including railways, bridges and military bases, as well as kidnaping and assassinating British officials. These steps led to the evacuation of British civilians from Palestine and the imposition of military rule in some areas.[65] Immediately following World War II, another committee was appointed, the Anglo-American Committee of Inquiry, and in May 1946 they recommended against the partition of Mandatory Palestine.[66] In the summer of 1946, the Morrison-Grady Plan for provincial autonomy under British or international rule was introduced.[67] None of these plans were implemented, and the British Mandate continued. In February 1947, Britain decided to leave Mandatory Palestine and refer the matter to the UN.[68]

In April 1947, following Britain's request, the United Nations General Assembly convened a special session to discuss the Palestine issue.[69] The General Assembly's resolution was to establish the United Nations Special Committee on Palestine (UNSCOP), which was asked to recommend a solution.[70] Following investigations and deliberations, UNSCOP found that the British Mandate on Palestine must end. The Committee recommended partition based on the principle of dividing the land according to the demographic distribution of each ethnic group across space: so that fewer Jews will reside in the territory allocated to the Palestinians, and fewer Palestinians will reside in the territory allocated to Jews.[71]

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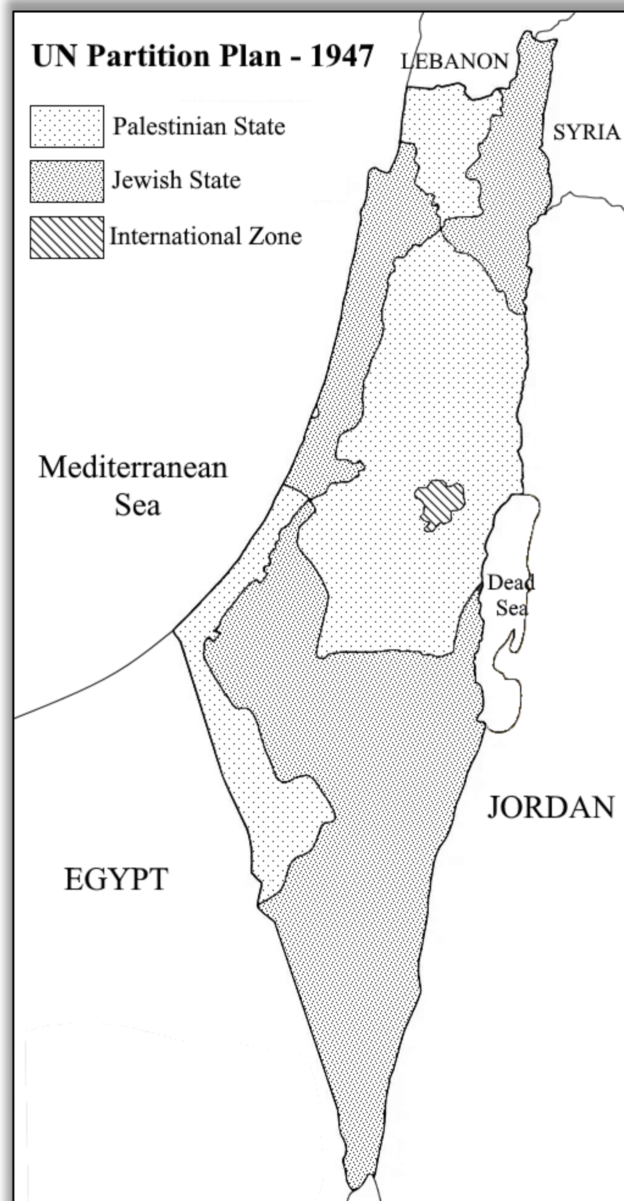
[63] ibid.
[64] Khalidi, *The Iron Cage: The Story of the Palestinian Struggle for Statehood* (n 52) 71; Kimmerling and Migdal (n 38) 113.
[65] Kimmerling and Migdal (n 38) 125; Morris (n 41) 45–51.
[66] Morris (n 41) 47–50.
[67] ibid 51–52.
[68] Kimmerling and Migdal (n 38) 128; Morris (n 41) 53.
[69] Morris (n 41) 55.
[70] ibid.
[71] ibid 64.

Figure 1.1: The United Nation Partition Plan, 1947



In November 1947, the United Nations General Assembly voted in favour of Resolution 181, that is, the UNSCOP Partition Plan. The Resolution introduced a plan for the termination of the British Mandate over Palestine by May 1948, the partition of the territory into three distinct areas, while granting independence to both the Jewish and the Palestinian peoples,

within the new borders it stipulated (see Figure 1.1).[72] At the time of the resolution, there were about 650,000 Jews and 1.2 million Palestinians in Palestine.[73] While the Jews owned 7% of the land[74] and the Palestinians almost 90%,[75] the Jewish state received 55% of the territory within Mandatory Palestine, and the Palestinians only 42%.[76]

1.1.2 1948-1966

The Zionist leaders decided to accept the Partition Plan, knowing that given the size of the Jewish population and the land that was offered, the proposal was extremely favourable to their side.[77] They also understood that this was a sound political move, even as they planned to expand the area UNSCOP allocated to the Jewish state. The Palestinians on their part felt betrayed, as the plan demanded that they concede 55% of the territory to a minority that was about half their size.[78]

The period between the approval of Resolution 181 in November 1947 and the withdrawal of British forces was characterised by ongoing clashes and skirmishes between Jews and Palestinians.[79] Walid Khalidi defines this part of the fighting as a 'civil war'.[80] On May 14, 1948, David Ben-Gurion, the Zionist leader and Israel's first Prime Minister, announced the establishment of the State.[81] The Israeli declaration of independence and the British evacuation, led to the 1948 war, with troops invading Palestine from five neighbouring countries.[82] Nonetheless, the Zionist leadership had managed to mobilise more forces than all the Arab countries combined, they were better trained and better equipped, mainly by arm

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[72] United Nations General Assembly, 'Resolution 181 (II). Future Government of Palestine' (1947) <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253> accessed 20 November 2020.
[73] Zureik, *The Palestinians in Israel: A Study in Internal Colonialism* (n 46) 47; Netanel Lorch, *The Edge of the Sword: Israel's War of Independence, 1947-1949* (Plunkett Lake Press 2016) ch 1.3.
[74] Khalidi, 'The Palestine Problem: An Overview' (n 24) 8.
[75] Khalidi, *The Iron Cage: The Story of the Palestinian Struggle for Statehood* (n 52) 46.
[76] Morris (n 41) 81.
[77] ibid.
[78] Walid Khalidi, 'A Palestinian Perspective on the Arab-Israeli Conflict' (1985) 14 Journal of Palestine Studies 35, 40; Khalidi, 'The Palestine Problem: An Overview' (n 24) 8.
[79] Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949* (Am Oved Publishers 1991) 50; Pappé (n 25) 125–127.
[80] Khalidi, 'The Palestine Problem: An Overview' (n 24) 8.
[81] The State of Israel, 'Declaration of Establishment of State of Israel' (1948) <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration of establishment of state of israel.aspx> accessed 24 November 2020.
[82] Pappé (n 25) 131–132.

shipments from Czechoslovakia.[83] In 1949, the hostilities came to an end, with the signing of the Armistice Agreements between Israel and Egypt, Lebanon, Jordan and Syria.[84]

Figure 1.2 – 1949 Armistice Lines

The 1948 war, called by Israelis the 'War of Independence', and 'al-Nakbah', or catastrophe by Palestinians, had two significant outcomes that shaped the reality of Israel/Palestine. First, contrary to Resolution 181, only one state was established in Mandatory Palestine, the State of Israel, and by the end of the war it had conquered much of the territory, far beyond the area allocated to Jews in the partition maps.[85] Second, during the war, the vast majority of the

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[83] Walid Khalidi, 'Plan Dalet: Master Plan for the Conquest of Palestine' (1988) 18 Journal of Palestine Studies 4, 13–14; Khalidi, *The Iron Cage: The Story of the Palestinian Struggle for Statehood* (n 52) 51–61.
[84] Pappé (n 25) 130; Morris (n 41) 405.
[85] Khalidi, *The Iron Cage: The Story of the Palestinian Struggle for Statehood* (n 52) 46.

Palestinian population within the 1948 borders, fled or had been expelled (first by paramilitary Jewish organisations, and later by Israeli organised troops) across international borders.[86] Between December 1947 and September 1949, an estimated 750,000 Palestinians became refugees in Lebanon, Jordan, Syria, and Egypt, and only 160,000 Palestinians remained in what became Israel.[87]

The Palestinian refugee problem was immediately addressed by the United Nations,[88] and in Resolution 194 of 11 December 1948, it explicitly anchored the refugees' right of return, stating that: '[the General Assembly] *Resolves* that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date […]'.[89] Yet, the Israeli government decided to ignore the resolution, and actively prevented Palestinian attempts to return to their homes.[90]

Already during the war and also in the months after it had ended, approximately 370 Palestinian villages and cities were emptied of their inhabitants,[91] Israeli troops and authorities demolished many of the abandoned villages, and either gave their lands to nearby Jewish settlements (primarily Kibbutzim), or established new settlements on top of their ruins.[92] Of the 370 new Jewish settlements established soon after 1948, 350 were built on or in proximity to Palestinian villages that had been destroyed.[93] In cities, the state gave abandoned Palestinian houses to new Jewish immigrants to live in.[94] Israel invested many efforts in the deconstruction of space to erase Palestinian traces on the ground and create a

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[86] Khalidi, 'Plan Dalet: Master Plan for the Conquest of Palestine' (n 83) 4–9; Walid Khalidi, 'Why Did the Palestinians Leave, Revisited' (2005) 34 Journal of Palestine Studies 42, 49–50.
[87] Ian Lustick, *Arabs in the Jewish State: Israel's Control of a National Minority* (University of Texas Press 1980) 28, 48–49; Khalidi, 'The Palestine Problem: An Overview' (n 24) 9; Morris (n 79) 397; Khalidi, *The Iron Cage: The Story of the Palestinian Struggle for Statehood* (n 52) 46.
[88] Khalidi, 'Plan Dalet: Master Plan for the Conquest of Palestine' (n 83) 5.
[89] United Nations General Assembly, 'Resolution 194 (III). Palestine - Progress Report of the United Nations Mediator' (1948) s 11 <https://unispal.un.org/DPA/DPR/unispal.nsf/0/C758572B78D1CD0085256BCF0077E51A> accessed 28 November 2020.
[90] Morris (n 79) 184; Shira Robinson, *Citizen Strangers: Palestinians and the Birth of Israel's Liberal Settler State* (Stanford University Press 2013) 33.
[91] Morris (n 79) 213.
[92] Kimmerling and Migdal (n 38) 141–142.
[93] Alexandre (Sandy) Kedar and Oren Yiftachel, 'Land Regime and Social Relations in Israel' (2006) 1 Swiss Human Rights Book 127, 135.
[94] Lustick (n 87) 46, 58.

new landscape.[95] At the same time, new legislation was introduced, both to take over abandoned property,[96] and to prevent return.[97]

The 160,000 Palestinians who remained within Israeli new borders, were granted Israeli citizenship,[98] but were held under strict military rule for eighteen years, until 1966.[99] The Palestinian citizens of Israel were treated de facto as a fifth column.[100] Israel made use of British emergency regulations to severely restrict their movement, imposing curfews, and allowing only those with permits to leave one's village, as well as impeding freedom of speech and freedom of association.[101] Ahmad Sa'di shows how in 1952, when Israeli leaders realised that expulsion of all the state's Palestinian citizens was no longer an option, they began focusing on the foundation of a system of surveillance and control to dominate them effectively.[102] Israel's security services began working in earnest to recruit Palestinian collaborators, and encourage informers, who in return received land leasing opportunities, work promotions, movement permits, and other benefits.[103]

The state's central justification of the military administration was security, but in fact, it achieved other goals, among them the confiscation of Palestinian citizens' lands.[104] Israel managed to gain control over 93% of the lands within the 1949 Armistice line[105] by

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[95] Ghazi Falah, 'The 1948 Israeli-Palestinian War and Its Aftermath: The Transformation and De-Signification of Palestine's Cultural Landscape' (1996) 86 Annals of the Association of American Geographers 256, 257, 281.
[96] Rassem Khamaisi, 'Mechanism of Land Control and Territorial Judaization in Israel' in Majid Al-Haj and Uri Ben-Eliezer (eds), *In the Name of Security: The Sociology of Peace and War in Israel in Changing Times* (Haifa University Press 2003) 427.
[97] Oren Yiftachel, 'Ghetto Citizenship: Palestinian Arabs in Israel' in Nadim Rouhana and Areej Sabbagh-Khoury (eds), *Israel and the Palestinians – Key Terms* (Mada Center for Applied Research 2009) 58; Noura Erakat, *Justice for Some: Law and the Question of Palestine* (Stanford University Press 2019) 54–56.
[98] Azmi Bishara, 'On the Question of the Palestinian Minority in Israel' (1993) 3 Theory and Criticism 7, 9; Nadera Shalhoub-Kevorkian, *Security Theology, Surveillance and the Politics of Fear* (Cambridge University Press 2015) 44–45.
[99] Robinson (n 90) 38.
[100] Lustick (n 87) 52–53.
[101] Kimmerling and Migdal (n 38) 149; Ilan Pappé, *The Forgotten Palestinians: A History of the Palestinians in Israel* (Yale University Press 2011) 46; Robinson (n 90) 31–39.
[102] Ahmad H Sa'di, *Thorough Surveillance: The Genesis of Israeli Policies of Population Management, Surveillance and Political Control Towards the Palestinian Minority* (Manchester University Press 2013) 35–39.
[103] Hillel Cohen, *Good Arabs: The Israeli Security Services and the Israeli Arabs* (Ivrit 2006) 266; Sa'di (n 102) 44.
[104] Sa'di (n 102) 40.
[105] Ghazi-walid Falah, 'Dynamics and Patterns of the Shrinking of Arab Lands in Palestine' (2003) 22 Political Geography 179, 197.

employing land grab mechanisms, including confiscation and expropriation of property through law, forced purchases of lands and war conquests.[106] A majority of the Palestinian land that Israel confiscated during its first years was the property of Palestinian citizens that were internally displaced and therefore declared as 'present-absentees'.[107]

The Absentees' Property Law of 1950 created the category of 'present-absentees', denoting internally displaced Palestinian citizens of Israel who were declared as absentees according to the law, but in reality were present in the State,[108] and declared all their property as 'absentee property'.[109] The law also facilitated the founding of the Custodian of Absentees Property,[110] and vested every property or property right of an absentee in the Custodian.[111] While the Custodian was allegedly not permitted to sell or transfer ownership over lands, the law allowed it to carry out transactions with the newly established Development Authority.[112] This new authority, founded through the Development Authority Law (Assets Transfer) of 1950, was defined as 'an authority for the development of the country',[113] but in fact, served as a mediator to transfer expropriated Palestinian land from the Custodian to the State and the Jewish National Fund (JNF).[114] This way, the State could make use of Palestinian refugees' property, and simultaneously, guaranteed that most of the land remain in Jewish hands, either as State land or as the property of the JNF.[115] Following concerns that present-absentees will demand to receive their property back, another legislation was introduced, to make sure the lands were 'properly' and completely appropriated.[116] The Land Acquisition Law (Validation of Acts and Compensation) of 1953, established a mechanism to expropriate specific lands

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[106] Khamaisi (n 96) 425.
[107] Lustick (n 87) 51.
[108] Sabri Jiryis, 'Recent Knesset Legislation and the Arabs in Israel' (1971) 1 Journal of Palestine Studies 53, 62.
[109] The Absentees' Property Law 1950 (IL) 86, s 1(e).
[110] ibid 2(a).
[111] ibid 4(a).
[112] ibid 19(a)(1).
[113] The Development Authority Act (Assets Transfer) 1950 (IL) s 2(a).
[114] Geremy Forman and Alexandre (Sandy) Kedar, 'From Arab Land to "Israel Lands": The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948' (2004) 22 Environment and Planning D: Society and Space 809, 818.
[115] According to the law, the Development Authority is allowed to sell lands only with government approval; Yossi Katz, *'The land shall not be sold in perpetuity' The Legacy and Principles of Keren Kayemeth Leisrael (Jewish National fund) in the Israeli Legislation* (Research Institute for the History of KKL-JNF 2002) 20, 39 <https://www.magnespress.co.il/book/5151/read>.
[116] Forman and Kedar (n 114) 819.

due to national needs.[117] The Minister of Finance was authorised to implement the law, and had a one-year period (from March 1953 to March 1954) in which he could expropriate lands through this mechanism.[118] The Land Acquisition Law served to expropriate lands owned by present-absentees and other Palestinian citizens, and within the one-year slot designated for its implementation, had been utilised to take over 1.2 million dunams of land, 311,000 of which were privately owned.[119]

In order to secure the State's lands, the Israeli Knesset enacted Basic-Law: Israel's Lands in 1960.[120] The law poses restrictions on any ownership transfer over State lands, making sure that the majority of lands will remain under State ownership, and allowing the State and its authorities high regulation of the use of lands. Also introduced in 1960 is the Israel Land Authority Law, that founded the Israeli Land Administration. According to the law, the Authority's aim is to work to 'administer Israel's lands as resource for the development of the State of Israel for the benefit of the public, the environment, and future generations […]'.[121] Over the years, the Authority has been working to safeguard Israeli interests through the administration of State land. This new legislation served as well to unify Israel's lands under one authority, that operates according to a clear policy.[122]

Understanding that it was not enough to expropriate lands in the Negev/Naqab or the Galilee area, Israel employed a set of mechanisms to 'Judaise' these spaces, that is, a process in which areas that were largely populated with Palestinian citizens, were altered to make them more Jewish, and in this way strengthen the state's control there.[123] This combination of mechanisms included the establishment of new Jewish settlements[124] accompanied by incentives for Jews to move to areas where Palestinian land had been expropriated.[125] The massive Jewish immigration that arrived in Israel's first years contributed to the state's ability

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[117] The Land Acquisition Law (Validation of Acts and Compensation) 1953 (IL).
[118] ibid 2.
[119] Forman and Kedar (n 114) 821.
[120] Basic-Law: Israel's Lands 1960 (IL) s 1.
[121] Israel Land Authority Law 1960 (IL) s 1A.
[122] Katz (n 115) 54.
[123] Falah, 'Israeli "Judaization" Policy in Galilee' (n 18) 69; Yinon Cohen and Neve Gordon, 'Israel's Biospatial Politics: Territory, Demography, and Effective Control' (2018) 30 Public Culture 199, 200.
[124] Ghazi Falah, 'Israeli "Judaization" Policy in Galilee and Its Impact on Local Arab Urbanization' (1989) 8 Political Geography Quarterly 229, 230; Falah, 'Israeli "Judaization" Policy in Galilee' (n 18) 76–79; As'ad Ghanem, 'The Expanding Ethnocracy: Judaization of the Public Sphere' (2011) 26 Israel Studies Review 21, 23–25.
[125] Ghanem (n 124) 24.

to alter the demographics of these parts of the country.[126] By the end of 1951, more than 684,000 Jewish immigrants arrived in Israel, so the Jewish population doubled its size within 2.5 years.[127] The Palestinians who had become refugees were ‘replaced’ by a similar number of Jewish immigrants, both Holocaust survivors from Europe and Mizrahi Jews from Arab countries, thus transforming the nascent state’s ethnic composition without altering its overall population size.[128]

Second, utilising planning procedures and manipulating local government jurisdiction Israel reduced the area under Palestinian localities’ jurisdiction, blocking opportunities to expand and preventing territorial continuity.[129] Ghazi Falah describes it as ‘shrinking’ Palestinian spaces, to emphasise an ongoing process in which, over time, more and more Palestinian lands are confiscated by the state.[130] In addition, Israel made sure to change the names of places and sites to Hebrew, mostly biblical names to underscore a so-called historical link between Jews and the space,[131] and made wide use of afforestation, both to hold land and to change the landscape.[132] As Alexandre Kedar and Oren Yiftachel explain, the Palestinian settlement map was ‘frozen’ in 1948 by prohibiting the establishment of new Palestinian villages and towns and arresting the development of those still intact after the war. This was carried out by confiscating most of their land reserves, preventing any development outside the already developed area, and surrounding them with Jewish settlements.[133] In this way, Israel created a ‘geography of enclaves’ in which the vast majority of Israel’s Palestinian citizens have remained until this day—even as their population has increased tenfold.[134]

The resignation of David Ben-Gurion in 1963 and the appointment of Levi Eshkol as Prime Minister, the ongoing protest and resistance among the Palestinian population, as well as Israeli concerns regarding the formation of connections between the Palestinian opposition

[126] Cohen and Gordon (n 123) 201–202.
[127] Lustick (n 87) 44.
[128] Cohen and Gordon (n 123).
[129] Falah, ‘Dynamics and Patterns of the Shrinking of Arab Lands in Palestine’ (n 105) 198–205; Khamaisi (n 96) 432–435.
[130] Falah, ‘Dynamics and Patterns of the Shrinking of Arab Lands in Palestine’ (n 105) 181.
[131] Nur Masalha, *Palestine: A Four Thousand Year History* (Zed Books 2018) 319–320.
[132] ibid 381.
[133] Kedar and Yiftachel (n 93).
[134] Cohen and Gordon (n 123).

inside and outside Israel, led to the abolition of the military government in December 1966.[135] While military rule was cancelled, many of its tactics and mechanisms remained, and from that point on were carried out by the Israeli police instead of the military.[136]

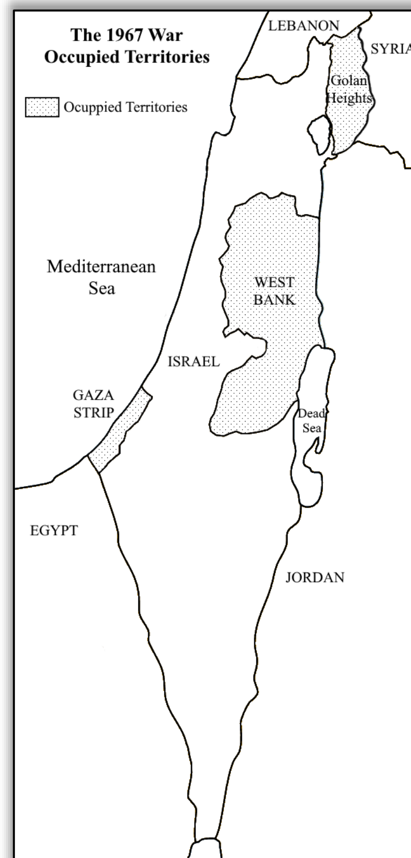
1.1.3 1967-2020

About half a year after the military rule over the Palestinian citizens of Israel ended, in June 1967, Israel launched a pre-emptive airstrike against Egypt, Jordan and Syria. The war erupted after an extended period of tension in the region, following the 1956 war between Israel and Egypt, and later on, Egypt's removal of UN forces from Sinai Peninsula and naval blockade on the Straits of Tiran. During the 1967 war, that lasted only six days, Israel conquered the West Bank and East Jerusalem in the east, Sinai Peninsula and Gaza Strip in the south, and the Golan Heights in the north.[137] Following the war, an additional 320,000 Palestinians from the West Bank and Gaza Strip became refugees in neighbouring countries.[138] With East Jerusalem, the West Bank and Gaza Strip under Israeli control, 1.3 million Palestinians were now subject to Israeli domination.[139]

In November 1967, the United Nations Security Council voted in favour of Resolution 242, calling for the withdrawal of Israeli forces from territories occupied during the 1967 war and reiterating the need for a just solution for the continuous Palestinian refugee problem.[140] But Resolution 242 was never implemented.[141] The Sinai Peninsula was the only territory returned by Israel, handed back to Egypt as part of the Camp David peace agreements in 1978.[142]

[135] Sabri Jiryis, *The Arabs in Israel* (Monthly Review Press 1976) 56–58.
[136] Sa'di (n 102) 48.
[137] Khalidi, 'The Palestine Problem: An Overview' (n 24) 9; Gershon Shafir, *A Half Century of Occupation: Israel, Palestine, and the World's Most Intractable Conflict* (University of California Press 2017) 2.
[138] Masalha (n 42) 63.
[139] ibid.
[140] United Nations Security Council, 'Resolution 242' (1967) <https://unispal.un.org/unispal.nsf/0/7D35E1F729DF491C85256EE700686136> accessed 16 November 2020.
[141] Erakat (n 97) 64.
[142] Shafir, *A Half Century of Occupation: Israel, Palestine, and the World's Most Intractable Conflict* (n 137) 3.

Figure 1.3: The 1967 War Occupied Territories



East Jerusalem was unilaterally annexed by Israel already in June 1967, a mere two weeks after the war.[143] The city's municipal borders were extended to incorporate a 70 square kilometre area which included the Old City and several Palestinian villages, in order to 'reunite' Jerusalem.[144] Yet, while Israel applied its law to East Jerusalem, it did not grant the city's Palestinian inhabitants full citizenship, only permanent residence.[145] The rationale behind granting Palestinians a set of civil rights but not political ones was demographic, as

[143] Ibrahim Matar, 'The Jewish Conquest of West and East Jerusalem: 1948 to the Present' (2011) 17 Palestine - Israel Journal of Politics, Economics, and Culture 214.
[144] Meron Benvenisti, *The West Bank Handbook: A Political Lexicon* (The Jerusalem Post 1986) 65; Haim Yacobi and Wendy Pullan, '"More for the Arab": On the Paradox of the Urban Settlements in Jerusalem' (2016) 47 Theory and Criticism 111, 114.
[145] Shafir, *A Half Century of Occupation: Israel, Palestine, and the World's Most Intractable Conflict* (n 137) 16.

awarding a large group of Palestinians citizenship would over time jeopardise the Jewish majority and give the Palestinians in Israel political power.[146]

The situation in the Syrian Golan Heights was different, as after the 1967 war, only about 6,500 residents remained in the area, out of a population of more than 150,000,[147] the vast majority forced to flee in what today would be called an act of ethnic cleansing.[148] In 1981, Israel passed a law to annex the Golan Heights and apply Israeli law there.[149] Within three days, the United Nations Security Council adopted Resolution 497, which 'decides that the Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is null and void and without international legal effect'.[150] Yet, Israel still holds the Golan Heights, and approximately 20,000 Israeli settlers currently live on the mountainous plateau.[151]

Shortly after the end of the 1967 war, the question of the West Bank and Gaza Strip's future arose. While some Israelis saw it as an opportunity to exchange 'land for peace',[152] others thought that holding on to the land was militarily necessary,[153] and for some religious and messianic groups the conquest was the realisation of the 'Greater Land of Israel' as had been promised in the Bible.[154] One of the main issues that bothered the Israeli authorities, was that any sort of annexation, that would involve granting Palestinians Israeli citizenship, would change dramatically the demographic equation between Jews and Palestinians in Israel—and this was considered an existential threat.[155] Indeed, over the years, one of Israel's central

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[146] Richard Falk and Virginia Q Tilley, 'Israeli Practices towards the Palestinian People and the Question of Apartheid' (2017) 1 Middle East Policy 1, 41–42.
[147] Moriel Ram, 'Colonial Conquests and the Politics of Normalization: The Case of the Golan Heights and Northern Cyprus' (2015) 47 Political Geography 21, 23.
[148] Neve Gordon and Moriel Ram, 'Ethnic Cleansing and the Formation of Settler Colonial Geographies' (2016) 53 Political Geography 20.
[149] The Golan Heights Law 1981 (IL).
[150] United Nations Security Council, 'Resolution 497 Israel-Syrian Arab Republic' (1981) <http://unscr.com/en/resolutions/doc/497> accessed 2 November 2020.
[151] Ram (n 147) 28.
[152] Michael Feige, *One Space, Two Places: Gush Emunim, Peace Now and the Construction of Israeli Space* (The Hebrew University Magnes Press 2002) 30–35.
[153] David Newman, 'Jewish Settlement in the West Bank: The Role of Gush Emunim' (University of Durham, Centre for Middle Eastern and Islamic Studies 1982) 17–20.
[154] ibid 20–22; Feige (n 152) 36–39; David Newman, 'From Hitnachalut to Hitnatkut: The Impact of Gush Emunim and the Settlement Movement on Israeli Politics and Society' (2005) 10 Israel Studies 192, 194–195.
[155] Elia Zureik, 'Demography and Transfer: Israel's Road to Nowhere' (2003) 24 Third World Quarterly 619, 620.

concerns has been the maintenance of a significant Jewish majority.[156] In 1967, there were almost 2.4 million Jews in Israel, and approximately 380,000 Palestinian citizens.[157] Granting citizenship an estimated 1.3 million Palestinians residing in the Occupied Territories would have altered the demographic equation from an 85% to a 65% Jewish majority.

Accordingly, Israel decided not to annexe the Occupied Palestinian Territories, yet shortly after the war different actors who wanted to make sure Israel continued to hold on to the territories, including right-wing political organisations like the Movement for Greater Israel and political parties like Gahal, launched the settlement project. Already in September, just three months after the war, Jewish settlers established Kfar Etzion in the West Bank.[158] The settlers enjoyed the support of the Labour government, and by 1977 when Labour lost the elections to the Likud, 38 settlements had already been established, dispersed throughout the West Bank.[159] Following the Likud takeover, even more money was allocated to the settlement enterprise in the Occupied Palestinian Territories and within 15 years an additional 83 settlements were established in the West Bank,[160] and 21 in Gaza Strip.[161] Today, there are 132 Israeli settlements and an additional 146 outposts in the West Bank.[162] By the end of 2021, more than 690,000 Jewish citizens—7.4% of Israel's citizenry and 9.9% of its Jewish citizenry—were living in the occupied West Bank and East Jerusalem.[163]

The formation of Israeli settlements in the West Bank has generated a situation in which two communities live in the same territory, one, the settlers, enjoying full privileges as Israeli citizens, and the other, the Palestinians, an occupied population that has no rights.[164] These groups are subjected to completely different legal systems, the Israeli settlers to Israeli civil law, and the Palestinians to Israeli military rule (I discuss this below).[165] Moreover, Israel's

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[156] Falk and Tilley (n 146) 31–32.
[157] Israeli Central Bureau of Statistics, 'Population, by Population Group' (2020).
[158] Idith Zertal and Akiva Eldar, *Lords of the Land - the War over Israel's Settlements in the Occupied Territories, 1967-2007* (Nation Books 2007) ch 1.
[159] Neve Gordon, *Israel's Occupation* (University of California Press 2008) 229–230.
[160] ibid 230–231.
[161] The Yesha Council, 'Gaza Coast Regional Council' <http://www.myesha.org.il/?CategoryID=172&ArticleID=56> accessed 23 November 2020.
[162] Peace Now, 'Data - Population' <https://peacenow.org.il/en/settlements-watch/settlements-data/population> accessed 27 August 2023.
[163] ibid.
[164] Michael Sfard, *The Wall and the Gate: Israel, Palestine, and the Legal Battle for Human Rights* (Metropolitan Books 2018) ch 3.
[165] Falk and Tilley (n 146) 30.

ongoing occupation of the West Bank and Gaza Strip has involved the deployment of a variety of methods that enabled the extensive domination over the occupied Palestinian population. These methods included setting up an extensive surveillance apparatus to monitor the population's every move[166] as well as implementing restrictions on movement[167] and assembly, deportations,[168] administrative detentions,[169] torture,[170] extra-judicial executions, collective punishment and massive dispossession.[171] They also include violations to economic and social rights such as the right to education,[172] adequate healthcare[173] and livelihood.[174]

Since the beginning of Israel's occupation of the West Bank, Gaza Strip and East Jerusalem, Palestinians have resisted Israeli rule.[175] The first popular uprising also known as the intifada erupted in December 1987 and lasted until September 1993.[176] It was mainly nonviolent, characterised by civil disobedience, including general strikes, tax strikes, and mass demonstrations, as well as setting barricades, throwing stones and Molotov cocktails.[177] Israel aimed to crush the uprising.[178] Mass arrests, administrative detentions, torture,[179] house

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[166] David Lyon, 'Identification, Colonialism, and Control: Surveillant Sorting in Israel/Palestine' in Elia Zureik, David Lyon and Yasmeen Abu-Laban (eds), *Surveillance and Control in Israel/Palestine: Population, territory, and power* (Routledge 2011).
[167] Yael Berda, *Living Emergency: Israel's Permit Regime in the Occupied West Bank* (Stanford University Press 2017).
[168] Orna Ben Naftali, Michael Sfard and Hedi Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press 2018) 78–94.
[169] Gordon (n 159) 52; Laleh Khalili, 'The Location of Palestine in Global Counterinsurgencies' (2010) 42 International Journal of Middle East Studies 413.
[170] Catherine M Gross, 'International Law in the Domestic Arena: The Case of Torture in Israel' (2000) 86 Iowa Law Review 305.
[171] Sfard, *The Wall and the Gate: Israel, Palestine, and the Legal Battle for Human Rights* (n 164) ch 4.
[172] Aimee Shalan and Samer Abdelnour, 'Another Casualty of Israel's Wars: Palestinians' Right to Education'; Nadera Shalhoub-Kevorkian, 'Palestinians, Education, and the Israeli "Industry of Fear"', *World Yearbook of Education 2010: Education and the Arab 'World': Political Projects, Struggles, and Geometries of Power* (2017).
[173] Angelo Stefanini and Hadas Ziv, 'Occupied Palestinian Territory: Linking Health to Human Rights' (2004) 8 160; Richard Horton, 'The Occupied Palestinian Territory: Peace, Justice, and Health' (2009) 373 Lancet 784; Aeyal Gross, 'Litigating the Right to Health under Occupation: Between Bureaucracy and Humanitarianism' (2018) 27 Minnesota Journal of International Law 421.
[174] Leila Farsakh, *Palestinian Labour Migration to Israel: Labour, Land and Occupation* (Routledge 2005) 40–41; Neve Gordon, 'From Colonization to Separation: Exploring the Structure of Israel's Occupation' (2008) 29 Third World Quarterly 25.
[175] Gordon (n 159) 148–149.
[176] F Robert Hunter, *The Palestinian Uprising: A War by Other Means* (University of California Press 1991) 67; Joel Beinin and Lisa Hajjar, 'Palestine, Israel and the Arab-Israeli Conflict' [2014] Midle East: The Middle East Research and Information Project 21; Ala Alazzeh, 'Seeking Popular Participation: Nostalgia for the First Intifada in the West Bank' (2015) 5 Settler Colonial Studies 251, 252.
[177] Beinin and Hajjar (n 176) 21–22.
[178] Hunter (n 176) 88; Lisa Hajjar, 'Human Rights in Israel/Palestine: The History and Politics of a Movement' (2001) 30 Journal of Palestine Studies 21, 27.

demolitions,[180] curfews and other forms of collective punishment became par for the game.[181] Nonetheless, the intifada spread like wildfire as Palestinian society mobilised. During four years, more than a thousand Palestinians were killed by Israeli forces[182] and tens of thousands were arrested.[183]

In August 1993, the negotiations between the Israeli Government and the Palestinian Liberation Organisation led to the first Oslo Accord. As part of this agreement, Israel officially recognised the PLO, and the two parties decided to establish the Palestinian Authority (PA).[184] The second Oslo Accord was signed in September 1995. According to this agreement, the West Bank would be divided to three areas, A, B and C, in which the control is divided between Israel and the PA.[185] In Area A, about 18 percent of the West Bank, the PA would receive both civil and security authority; in Area B, about 22 percent of the West Bank, the PA would be granted civil authority, and security would remain under Israeli control; in Area C, 60 percent of the West Bank, Israel would continue holding both civil and security authority.[186] According to Noura Erakat, Oslo II, by allowing Israel to maintain the occupation and preserve control over Palestinian life, 'reified the patchwork authority delegated to Palestinians, enshrined Israel as the sole source of all authority, and did not enhance the prospect of Palestinian independence'.[187] The alleged division of the West Bank constituted a reorganisation of Israel's occupation of the West Bank, not a withdrawal.[188] The implementation of the Oslo Accords continued until the 2000 Camp David Summit, at which point the two parties failed to reach a new agreement.[189]

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[179] Hajjar, 'Human Rights in Israel/Palestine: The History and Politics of a Movement' (n 178) 27.
[180] Efrat Silber, 'Israel's Policy of House Demolitions During the First Intifada, 1987 – 1993' (2010) 23 Terrorism and Political Violence 89, 97.
[181] Hunter (n 176) 90–94.
[182] Gordon (n 159) 156–157.
[183] Hunter (n 176) 90–95.
[184] Aeyal M Gross, *The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation*, vol 19 (2006) 181; Erakat (n 97) 166.
[185] Gross, *The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation* (n 184) 182–183.
[186] Erakat (n 97) 168.
[187] ibid.
[188] Gordon (n 174).
[189] Erakat (n 97) 170–173.

The al-Aqsa intifada erupted in September 2000, following Ariel Sharon's well publicised visit to Haram al-Sharif/Temple Mount.[190] The uprising's central goal was to end the Israeli occupation of the Palestinian Territories, but also, to stress the need of a democratic reform within the Palestinian Authority.[191] The second intifada was much more violent in comparison to the first, marked mainly by intense protests and suicide bombing against Israeli targets.[192] Israel's response was severe; aiming to crush the intifada it deployed excessive military force, using helicopters, tanks, and snipers.[193]

The al-Aqsa intifada was used to justify the construction of a 'Separation Barrier' within the West Bank. The 'Barrier's' route did not follow the border set out in the 1949 Armistice Agreement, but became a mechanism of dispossession, expropriating Palestinian land in the West Bank while separating Palestinian farmers from their agricultural plots, workers from their source of livelihood, patients from hospitals, pupils from schools and even the dead from ancestral cemeteries.[194] These were some of the reasons that in its advisory opinion, the International Court of Justice found the Israeli construction of the 'Barrier to violate' international law.[195]

Since the mid-1990s, due to Israel's agreement to refrain from establishing new settlements during the period of the Oslo Accords, settlers aided by government offices built a plethora of 'illegal outposts' throughout the West Bank.[196] While all of the settlements are illegal according to the international law,[197] the outposts are illegal, even according to Israeli domestic law. Yet, today 146 outposts are scattered throughout the West Bank, taking over

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[190] Rema Hammami and Salim Tamari, 'The Second Uprising: End or New Beginning?' (2001) 30 Journal of Palestine Studies 5, 5; Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (University of California Press 2005) 237.
[191] Rema Hammami and Jamil Hilal, 'An Uprising at a Crossroads' (2001) 219 Middle East Report 2, 3.
[192] ibid; Michele K Esposito, 'The Al-Aqsa Intifada: Military Operations, Suicide Attacks, Assassinations, and Losses in the First Four Years' (2005) 34 Journal of Palestine Studies 85.
[193] Esposito (n 192).
[194] Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge University Press 2017).
[195] David Kretzmer, 'The Advisory Opinion: The Light Treatment of International Humanitarian Law' (2005) 99 The American Journal of International Law 88, 89.
[196] Talia Sasson, 'Opinion Concerning Unauthorized Outposts (Sasson Report)' (2005) 19.
[197] Kretzmer, 'The Advisory Opinion: The Light Treatment of International Humanitarian Law' (n 195) 89.

large swaths of land.[198] Over the years, only two outposts were evicted, and 15 were legalised retroactively.[199]

While the West Bank remains under direct Israeli occupation, in 2005 the Israeli military announced the end of Israeli military rule in Gaza Strip.[200] The government's 'disengagement' plan included the unilateral withdrawal of all Israeli citizens and military troops from Gaza Strip,[201] in spite of the settlers objection and actual resistance to the evacuation.[202] Yet, Israel still controls both Gaza Strip's airspace and territorial waters, the access to Israel of both persons and goods, and Gaza Strip's population registration records.[203] In addition, Israel prevents Gaza from establishing a seaport or an airport.[204] De Facto, Israel has been holding Gaza under siege, and does not recognise the sovereignty of either the Hamas government (who won in the elections in 2006) or even the Palestinian Authority.[205]

1.1.4 Palestinian citizens in Israel

By the end of 2022, there were two million Palestinian citizens in Israel, comprising approximately 21 percent of the state's population.[206] While the military government was dismantled in 1966, the Palestinians in Israel did not become equal citizens. Already in 1950, the Law of Return determined in its first section that 'every Jew is entitled to immigrate to the state'.[207] The Citizenship Law of 1952 determined that every Jew that immigrated according to the Law of Return will be granted Israeli citizenship.[208] These essential acts anchored the inequality between Jewish and Palestinian citizens.[209]

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[198] Peace Now (n 162).
[199] ibid.
[200] Yuval Shany, 'Faraway, so Close: The Legal Status of Gaza after Israel's Disengagement' (2005) 8 Yearbook of International Humanitarian Law 369, 3.
[201] ibid 7.
[202] Newman (n 154) 212–216.
[203] Shany (n 200) 7; Falk and Tilley (n 146) 43–44.
[204] Shany (n 200) 7.
[205] Falk and Tilley (n 146) 44; Ben Naftali, Sfard and Viterbo (n 168) 355–357.
[206] Israeli Central Bureau of Statistics, 'Population, by Population Group (Table 2.1)' (n 4).
[207] Law of Return 1950 (IL) s 1.
[208] Citizenship Law 1952 s 2.
[209] Nadim Rouhana, 'The Political Transformation of in Israel: From the Palestinians Acquiescence to Challenge' (1989) 18 Journal of Palestine Studies 38, 40.

As long as Israel enshrines its Jewish character, emphasising that it is a state of the Jewish people, and not of all its citizens, the Palestinians in Israel remain second class citizens.[210] As Azmi Bishara describes, Israel 'is constructed not to be a state of many of its own citizens (currently close to 25% non-Jewish citizens […]), while at the same time aspiring to be a state of many non-citizens [Jews abroad]'.[211] Bishara distinguishes between two types of citizenships that were created out of Israel's Law of Return and Citizenship Law: essential, for Jews, and incidental, for Palestinian citizens.[212] Nimer Sultany explains that this system is an ideological one, directed at safeguarding a Jewish majority in Israel, and therefore its outcome is a 'differentiated citizenship', as its aim is to constitute inequality between Jews and Palestinians.[213]

Over the years, many laws, amendments and court decisions, have served to construct a social hierarchy in order to reinforce the inferior status of Palestinian citizens.[214] A recent example is the issue of family unification. In 2003, a temporary order of the citizenship law determined that family unification is prohibited for Israeli citizens with Palestinian spouses from the West Bank and Gaza Strip.[215] The High Court of Justice approved the order, that is renewed every couple of years, even though it is clear that its main purpose is to ensure that Israel maintains a Jewish majority, and to do so violates the right to family of Palestinian citizens only, who wish to live in Israel with their non-citizen Palestinian partners.[216]

The resistance of Israel's Palestinian citizens and their struggle for equality began with the establishment of the state. Over the years, a number of initiatives by Palestinian groups aimed to advance an equal society within Israel have emerged. In the early 1990's, Azmi Bishara and Jamal Zehalka presented the idea of 'a state of all its citizens', which stresses the state's

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[210] Amal Jamal, 'Constitutionalizing Sophisticated Racism: Israel's Proposed Nationality Law' (2016) 45 40, 47; Azmi Bishara, 'Zionism and Equal Citizenship Essential and Incidental: Citizenship in the Jewish State' in Nadim N Rouhana and Sahar S Huneidi (eds), *Israel and its Palestinian Citizens: Ethnic Privileges in the Jewish State* (Cambridge University Press 2017) 137.
[211] Bishara (n 210) 138.
[212] ibid 137–138.
[213] Nimer Sultany, 'The Legal Structures of Subordination: The Palestinian Minority and Israeli Law' in Nadim Rouhana and Sahar S Huneidi (eds), *Israel and its Palestinian Citizens: Ethnic Privileges in the Jewish State* (Cambridge University Press 2017) 205–208.
[214] Amal Jamal, 'Mechanisms of Governmentality and Constructing Hollow Citizenship: Arab Palestinians in Israel' in Nadim Rouhana and Sahar S Huneidi (eds), *Israel and its Palestinian Citizens: Ethnic Privileges in the Jewish State* (Cambridge University Press 2017) 181; Sultany (n 213) 191.
[215] Jamal (n 214) 181; Sultany (n 213) 209.
[216] Sultany (n 213) 211.

democratic character over the Jewish one.[217] They demanded full equality for the Palestinian citizens of Israel.[218] Around 2006, three documents were published by groups of Palestinian intellectuals—the Haifa Declaration, the Future Vision, and the Democratic Constitution.[219] All demanded the democratisation of the state, and individual and collective rights as well as civil and national equality for Palestinian citizens.[220]

Notwithstanding these demands, in July 2018 the Israeli Knesset voted in favour of 'Basic Law: Israel - the Nation State of the Jewish People'.[221] The law defines 'the Land of Israel' as the 'historical homeland of the Jewish people',[222] 'the State of Israel' as 'the nation state of the Jewish People',[223] and declares that 'the exercise of the right to national self-determination in the State of Israel is unique to the Jewish People'.[224] These assertions tilt the balance even further from the state's democratic character towards a Jewish ethnic identity.[225] The law goes on to declare that 'Jerusalem, complete and united, is the capital of Israel',[226] determines that 'the State shall be open for Jewish immigration, and for the Ingathering of the Exiles',[227] while 'the State views the development of Jewish settlement as a national value, and shall act to encourage and promote its establishment and strengthening'.[228] The Nation State basic law spurred significant protests across the country, but remained intact, formally subjugating the Palestinian citizens of Israel to the Jewish state.

1.2 The Evolution of the Israeli Domestic Legal System

Israeli domestic law, which informs the social relations I have been describing, is the result of an array of legal legacies that existed in its territory since the late nineteenth century. Over the years, five official judicial systems operated in the area, including an Ottoman Muslim-religious system, and a civil-secular one; British military-post-occupation system, and a civil-mandatory system; and since the formation of the State of Israel in 1948, the Israeli judicial

[217] Jamal (n 210) 46.
[218] ibid.
[219] ibid 47.
[220] ibid.
[221] Basic Law: Israel - the Nation State of the Jewish People 2018.
[222] ibid 1(a).
[223] ibid 1(b).
[224] ibid 1(c).
[225] Jamal (n 210) 41.
[226] Basic Law: Israel - the Nation State of the Jewish People s 3.
[227] ibid 5.
[228] ibid 7.

system.[229] Today, the Israeli legal system is defined as a combination of civil law, with Ottoman and British influences, including common law and equity, and religious law that applies partly for personal matters.[230]

During the Ottoman period, the central regime in Istanbul enacted laws that applied to the entire empire, hence no local judicial system was established in Ottoman Palestine.[231] During the Tanzimât period of reform of the Ottoman empire, from 1839 to 1879, new and mainly secular legislation was introduced, and a civil-secular judicial system was formed.[232] In 1918, when British troops captured Ottoman Palestine, they found an abandoned judicial system,[233] as Ottoman judges had fled the area, and all courts were closed.[234] The British regime had to form a new judicial system.[235]

This quest was assigned to the senior judicial officer in Palestine, Orme Bigland Clarke.[236] Clarke appointed local judges, Arabs and Jews, to the Magistrate's Courts, with British judges serving as heads of judicial panels and court presidents.[237] The British government's central interest was to change the procedural laws that had been in place, not the substantial ones, mainly due to efficiency considerations.[238] Many of the judges and lawyers that operated in the colonies were British officials, who were already familiar with British procedural law.[239] British legislation was imported through two central mechanisms, the High Commissionaire's legislation, and court ruling.[240] Article 46 of the 1922 Palestine Order in Council, stated that local courts will rule according to Ottoman and mandatory legislation, yet when facing a lacuna, an unanswered question, one will turn to common law and equity.[241] At

[229] Nathan Brun, *Judges and Lawyers in Eretz Israel: Between Constantinople and Jerusalem, 1900–1930* (The Hebrew University Magnes Press 2008) 1.
[230] Vered Deshe', *The Legal System in Israel* (Nevo Publishing 2019) 84–85.
[231] Brun (n 229) 15.
[232] ibid 16, 20.
[233] ibid 133.
[234] ibid 134.
[235] ibid.
[236] ibid.
[237] ibid 151.
[238] Assaf Likhovski, 'Between Two Worlds: The Legacy of the Mandatory Judicial System in the Early Years of the State of Israel' in Yehoshua Ben-Arieh (ed), *Jerusalem and the British Mandate: Interaction and Legacy* (Mishkenot Sha'ananim 2003) 257.
[239] ibid 258.
[240] ibid 261.
[241] ibid.

the end of the British Mandate over Palestine, in 1948, the British government left behind a 'mixed' legal system, that is partly based on Ottoman law and partly on British law.[242]

In late 1947, when it became clear that the British Mandate was about to end, the Jewish Situation Committee responsible for making arrangements for the future state formed a juridical council to plan and establish the Israeli legal system.[243] The committee examined different options, including the adoption of mandatory law, adopting the continental system and importing laws from European countries, or forming a new system based on Hebrew religious law.[244] Ultimately, they decided to maintain the Mandatory laws as stipulated in the Law and Administration Ordinance that was legislated shortly after the state's establishment.[245] The Ordinance was legislated promptly and under pressure, and was regarded as a temporary solution for urgent matters.[246]

Yet, the Ordinance was not temporary and it has had significant long term consequences.[247] Section 11 to the Ordinance states that the existing law will remain in force, as long as it does not contradict the Ordinance itself or any new Israeli legislation.[248] The Ordinance also created a normative continuity based on the norms within the mandatory law.[249] Section 17 provides that courts will continue operating according to the authorities granted to them by law.[250] Thus, it sets a continuity of the judicial system as well.[251] The Ordinance also prevented the implementation of Hebrew law, and any later attempts to integrate this body of law remained marginal or failed.[252]

The Israeli Declaration of Independence stipulated that by October 1st, 1948, a Constitutive Assembly would be elected to formulate the Israeli constitution.[253] But the assembly was never elected, and differences regarding the content of the proposed constitution grew wide. In 1950, the Harari Resolution was accepted, determining that basic laws will be legislated

[242] ibid 263.
[243] Ron Harris, *The Israeli Law - The Formative Years: 1948-1977* (Hakibbutz Hameuchad 2014) 25.
[244] ibid 26.
[245] Law and Administration Ordinance 1948.
[246] Harris (n 243) 49–50.
[247] ibid 51.
[248] Law and Administration Ordinance s 11.
[249] Harris (n 243) 22.
[250] Law and Administration Ordinance s 17.
[251] Harris (n 243) 22.
[252] ibid 17.
[253] The State of Israel (n 81).

over time, to be integrated into one comprehensive constitution in the future.[254] Over the years, 14 basic laws have been adopted, mostly concerning the operation of government authorities.

From 1948, and more significantly from the 1960's, Israeli law began moving away from its mandatory legacy, specifically from its Ottoman parts.[255] Yet, Mandatory system continues to have a significant impact as some of the most fundamental characteristics informing the Israeli juridical system can be traced back to it. These include the principle of precedent, the normative role of judges in court, and the central function of advocates in the legal procedure.[256] In addition, entire areas in Israeli law are still based on mandatory legislation, even though some laws have been amended over the years (tort, tax, criminal law, civil and criminal procedure).[257]

In the 1990's, two basic laws that anchor and secure human rights were adopted by the Israeli legislature – 'Basic Law: Human Dignity and Freedom', and 'Basic Law: Freedom of Occupation'. This legislation is often referred to as the Israeli 'constitutional revolution', since it elevated a set of human rights to a constitutional normative level.[258] The Basic Laws stipulate a set of rights, including the right to life, dignity, property, freedom, privacy, freedom of movement and freedom of occupation.[259] According to the laws, any violation of these rights by any state authority can be carried out only if they conform to a set of conditions that are specified in the laws' 'limitation clause'.[260] Infringement of the rights stipulated in these Basic Laws can be upheld only if it is carried out by means of law, that the law suits the State's values, that the law was legislated for an appropriate purpose, and that the infraction is proportional.[261] Hence, the two Basic Laws paved the way for the Israeli Supreme Court to practice judicial review, as ordinary laws that are legislated by the Knesset

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[254] Harris (n 243) 61–62.
[255] Likhovski, 'Between Two Worlds: The Legacy of the Mandatory Judicial System in the Early Years of the State of Israel' (n 238) 264.
[256] ibid.
[257] ibid; Yoram Shachar, 'The Sources of the Criminal Code Ordinance 1936' (1979) 7 Tel Aviv University Law Review.
[258] Aharon Barak, 'A Constitutional Revolution: Israel's Basic Laws' (1993) 4 Constitutional Forum 83, 83; Yoram Rabin and Yuval Shany, 'The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights' (2003) 37 Israel Law Review 299, 310–314; Aharon Barak, 'Human Rights in Israel' (2006) 39 Israel Law Review 12, 18–21.
[259] Basic Law: Human Dignity and Freedom 1992 s 2,3,5,6,7; Basic Law: Freedom of Occupation 1994 s 3.
[260] Basic Law: Human Dignity and Freedom s 8; Basic Law: Freedom of Occupation s 4.
[261] Basic Law: Human Dignity and Freedom s 8; Basic Law: Freedom of Occupation s 4.

which violate a protected right, and do not do so according to the conditions stipulated in the limitation clause can be annulled. Notably, however, the right to equality is missing from both Basic Laws while the values of the State can be discriminatory since they highlight its Jewish character.[262]

The Israeli judicial system is formed as a pyramid, with 29 Magistrates Courts at the base, that are spread across the country. Six District Courts located in Jerusalem, Tel Aviv, Haifa, Be'er Sheva, Lod, and Nazareth form the middle of the pyramid and the Supreme Court sits at the apex, functioning also as the High Court of Justice. In parallel, several exclusive courts operate, including Labour Court, Family Court, and Administrative Court.[263] Religious Courts operate as well, and have a limited authority over personal matters—Rabbinic courts, Sharia courts, and tribunals of the different Christian communities.[264]

The system is adversarial, the passive judge is expected to rule based on the evidence presented by both sides.[265] In general, the right to appeal is granted for the first instance's decision, both in criminal and civil suits, but further appeals depend on court approval.[266] To petition against state authority, the Supreme Court sits as High Court of Justice, and since 1992, some of the matters are directed to the Administrative Court.[267]

According to former Supreme Court President, Aharon Barak the Israeli juridical system is informed by the 'principles of equality, justice, morals. They spread over social objectives of separation of powers, rule of law, freedom of expression, freedom of procession, religion, occupation, human dignity, righteousness of the law, public safety and security, the democratic values of the state and its very existence. These principles include good faith, natural justice, fairness and reasonableness'.[268] Ultimately, Israeli Jewish citizens enjoy what superficially resembles a robust judicial and perceived democratic system. By contrast, many

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[262] David Kretzmer, 'The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law' (1992) 26 Israel Law Review 238, 243–244; Sultany (n 213) 196.
[263] 'The Israeli Judicial Authority' <https://www.gov.il/he/departments/the_judicial_authority> accessed 23 November 2020.
[264] Deshe' (n 230) 86.
[265] ibid.
[266] ibid 168–171.
[267] Administrative Courts Law 1992.
[268] *CA 677/83 Shmuel Borochov v Ze'ev Yefet* (1983) 39(3) 205, 4.

Palestinian citizens perceive the Supreme Court as a tool of the State that accepts the state's logic and values, and defends its premises.[269]

1.3 The legal system in Israel/Palestine

Shortly after the 1967 war had ended, difficulties regarding the legal status of the occupied territories, the law that applied there, and sovereignty over the area, emerged.[270] While answers to those questions have continued to be debated over the years, Israeli authorities have, nonetheless proceeded in developing a complex legal system in the territories formed out of legislation from former regimes, including Ottoman, British, Egyptian and Jordanian law; military decrees, ordinances and proclamations adopted by the military commander.[271]

In June 7, 1967, while the battles on other fronts were yet to be concluded, the military commander in the West Bank issued Proclamation Two, a military order which determined that the existing law in the occupied territories will remain in force as long as it does not contradict any military order.[272] Over the years, the legislative power of the military commanders served to alter and replace former laws, and these orders rapidly exceeded the basic amendments needed to protect the life and property of the occupied population, as permitted by the international law of occupation. Thousands of orders have been issued, establishing and maintaining a complex legal apparatus in the Territories.[273] In 1970, the Security Provisions Order came into force, constituting the new penal code of the Territories.[274] Under these provisions, the Military Courts System was established, and until this day it serves to prosecute Palestinians from the West Bank and Gaza Strip in front of

[269] Sultany (n 213).
[270] Moshe Drori, *The Legislation in the Area of Judea and Samaria* (The Sacher Institute for Legislative Research and Comparative Law, Hebrew University of Jerusalem 1975) 23.
[271] ibid 93–94; Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (n 190); Smadar Ben-Natan, 'The Application of Israeli Law in Military Courts in the Occupied Territories' (2014) 43 Theory and Criticism 45.
[272] Proclamation Regarding Regulation of Administration and Law (The West Bank Region) (No. 2) 1967.
[273] Gordon (n 159) 27.
[274] Security Provisions Order (Consolidated Version) (West Bank) (No. 378) 1970.

military judges, according to the military rule.[275] In 1989, a Military Court of appeals was established as well.[276]

The idea was that in the pre-1967 borders Israeli law would be used, while military rule would regulate the people and land within the territories occupied in 1967. As the Israeli settlements in the Occupied Territories expanded, with a growing number of Israeli Jews residing outside the State's official jurisdiction, a solution was needed so Israeli settlers would not be prosecuted in military courts according to local Jordanian/Egyptian law or military law, like the stateless Palestinians. To avoid a direct application of Israeli law to the territories which is prohibited according to international law, the Israeli Parliament decided that specific laws could be applied personally rather than territorially.[277] This way, Israeli civil courts obtained jurisdiction over Israeli citizens who lived outside its internationally recognised borders, while their Palestinian neighbours remained subject to the military legal system, that derives its power from the international law of occupation.

Furthermore, shortly after the 1967 war, the Israeli Supreme Court agreed to review actions carried out by the military in the territories that had been occupied.[278] The separation that had been kept to some extent at the legislative level, was obfuscated by the court in what some have called the juridical annexation of the occupied territories. Baruch Kimmerling demonstrates how in fact, the selective application of international humanitarian law in the region has been accompanied by a series of Supreme Court decisions that served to advance the crawling annexation of the Occupied Palestinian Territories.[279] No international provision constitutes the right of an occupied population to file petitions to its occupier's domestic court. This is a precedent set by the Supreme Court the moment it agreed to hear the first Palestinian petition,[280] as the State representative did not argue against it, and the Court itself

[275] Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (n 190); Ben-Natan (n 271).
[276] Sharon Weill, 'The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories' (2007) 89 International Review of the Red Cross 395, 402.
[277] Amnon Rubinstein, 'The Changing Status of the Territories (West Bank and Gaza): From Escrow to Legal Mongrel' (1988) 8 Tel Aviv University Studies in Law 59, 69.
[278] Kretzmer, 'The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law' (n 262).
[279] David Kretzmer, *The Occupation of Justice* (State University of New York Press 2002); Baruch Kimmerling, *Clash of Identities: Explorations in Israeli and Palestinian Societies* (Columbia University Press 2008); Sfard, *The Wall and the Gate: Israel, Palestine, and the Legal Battle for Human Rights* (n 164).
[280] Kimmerling, *Clash of Identities: Explorations in Israeli and Palestinian Societies* (n 279) 189.

did not question the Palestinian applicant's right to apply to the Supreme Court.[281] Over the years, the Supreme Court served as a central arena[282] for Palestinians who tried to challenge the military regime and its actions.[283] Such rulings, that at times apply domestic law to an occupied territory, can be construed as a violation of international law provisions.[284]

The International Law of Occupation is considered a subcategory of International Humanitarian Law. Its main sources are the 1907 Hague Regulations, the 1949 Fourth Geneva Convention, and the 1977 Additional Protocols. While Israel signed and ratified the Fourth Geneva Convention in 1951,[285] the State constantly claims that the treaty does not apply to the Occupied Territories, and that only its humanitarian directions will be implemented there,[286] yet, which provisions are supposed to be respected had remained unclear. Israel defines the Occupied Palestinian Territories as administered territories instead of occupied, claiming that the Palestinians never held sovereignty over the area and therefore Israel did not occupy it from them.[287] The Supreme Court accepted this idiosyncratic interpretation, disregarding the accepted view among experts and UN member states.[288]

While de jure, Israel did not directly apply its domestic law to the territories, to avoid an act of unilateral annexation, legal experts have shown how a variety of tactics employed by the military regime in the Occupied Territories, including administrative detentions, deportations, house demolitions, establishment of civil settlements and the construction of the 'Separation Barrier', violates international law.[289] Scholars maintain that de facto, Israel simultaneously accepts and rejects parts of the international law provisions, to advance its own interests in

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[281] Meir Shamgar, 'The Observance of International Law in the Administered Territories', *The Progression Of International Law* (Brill | Nijhoff 2011) 440–441.
[282] In July 2018, as part of amendment 117 to the Courts of Administrative Matters Law, section 5A, that grants the authority to hear petitions regarding the West Bank affairs to the Court of Administrative Matters in Jerusalem, was added. According to clause 11, the Supreme Court serves as instance of appeal; Courts of Administrative Matters Act 2000 (IL) ss 5A, 11.
[283] Kretzmer, *The Occupation of Justice* (n 279); Sfard, *The Wall and the Gate: Israel, Palestine, and the Legal Battle for Human Rights* (n 164).
[284] Yaël Ronen, 'Applicability of Basic Law: Human Dignity and Freedom in the West Bank' (2013) 46 Israel Law Review 135, 145.
[285] Rubinstein (n 277) 63.
[286] ibid 63–64.
[287] Ronen (n 284) 136.
[288] Rubinstein (n 277) 66.
[289] Kretzmer, *The Occupation of Justice* (n 279); Gordon (n 159); Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (n 194); Sfard, *The Wall and the Gate: Israel, Palestine, and the Legal Battle for Human Rights* (n 164).

the West Bank. Focusing on the role played by international tribunals that discussed these matters, Aeyal Gross has argued that the occupation itself rather than specific acts within it has become illegal.[290]

1.4 Apartheid

Other scholars have argued that de facto the Green Line separating the pre-1967 borders and the territories occupied during the war no longer exists. They suggest that the space between the Jordan valley and the Mediterranean Sea is actually contiguous, no longer divided into various units, and that within it different people reside and are governed by different legal systems. Some of these scholars have characterised Israel as an Apartheid regime.[291]

Already in the 1980s, a few scholars began claiming that there exists an apartheid regime in Israel/Palestine. While such voices remained limited during the 1990s, in the 2000s, the concept of apartheid in Israel/Palestine became more prevalent.[292] Already in 2007, John Dugard, the Special Rapporteur on the situation of human rights in the Palestinian territories, raised questions as to whether Israel is in breach of the prohibition of apartheid in international law, with regards to its control over the occupied Palestinian territories.[293] In 2014, Amelia Smith and Penny Green described the 'physical structures of apartheid' that Israel had established in the occupied territories, including the 'Separation Barrier', segregated roads accessible for Israeli citizens only, and military checkpoints, spread across the West Bank, that severely restrict the movement of noncitizen Palestinians.[294] In 2017, a pathbreaking report of the United Nations Economic and Social Commission for Western Asia written by Richard Falk and Virginia Tilley found that 'on the basis of scholarly inquiry

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[290] Gross, *The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation* (n 184); Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (n 194); A Dirk Moses, 'Empire, Resistance, and Security: International Law and the Transformative Occupation of Palestine' (2017) 8 Humanity: An International Journal of Human Rights, Humanitarianism, and Development 379.
[291] Oren Yiftachel, 'Between Colonialism and Ethnocracy: "Creeping Apartheid" in Israel/Palestine' in Na'eem Jeenah (ed), *Pretending Democracy - Israel an Ethnocratic State* (Afro-Middle East Centre 2012); John Dugard and John Reynolds, 'Apartheid, International Law, and the Occupied Palestinian Territory' (2013) 24 European Journal of International Law 867; Falk and Tilley (n 146).
[292] Dugard and Reynolds (n 291) 868.
[293] John Dugard, 'Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"' (United Nations General Assembly 2007) A/HRC/4/17.
[294] Amelia Smith and Penny Green, 'Forced Evictions in Israel-Palestine' (MEMO Publishers 2014); See also: Penny Green and Amelia Smith, 'Evicting Palestine' (2016) 5 State Crime Journal 81.

and overwhelming evidence, […] Israel is guilty of the crime of Apartheid'.[295] Recently, international, Palestinian, and Israeli human rights organisations have published a series of reports, which also define the Israeli regime as apartheid.[296]

The term 'apartheid' has two main sources for definition. One, is the actual apartheid regime that took place in South Africa, from 1948 to 1994. The other is the universal concept of apartheid in international law. While some scholars compare the reality in Israel/Palestine to that of apartheid South Africa, others prefer to follow the universal definition of apartheid to evaluate the situation in Israel/Palestine. Richard Falk and Virginia Tilley, for instance, stress that the comparison of the Palestinian reality to Southern Africa is problematic, as it ignores the universal dimension of the prohibition of apartheid. They emphasise that every apartheid system that will be formed in a state will be necessarily different, yet it will still be apartheid.[297]

There exist several sources for the prohibition of apartheid in the international law, including the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), Additional Protocol (I) to the Geneva Conventions (1977), and the Rome Statute of the International Criminal Court (1998).[298] While the State of Israel did not join any of these treaties, it is a party to the International Convention on the Elimination of All Forms of Racial Discrimination (1965), which, in article 3, determines that: 'States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction'.[299]

The International Convention on the Suppression and Punishment of the Crime of Apartheid was introduced in 1973, and currently 109 states are party to the convention.[300] The convention defines 'the crime of apartheid' as 'inhuman acts, committed for the purpose of

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[295] Falk and Tilley (n 146) 51.
[296] Al-Haq – Law in the Service of Man and others (n 1); Sfard, 'The Israeli Occupation of the West Bank and the Crime of Apartheid: Legal Opinion' (n 1); B'Tselem (n 1); Shakir (n 1); Amnesty International (n 1).
[297] Falk and Tilley (n 146) 14–16.
[298] ibid 12.
[299] United Nations General Assembly, 'International Convention on the Elimination of All Forms of Racial Discrimination' (1965) s 3 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> accessed 30 November 2020.
[300] United Nations Treaty Collection, 'International Convention on the Suppression and Punishment of the Crime of Apartheid' <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-7&chapter=4&clang=_en> accessed 30 November 2020.

establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them'.[301] 'Inhuman acts' stipulated in the convention include: denial of the right to life and liberty;[302] deliberate imposition of living conditions that are intended to cause physical destruction;[303] measures designed to prevent participation in the political, social, economic and cultural life of the country, and the deliberate creation of conditions preventing full development, in particular by denying basic human rights and freedoms;[304] measures to divide the population along racial lines, including segregation in residence, prohibition of mixed marriages, and expropriation of landed property;[305] exploitation of labour;[306] and persecution of those who oppose apartheid.[307]

Additional Protocol I to the Geneva Conventions defines 'practices of "apartheid" and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination'[308] as a grave breach of the protocol 'when committed wilfully and in violation of the Conventions or the Protocol'.[309] The Rome Statute of the International Court classifies the crime of apartheid as a crime against humanity.[310] Article 7(2)(h) to the Statute defines the crime of apartheid as 'inhumane acts […] committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime'.[311] This set of prohibitions constitute a universal definition of apartheid, which is based on the South African regime, but acknowledges the possibility that such a regime will be formed in other countries.

In November 2019, a group of Palestinian organisations submitted a joint parallel report to the United Nations Committee on the Elimination of Racial Discrimination, on Israel's

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[301] United Nations General Assembly, 'International Convention on the Suppression and Punishment of the Crime of Apartheid' (1973) s II.
[302] ibid II(a).
[303] ibid II(b).
[304] ibid II(c).
[305] ibid II(d).
[306] ibid II(e).
[307] ibid II(f).
[308] 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)' art 85(4)(c).
[309] ibid 85(4).
[310] UN General Assembly, 'Rome Statute of the International Criminal Court' art 7.
[311] ibid 7(2)(h).

periodic report to the Committee.[312] Following an in-depth analysis, the report concludes that 'Israel has created an institutionalised regime of systematic racial domination and oppression over the Palestinian people as a whole, amounting to the crime of apartheid'.[313] The report suggests that 'Israel's fragmentation of the Palestinian people is a main tool through which it maintains its apartheid regime'.[314]

In June 2020, Yesh Din, an Israeli human rights organisation, published its legal opinion regarding 'The Israeli Occupation of the West Bank and the Crime of Apartheid'.[315] The document concludes that 'the crime against humanity of apartheid is being committed in the West Bank. The perpetrators are Israelis, and the victims are Palestinians'.[316] The legal opinion focuses on the West Bank only, excluding East Jerusalem, and therefore evaluates the situation since 1967. In April 2021, B'Tselem, another Israeli human rights organisation, published a position paper titled 'This is Apartheid'.[317] The organisation found that: '[t]he Israeli regime, which controls all the territory between the Jordan River and the Mediterranean Sea, seeks to advance and cement Jewish supremacy throughout the entire area'.[318] According to B'Tselem, the Israeli apartheid regime has developed over time since the occupation of the West Bank, East Jerusalem, and the Gaza strip in 1967.[319]

Also in April 2021, Human Rights Watch (HRW), an international human rights organisation, published its report 'A Threshold Crossed', regarding the reality in Israel/Palestine.[320] HRW found that '[…] the Israeli government has demonstrated an intent to maintain the domination of Jewish Israelis over Palestinians across Israel and the OPT. In the OPT, including East Jerusalem, that intent has been coupled with systematic oppression of Palestinians and inhumane acts committed against them. When these three elements occur together, they amount to the crime of apartheid'.[321] Thus, HRW found that there exists an apartheid regime in the entire area between the river and the sea, and that the crime of

[312] Al-Haq – Law in the Service of Man and others (n 1).
[313] ibid 54.
[314] ibid.
[315] Sfard, 'The Israeli Occupation of the West Bank and the Crime of Apartheid: Legal Opinion' (n 1).
[316] ibid 57.
[317] B'Tselem (n 1).
[318] ibid 7.
[319] B'Tselem (n 1).
[320] Shakir (n 1).
[321] ibid 10.

apartheid is committed in the occupied territories.[322] Almost a year later, in February 2022, Amnesty International published its own report, titled 'Israel's Apartheid against Palestinians'.[323] The report concludes that 'Israel has established and maintained an institutionalised regime of oppression and domination of the Palestinian population for the benefit of Jewish Israelis – a system of apartheid – wherever it has exercised control over Palestinians' lives since 1948'.[324] Thus, Amnesty found that both the crime of apartheid and an apartheid regime take place in the whole territory between the river and the sea, since the establishment of the state.

This series of reports, by organisations that previously defined the occupation as their main target, indicates a major shift, both in the political reality between the river and the sea, and in the organisations' interpretation and analysis of that very reality.

1.5 Settler Colonialism

Scholars have defined the Zionist enterprise, and later the State of Israel, as a settler colonial project.[325] The fundamental characteristic of settler colonial projects, which also distinguishes them from other colonial enterprises is, as Patrick Wolfe simply puts it, that '[t]he colonisers come to stay'.[326] Wolfe, who is widely recognised as the founder of the academic field of settler colonial studies, identifies the 'logic of elimination' as another key characteristic of settler colonial regimes. According to Wolfe, 'settler colonies were not primarily established to extract surplus value from indigenous labour. Rather, they are premised on displacing indigenes from (or *re*placing them on) the land'.[327] In other words, while colonialism is focused on the exploitation of the native community, settler colonialism is directed at the elimination of the natives.

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[322] Shakir (n 1).
[323] Amnesty International (n 1).
[324] ibid 266.
[325] Nadim N Rouhana and Areej Sabbagh-khoury, 'Settler-Colonial Citizenship: Conceptualizing the Relationship between Israel and Its Palestinian Citizens' (2015) 0 Settler Colonial Studies 1, 205; Lorenzo Veracini, *Israel and Settler Society* (Pluto Press 2015) 1; Lorenzo Veracini, 'What Can Settler Colonial Studies Offer to an Interpretation of the Conflict in Israel–Palestine?' (2015) 5 Settler Colonial Studies 268, 268; Raef Zreik, 'When Does a Settler Become a Native? (With Apologies to Mamdani)' (2016) 23 Constellations 351, 358–360; Yuval Evri and Hagar Kotef, 'When Does a Native Become a Settler? (With Apologies to Zreik and Mamdani)' [2020] Constellations 1467, 3.
[326] Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (n 19) 2.
[327] ibid 1.

Taking into account the differences among settler colonial projects, which take place in varied countries and different eras, Patrick Wolfe and Lorenzo Veracini identified shared characteristics of settler colonial regimes across the world. These include the significance of the territory itself, as Wolfe asserts, contrary to colonialism which is focused on value and profit, '[t]he primary object of settler-colonisation is the land itself', and therefore 'settler colonisation is at base a winner-take-all project whose dominant feature is not exploitation but replacement'.[328] The relation between settler colonialism and colonialism is understood differently among scholars, Wolfe, for instance, sees settler colonialism as one type of colonialism,[329] while Veracini claims that they 'should not only be seen as separate but also construed as antithetical'.[330] Another characteristic is the continuous nature of the project, that does not take place in a particular historical moment, but is an ongoing structure which is directed at eliminating the indigenous population.[331] The element of supremacy, as Caroline Elkins and Susan Pedersen explain that 'settler colonialism is defined […] also by a particular structure of privilege',[332] and is 'marked by pervasive inequalities, usually codified in law, between settler and indigenous populations'.[333]

The division of society into groups is another point of disagreement for some scholars, Veracini, for example, describes three pertinent groups in the settler-colonial setting, the indigenous, the settler, and the exogenous other,[334] while Wolfe asserts that there are only two relevant groups, the indigenous and the settlers, hence everyone who is not indigenous is a settler.[335] Another important feature of settler colonialism is the pressure to expand which keeps this regime in continuous motion. Some scholars criticise this restricted set of components which they claim limits the paradigm's scope.[336] They argue that in fact, many settler colonial societies were built on the exploitation of indigenous populations, rather than

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[328] ibid 163.
[329] Lorenzo Veracini, 'Patrick Wolfe's Dialectics' (2016) 40 Aboriginal History 249, 250.
[330] Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (Palgrave Macmillan 2010) 11–12.
[331] Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (n 19) 163.
[332] Caroline Elkins and Susan Pedersen (eds), *Settler Colonialism in the Twentieth Century* (Routledge 2005) 4.
[333] ibid.
[334] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 16.
[335] Veracini, 'Patrick Wolfe's Dialectics' (n 329) 250.
[336] Robin DG Kelley, 'The Rest of Us: Rethinking Settler and Native' (2017) 69 American Quarterly 267; Shannon Speed, 'Structures of Settler Capitalism in Abya Yala' (2017) 69 American Quarterly 783; Sai Englert, 'Settlers, Workers, and the Logic of Accumulation by Dispossession' (2020) 52 Antipode 1647.

an effort to eliminate them, or involved both policies of exploitation and elimination simultaneously.[337]

The writing about settler colonialism began years before Wolfe's work, and particularly in the context of the Palestinian struggle.[338] Fayez Sayegh described the 'Zionist settler-community' and the 'Zionist settler-state' in 1965, emphasising Israel's discriminatory character, and its pressure for territorial expansion.[339] More recently, Raef Zreik emphasises that although some aspects of the Israeli regime do not coincide with the settler colonial framework, '[a]s far as the dynamics, the technology, the settling project of taking over the land, and the relationship to the native are concerned, Zionism does fit into [the] paradigm'.[340] Such settler colonial efforts to transfer Palestinians from their homeland and constitute them as non-indigenous to the land include the expulsions across international borders during the 1948 war as well as internal displacement within state borders. It also involves the erasure of Palestinians from Israel's history,[341] and their conceptual displacement by referring to Palestinians as 'Arabs', and designating the Bedouin community as 'nomads' who have no present or historic connection to the land.[342]

At the same time, Zionist efforts have been focused on constituting the Jewish people as indigenous to Palestine. Such endeavours include geographical and historical manoeuvres. Geographically, we witness the Judaisation of space through acts of dispossession followed by destruction of Palestinian edifices and landscape, the removal of the population, and the changing the names of places, mainly using biblical references. Alongside the erasure of Palestinian geography and demography, one can witness the erasure of Palestinian history, both through the elision of Palestinian history in the region and the promotion of a narrative that presents the Zionist project as 'Jewish return' to the biblical land which had been promised to the Jews and had belonged to Jews before their expulsion in 70 CE.[343]

[337] Kelley (n 336) 271; Speed (n 336) 785; Englert (n 336) 1647.
[338] Rana Barakat, 'Writing/Righting Palestine Studies: Settler Colonialism, Indigenous Sovereignty and Resisting the Ghost(s) of History' (2018) 8 Settler Colonial Studies 349, 349.
[339] Fayez Sayegh, 'Zionist Colonialism in Palestine (1965)' (2012) 2 Settler Colonial Studies 206.
[340] Zreik (n 325) 357.
[341] Veracini, *Israel and Settler Society* (n 325) 69.
[342] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 35–36.
[343] Masalha (n 131) 51–52.

1.6 The Development of Israeli Legal Education

It is within the legal and political context outlined above that I aim to interrogate the present-day legal education system in Israel. The origins of this system can be traced back to the Ottoman period when legal education was first established, then through the British Mandate era when Israeli higher education institutions were first formed, and later to the foundation of the State of Israel.

In the Ottoman period, no law school existed in Palestine. To study law, students had to travel abroad, whether to the law faculty in Istanbul, that was established during the Tanzimât period, or to universities in Europe.[344] In 1909, following the Young Turks Revolution, a group of young Jews travelled from Palestine to study law at Istanbul University.[345] Their goal was to gain skills to advance the interests of the Jewish population in Palestine and to contribute to the Zionist struggle.[346] Indeed, out of this small group of Jews who studied law in Istanbul, one became the president of Israel, two prime ministers, including David Ben-Gurion, and others returned to be ministers or leaders of central Zionist institutions.[347]

The British introduced legal education in Mandatory Palestine. No less than three distinct institutions offered legal education or research in various legal fields during the Mandate. In 1920, Norman Bentwich, the attorney general of Mandatory Palestine, established the first local law school, in Jerusalem, 'Law Classes'.[348] The school offered vocational education, that suited the needs of the British government,[349] offering classes delivered by both local and British judges, lawyers and government officials.[350] The school provided its students with a diploma which allowed them to practice law, not an academic certificate.[351] The curriculum of Law Classes was based on formalist approaches to the law.[352]

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[344] Brun (n 229) 16.
[345] ibid 73.
[346] ibid.
[347] ibid 75.
[348] Assaf Likhovski, 'Legal Education in Mandatory Palestine' (2001) 25 Tel Aviv University Law Review 291, 298.
[349] Assaf Likhovski, 'Colonialism, Nationalism and Legal Education: The Case of Mandatory Palestine' in Ron Harris and others (eds), *The History of Law in a Multi-Cultural Society: Israel 1917-1967* (Ashgate 2002) 75.
[350] Likhovski, 'Legal Education in Mandatory Palestine' (n 348) 300.
[351] ibid 301.
[352] Likhovski, 'Colonialism, Nationalism and Legal Education: The Case of Mandatory Palestine' (n 349) 75.

The 'Higher School for Law and Economics' was established by researchers who were active in the 'Movement for Revitalisation of Hebrew Law',[353] and considered the school as part of the Jewish nation building project.[354] The four-year course was taught by former researchers and professors in universities abroad.[355] The school's mission was to produce national lawyers, academic scholars and future political leaders.[356] The Higher School never gained accreditation,[357] but continued to operate until 1959, when it merged with the Law School at Hebrew University.[358]

The Hebrew University in Jerusalem did not provide legal education or training during the British Mandate era. The university focused its work on scholarship, and could not compete with 'Law Classes', that received governmental recognition and support from British authorities.[359] Only 'Law Classes' graduates were allowed to apply for an internship and then take the bar exam to be licensed as lawyers.[360] In the summer of 1947, efforts to establish a law faculty in the Hebrew University recommenced due to the understanding that the British Mandate was about to end, leading to the closure of 'Law Classes' and the ensuing decision that the University should take part in the training of the future state's jurists.[361] Studies began in November 1949, shortly after the end of the 1948 war, and 200 students immediately enrolled.[362] Many of the lecturers in the new faculty were influenced by academic institutions in Continental Europe, and they shaped the character of legal education.[363] Since the 1950's, Israeli law schools have been largely informed by legal formalism, both in research and in

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[353] Uri Cohen, 'The School of Law and Economics in Lei-Aviv, 1935-1948: The Hopeless Pursuit of Political-Academic Legitimacy' (2009) 25 Bar-Ilan Law Studies 179, 183.
[354] ibid 187.
[355] Likhovski, 'Legal Education in Mandatory Palestine' (n 348) 311.
[356] Likhovski, 'Colonialism, Nationalism and Legal Education: The Case of Mandatory Palestine' (n 349) 75.
[357] Cohen, 'The School of Law and Economics in Lei-Aviv, 1935-1948: The Hopeless Pursuit of Political-Academic Legitimacy' (n 353) 211.
[358] Likhovski, 'Legal Education in Mandatory Palestine' (n 348) 315.
[359] ibid 334.
[360] Assaf Likhovski, 'Law Studies at the Hebrew University during the Period of the Mandate' in Hagit Lavsky (ed), *History of the Hebrew University Project*, vol 2 (The Hebrew University Magnes Press 2005) 548; Cohen, 'The School of Law and Economics in Lei-Aviv, 1935-1948: The Hopeless Pursuit of Political-Academic Legitimacy' (n 353) 194.
[361] Likhovski, 'Law Studies at the Hebrew University during the Period of the Mandate' (n 360) 567.
[362] Nathan Feinberg, 'At the 25th Anniversary of the Faculty of Law' (1975) 6 The Hebrew University Law Journal 231, 240–241.
[363] Asher D Grunis, 'Legal Education in Israel: The Experience of Tel-Aviv Law School' (1975) 27 Journal of Legal Education 203, 206.

teaching, leaving moral and social questions to the humanities and social sciences.[364] Legal education emphasised expertise in the rules and in the analytical ability to identify them, presenting the law as a scientific discipline that studies facts.[365]

Following the incorporation of the Higher School for Law and Economics into Hebrew University,[366] it also introduced courses at Tel Aviv University. [367] In 1969, it separated from the Hebrew university and became 'The Law Faculty at Tel Aviv University'.[368] The Tel Aviv faculty played an important role in altering legal education in Israel, shifting from a continental *ex cathedra* approach to one increasingly influenced by the United States, with more elective courses and a varied curriculum, as well as case-discussion teaching methods.[369] In 1970, a law faculty was established at Bar-Ilan University,[370] and in 1991 at Haifa University.[371] Legal formalism was prominent all the way through the 1980's, not only in legal education, but in the Israeli legal system in general.[372] The formalist approach to the law, included disregarding moral and social aspects of the law, understanding law as a set of rules that operates according to an internal logic, and assuming that the solution for every legal problem lies in the existing rules,[373] and characterised Israeli legal education as well as the Israeli legal field for almost four decades. Since the 1980's, law schools also began addressing the basic values and norms embodied in law, an approach which can be traced to the influence of the American academy.[374]

The Israel Bar Association Act,[375] stipulates the kind of training needed in order to join the Bar and access the legal profession. The primary for qualifying as a lawyer is to graduate from a law faculty in a recognised higher education institution in Israel or abroad.[376] As legal education tends to differ between countries, not least because it focuses on domestic

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[364] Menachem Mautner, *Legal Education* (Ramot Publishing Tel Aviv University 2002) 17, 22.
[365] ibid 18.
[366] Likhovski, 'Legal Education in Mandatory Palestine' (n 348) 315.
[367] Yael Efron, 'Legal Education in Israel: Where Is It Headed?' (2011) 9 Alei Mishpat - The Law Review of the Academic Center of Law and Business 45, 59.
[368] ibid.
[369] Grunis (n 363) 207, 218.
[370] Efron (n 367) 59.
[371] ibid.
[372] Mautner (n 364) 25.
[373] ibid 15.
[374] ibid 26.
[375] Israel Bar Association Act 1961.
[376] ibid 25.

legislation and juridical practices, most legal professionals seek their education in their state of residence. An LLB degree in Israel is normally achieved within 3.5 to 4 years. Israeli law schools are, therefore, the central preparation site for Israeli legal professionals.

Currently, in Israel, there are law schools in four universities, two publicly funded colleges, and seven private colleges.[377] In 1990, Amendment 17 to the Israeli Bar Association Act opened the gate for the founding of new law schools in Israel, to be established in extra-budgetary colleges.[378] The explanatory note to the bill emphasises the high demand for law studies, with only a 15 percent acceptance rate across the three existing faculties.[379] It stresses that the current situation prevents even students with high grades from studying their preferred fields, and leads to a composition of students in law faculties 'that is homogenous enough to spur significant concerns'.[380] The amendment suggests that the solution is not in accepting more students to the existing faculties in universities – but in allowing legal education outside universities.[381]

Following Amendment 17, three new law schools were established in extra-budgetary colleges across Israel.[382] Amendment 18 to the Bar Association Act, that was presented within one year, aimed at regulating the studies in those new law schools, to make sure that the length, extent and theoretical and professional level, are as similar as possible to the programs in university law faculties.[383] The opening of new schools decreased the admission requirements to study law, allowing students with lower scores to enter law programmes.[384] It also led to a rapid increase in the number of lawyers in Israel, which numbered more than 70,000 in 2020.[385]

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[377] Israeli Council for Higher Education, 'Law' <https://che.org.il/%D7%AA%D7%9B%D7%A0%D7%99%D7%95%D7%AA-%D7%9C%D7%99%D7%9E%D7%95%D7%93/?search=%D7%9E%D7%A9%D7%A4%D7%98%D7%99%D7%9D> accessed 2 December 2020.
[378] The Bar Association Act (Amendment 17) 1990 150.
[379] ibid 150.
[380] ibid.
[381] The Bar Association Act (Amendment 18) 1991 170.
[382] ibid 170.
[383] ibid.
[384] Shmuel I Becher, 'Legal Education in the 21st Century: There's Much (to re)New Under the Sun' (2014) 19 HaMishpat 7, 27.
[385] Israel Bar Association, '1,195 New Lawyers Were Admitted in a Festive Ceremony' (2020) <http://www.israelbar.org.il/article_inner.asp?pgId=411522&catId=6> accessed 2 December 2020.

1.7 Chapters Outline

This dissertation includes eight chapters, an introductory chapter followed by a literature review and a methodological account, four substantive chapters, and a conclusion. Chapter 2 presents the theoretical framework underpinning the research, combining five distinct bodies of literature—Marxist theory, theoretical critiques of the rule of law, critical pedagogy, settler colonial theory and studies in legal education. It emphasises the relevance and contribution of each body of literature to the thesis itself. Marxist materialist approach to the law informs the understanding of the law school as an ideological apparatus that produces and reproduces the logic and common sense of the Israeli juridical field.[386] The critical legal studies movement and socio-legal scholars' critiques of the rule of law help deconstruct the operation of liberal law in the classroom, and its ability to conceal the violence and repression inherent to it.[387] Critical pedagogy, offers actual concepts and tools for the study of law schools, including their daily operation, curriculum and assessment.[388] The settler colonial paradigm, exposes the operation of the Israeli regime, the dialectic relationship between settlers and indigenous people, as well as the concepts of territorial expansion and the erasure of the native.[389] Existing literature on legal education, and particularly studies conducted in Israel, provide some critical insights into legal education, as well as an account of Israeli legal education and expose the limited scope of research in Israel.[390]

Chapter 3 presents the research methodology and ethical considerations. It opens with a brief description of critical ethnography, the methodology employed in this thesis. It then turns to

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[386] Karl Marx, *Karl Marx - Selected Writings* (David McLellan ed, Oxford University Press 2000); Antonio Gramsci, *Prison Notebooks*, vol 3 (Columbia University Press 1975); Althusser (n 11).
[387] Catherine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, vol 17 (Harvard University Press 1987); Andrew Altman, *Critical Legal Studies - A Liberal Critique* (Princeton University Press 1990); Samera Esmeir, *Juridical Humanity: A Colonial History* (Stanford University Press 2012).
[388] Henry A Giroux and Anthony N Penna, 'Social Education in the Classroom: The Dynamics of the Hidden Curriculum' (1979) 7 Theory and Research in Social Education 21; Paulo Freire, *Pedagogy of the Oppressed* (Continuum 2000); Michael W Apple, *Education and Power* (Routledge 2012).
[389] Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (n 19); Veracini, *Settler Colonialism: A Theoretical Overview* (n 330); Zreik (n 325).
[390] Duncan Kennedy, 'Legal Education as Training for Hierarchy' in David Kairys (ed), *The Politics of Law* (1998); Philip F Iya, 'The Legal System and Legal Education in Southern Africa: Past Influences and Current Challenges' (2001) 51 Journal of Legal Education 355; Fiona Cownie, *Legal Academics: Culture and Identities* (Hart Publishing 2004); Elizabeth Mertz, *The Language of Law School: Learning to" Think Like a Lawyer"* (Oxford University Press 2007); Lesley Greenbaum, 'Re-Visioning Legal Education in South Africa: Harmonising the Aspirations of Transformative Constitutionalism with the Challenges of Our Educational Legacy' [2014] SSRN Electronic Journal 1.

elaborate on the data collection methods employed in this research, including four years of participant observation, aimed to provide an account of the experience of studying law in an Israeli law school, as well as qualitative textual analysis of a variety of written documents, including court decisions and other learning materials, such as class notes, exam sheets and assignments. The chapter then moves to discuss a variety of ethical considerations, some are essential to the methods deployed in this research, and others are specific issues that emerged from the inquiry's extensive fieldwork.

Chapters 4, 5, 6 and 7 are substantive chapters, each focusing on a particular settler colonial pedagogy. Chapter 4 discusses silence and utterance, a settler colonial pedagogy that allows law teachers to emphasise some aspects of the law, and particularly the liberal ones, while muting other, especially the settler colonial manifestations of the law. The chapter describe four types of utterances and silences and provides a variety of examples to illustrate how they operate in the classroom. Chapter 5 describes Judaising democracy, a settler colonial pedagogy that works to bind the Jewish and democratic characters of the State of Israel, providing 'democratic arguments' not only defend but even promote Jewish supremacy and inequality.

Chapter 6 portrays the *de facto* and *de jure* distinction, a settler colonial pedagogy that focuses on instructing students as to the legal situation, while disregarding the reality on the ground. The Chapter brings three distinct examples to illustrate how the legal description works to conceal the settle colonial reality. Chapter 7 focuses on spatial ambiguity and fragmentation, a settler colonial pedagogy that assists law teachers in conveying the lack of defined territory through casting ambiguity and fragmenting the region's territory. Offering concluding remarks, Chapter 8 describes the research itself as well as its findings and implications.

Chapter 2: Literature Review

The question I am interested in addressing is what happens when legal education meets political reality. The political reality in Israel/Palestine has been characterised as a form of settler colonialism or as an apartheid regime. Simultaneously, the Israeli juridical field has been characterised as a liberal legal sphere. Taking the Israeli legal education enterprise as a case study, this thesis explores how legal education makes sense of the application of liberal law within a repressive political context.

This research therefore draws on five main bodies of literature. It draws on a Marxist understanding that the law school is both an institution which is inseparable from the political and social context within which it operates and a significant site for the production and reproduction of the juridical field's shared worldviews and perceptions, as well as the ideas of the ruling class and juridical structures which support the capitalist modes of production.[391] As the research focuses on the operation of liberal law and its underlying principle of the rule of law as well, the second body of literature relates to theoretical critiques of the rule of law, including those presented by the critical legal studies movement and socio-legal scholars.[392] The research then turns to studies in critical pedagogy that offer a variety of key concepts for scrutinising daily practices within law schools.[393] Next, it moves to discuss the settler colonial paradigm, including how this paradigm informs the Israeli regime and its legal education.[394] Lastly, it builds on literature exploring the field of legal education, including critical works that question the legal profession, the legal training and the role of the law school, studies about legal education in Israel, and writings concerning legal education in the context of political conflicts and transitions.[395]

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[391] Marx (n 386); Gramsci, *Prison Notebooks* (n 386); Althusser (n 11).
[392] MacKinnon (n 387); Altman (n 387); Esmeir (n 387).
[393] Giroux and Penna (n 388); Freire (n 388); Apple, *Education and Power* (n 388).
[394] Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (n 19); Veracini, *Settler Colonialism: A Theoretical Overview* (n 330); Zreik (n 325).
[395] Kennedy, 'Legal Education as Training for Hierarchy' (n 390); Iya (n 390); Cownie, *Legal Academics: Culture and Identities* (n 390); Mertz (n 390); Greenbaum (n 390).

2.1 Hegemony, ideology, and the common sense

In 'The Materialist Conception of History', Karl Marx introduces his theory of the relationship between the material world and the world of ideas. Marx stresses that 'the production of ideas, of conceptions, of consciousness, is at first directly interwoven with the material activity and the material intercourse of men, the language of real life'.[396] Thus, for Marx, material behaviour determines the mental production of ideas.[397] This insight is situated at the core of my thesis, presuming not only that a firm connection exists between law and reality, but that it is the political and social reality that, to a significant extent, form and shape the applied law. 'Society', Marx claimed, 'is not founded upon the law […] the law must be founded upon society, it must express the common interests and needs of society […] which arise from the material mode of production prevailing at the given time'.[398] Hence, from a Marxist perspective the political reality of ongoing dispossession and repression in Israel/Palestine produces the law, while the law, in turn, aims to secure the existing political and economic order. Taking a step further, Pashukanis claims that 'law represents the mystified form of a specific social relation'.[399] Every aspect of the law, he maintains, even juridical abstractions reflect and help sustain complex social relations, thus suggesting that the liberal law studied in Israeli law schools is actually a central tool of domination.[400] The question that interests me is how liberal law is taught in higher education institutions given its role in legitimising and bolstering the regime and social and material relations in which it operates.

To examine the predominance of liberalism in law school in particular and in the juridical field in general, this research employs Antonio Gramsci's concepts of hegemony and common sense. Over the years, Gramsci's idea of hegemony altered and evolved in his writing. This research makes use of Peter Thomas's interpretation of Gramscian hegemony, emphasising its dialectical complexity. Hegemony is understood here as a political and social leadership of one group over others, that is achieved by using both consent and coercion.[401] In Gramsci's words, '[t]he "normal" exercise of hegemony […] is characterized by the

[396] Marx (n 386) 180.
[397] ibid.
[398] ibid 300.
[399] Pashukanis (n 10) 79.
[400] ibid 57.
[401] Peter D Thomas, *The Gramscian Moment: Philosophy, Hegemony and Marxism* (Brill 2009) 162–163.

combination of force and consent variously balancing one another, without force exceeding consent too much'.[402] Thus, hegemony is the ability of a dominant group to make its subordinate groups as well as its allies accept its worldviews and ideology as their own and comply with them. While consent and coercion tend to be distinct in theory, in reality they often operate together, so that hegemony and domination are always integrated because hegemony allows for domination to occur with the 'consent' of the 'people'.[403]

Common sense is central to the formation of hegemony, and specifically its consensual aspects. In the *Prison Notebooks*, Gramsci defines his notion of common sense as '[…] the "philosophy of nonphilosophers"—in other words, the conception of the world *acritically* absorbed from the various social environments in which the moral individuality of the average person is developed'.[404] Common sense serves to shape individuals' moral perceptions, and they grasp it in an almost uninformed manner. Gramsci goes on to stress that '[t]he fundamental characteristic of common sense consists in its being a disjointed, incoherent and inconsequential conception of the world that matches the character of the multitudes whose philosophy it is'.[405] Following Gramsci, I understand common sense as a shared intersubjective conception that is held by individuals, which reflects the hegemonic worldview. Focusing directly on legal education as a vital site for the production of common sense in a particular domain, this research makes use of Gramsci to question how a shared philosophy, between legal professionals and specifically law students, is produced within the Israeli legal terrain, with an emphasis on how the incoherence and inconsistencies are covered up.

Many critical thinkers understand education and professional training as significant sites for the interpellation of individuals into the social world. Concentrating on legal education that serves as the entrance point to the legal profession, this thesis aims to explore the role played by the law school in this socialisation and specialisation process. Louis Althusser claims that '[I]n order to exist, every social formation must reproduce the conditions of its production at

[402] Antonio Gramsci, *The Gramsci Reader: Selected Writings 1916-1935* (New York University Press 2000) 261.
[403] Thomas (n 401) 164, 167.
[404] Gramsci, *Prison Notebooks* (n 386) 333.
[405] ibid.

the same time as it produces, and in order to be able to produce'.[406] In other words, in order to maintain itself, it is not enough for a social structure to produce something, it must, at the same time, ensure that it will be able to keep producing in the future through reproduction the needed setting of its own production. The juridical field is produced, for instance, through the operation of courts, hearings, the representation of clients and through the enunciation of verdicts. But all that, according to Althusser, will not guarantee its ongoing existence, which can only be achieved through the reproduction of the conditions in which the field operates. In our example, it requires, among many other things, the production of skilled legal professionals.

For Althusser, the dominant state apparatus is the education system.[407] The importance of education institutions is not only their ability to generate skilled workers, but to make sure they are capable of working in specific systems, while guaranteeing their subordination to the dominate ideology.[408] Following Althusser, it is not enough to produce excellent lawyers who are competent to work in a particular juridical system and acquainted with the applied law, they also need to be inculcated into the ideology that dominates this specific field, to share its conventions and worldviews. Employing Althusser's insights to analyse legal education, allows us to trace the ongoing effort to produce and reproduce trained lawyers who adopt the dominant conventions and worldview of the legal field, and the various interests and players that guide this production and reproduction process.

Althusser's theory of ideology provides a framework to look at allegedly distinct societal organisations, like law schools, as state apparatuses that exercise state power, are subject to the dominant ideology, and are also crucial mediums of dominant ideology. For Althusser, state power and domination are exercised not only through the Repressive State Apparatus, but also through Ideological State Apparatuses which manifest themselves through 'distinct and specialized institutions'.[409] Thus, employing Althusser's understanding of the state, allows one to see how the diverse organisations and institutions that make up the state function in a unified manner. As he puts it 'the ideology by which they function is always in

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[406] Althusser (n 11) 2.
[407] ibid 27.
[408] ibid 6–7.
[409] ibid 17.

fact unified, despite its diversity and its contradictions, *beneath the ruling ideology*'.[410] Following Marx's materialist understanding of the law, as expressing the 'material mode of production',[411] Althusser shows how the law, a central State Apparatus, is produced and reproduced to secure the material social order. Althusser goes on to argue that this shared function is frequently elided. The notion of the law school as an island, distinguished from current politics and social developments, is a case in point. This separation allows it to keep its sense-making operation uninterrupted, since the law school appears not only to be distinct from the state and its institutions, but at times in direct confrontation. Such situations allow the law school to continue its production and reproduction efforts, which conform with the state's interests and ideology, in a rather unnoticed manner.

2.2 The Legal Universe

Critical scholars use different definitions to describe the Israeli political regime. Critical sociologist Baruch Kimmerling describes Israel as a democracy within *the boundary of Jewish citizenship*, and simultaneously as a form of internal colonialism within *the boundary of Israeli system of control*.[412] Oren Yiftachel suggests that Israel is an *ethnocracy* that mixes democratic and nondemocratic characteristics, facilitating the ability of the dominant ethnic group to control other ethnic minorities.[413] Others have described Israel as a settler colonial regime[414] and/or an apartheid regime.[415] Notwithstanding these scholarly interventions, within the Israeli public realm and within the legal field more specifically Israel is defined as a Jewish liberal democracy, that ostensibly protects the human rights and liberties of its population.[416]

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[410] ibid 20.
[411] Marx (n 386) 300.
[412] Kimmerling, *Clash of Identities: Explorations in Israeli and Palestinian Societies* (n 279) 182–184.
[413] Oren Yiftachel, *Ethnocracy - Land and Identity Politics in Israel/Palestine* (University of Pennsylvania Press 2006) 11–12, 84–85.
[414] Lorenzo Veracini, 'The Other Shift: Settler Colonialism, Israel, and the Occupation' (2013) 42 Journal of Palestine Studies 26.
[415] Uri Davis, *Apartheid Israel: Possibilities for the Struggle Within* (Zed Books 2003); Ben White, *Israeli Apartheid: A Beginner's Guide* (Pluto Press 2009); Virginia Tilley, *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (Virginia Tilley ed, Pluto Press 2012); Richard Falk, *Palestine's Horizon Toward a Just Peace* (Pluto Press 2017); Falk and Tilley (n 146); Ben White, *Cracks in the Wall Beyond Apartheid in Palestine/Israel* (Pluto Press 2018).
[416] Aharon Barak, *Interpretation in Law Volume III: Constitutional Interpretation* (Nevo Publishing 1994) 328, 334–336; Meir Shamgar, 'On Liberal Democracy' (1999) 22 Tel Aviv University Law Review 553, 557–559; Alexander Yakobson and Amnon Rubinstein, *Israel and the Family of Nations: The Jewish Nation-State and*

To address the way the legal field deals with the wide definitional range of Israel's political reality, this thesis turns to Pierre Bourdieu's notion of the juridical field, which he defines as a social universe in which juridical authority is produced and exercised. In the 'Force of Law', Bourdieu draws a theoretical outline for an examination of the relation between the juridical field and the society within which it operates, as well as the ongoing inner competition over symbolic capital among the field's members.[417] I invoke Bourdieu's set of theoretical concepts to examine the processes of inculcation of the layperson into the juridical field. While Bourdieu's observations provide numerous insights into how the Israeli law student is produced, his tools require some fine-tuning and alteration to be applicable to the Israeli context and particularly the law school.[418]

First, following Bourdieu's description of the juridical field as one that puts into play a neutralising operation of the law which is then deployed as a means for resolving and distancing conflicts.[419] Bourdieu locates the neutralising power of the court in the idea of legal representation, where the sides of a conflict are distanced from one another, and attorneys replace them in resolving disputes.[420] I propose that law professors, as agents of the law also adopt a neutralising role. In their teaching they often neutralise the discussion by distancing it from the political reality. For instance, the Hebrew word for 'occupation' is highly controversial within Israeli discourse, but at the same time a professional term that is part and parcel of public international law. Therefore, when discussing 'the law of belligerent occupation' in class, lecturers might make an active attempt to neutralise the word occupation by using a more benign synonym, like 'held territories' so as to facilitate an 'objective discussion'.

Bourdieu stresses the significance of the juridical language for an inquiry of the legal field. By combining elements of the common language with foreign components, the *appropriation effect* manifests itself in the rhetoric of impersonality and neutrality.[421] The *neutralisation effect* and the *universalisation effect* are realised through a specific use of language, including

Human Rights (Routledge 2009) 97–123; Ruth E Gavison, 'Can Israel Be Both Jewish and Democratic?' (2011) 21 Jewish Law Association studies 115, 140–148.

[417] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 Hastings Law Journal 805.

[418] ibid 817.

[419] ibid 805, 830.

[420] ibid 830.

[421] ibid 805, 819.

passive and impersonal constructions, the use of verbs in the third person singular form, and referencing values while assuming an ethical consensus surrounding them.[422] The transformation process of students into the legal world constitutes a proper site for understanding the operation of this set of effects. My ethnography of an Israeli law school allowed me to track the production of these concepts and to examine their use.

Bourdieu also describes the *normalisation effect,* used to transform the legal norm from a practical principle of symbolic domination, to an official and universal social rule;[423] the *symbolic effect*, serving to construct and maintain the image of the court as a distinct space in which law is applied freely, rationally and universally;[424] and the *chain of legitimisation*, which, according to Bourdieu, distinguishes the law, the court and especially the judge, from the arbitrary violence they employ.[425] These effects are of central interest for this research, as they directly involve the inculcation of students into the legal field. For the process of jurisprudence to be carried out, legal professionals must accept the field's inner logic. In order to become lawyers, law students need to both understand the way the law operates, and to be able to communicate it to their future clients. In this manner, law schools do not merely employ the strategies Bourdieu discusses but they also help constitute and reproduce them. Therefore, I suggest, law schools are a key site for rationalising and legitimising the operation of the legal system.

Finally, Bourdieu's idea of the *universalising attitude* is another key element, which he defines as the entry ticket to the juridical field. It claims to produce a specific form of judgement, distinct from basic intuitions of fairness, as decisions are deduced from the rules themselves.[426] This concept is useful when analysing legal education, since it lays bare how so-called 'basic intuition' is replaced with legal reasoning and rationalisation.

For Bourdieu, the juridical field, which is often violent, becomes self-evident or common sensical in the Gramscian sense of the term.[427] I suggest that in-depth inquiry of the formation of such a common sense in law school can be pursued by examining the manifestation and

[422] ibid 820.
[423] ibid 846.
[424] ibid 805, 830.
[425] ibid 824.
[426] ibid 820.
[427] Gramsci, *The Gramsci Reader: Selected Writings 1916-1935* (n 402) 329–347.

utilisation of these different effects, serving to construct the legal universe as an autonomous and abstract space. Together they contribute to the socialisation of law students into the common sense of the Israeli legal profession.

2.3 Liberal Legal Philosophy and its Critique

Liberal legal theory has been developing for four centuries, diverging into several fields and areas by a variety of philosophers and theorists. In the 17th century, John Locke maintained that the only justification for the establishment of the state was to guarantee and protect individual rights and freedoms.[428] In the following century, Montesquieu presented the idea of separation of powers, as further means to protect the individual from sovereign authority.[429] And in the 19th century, John Stuart Mill had defined liberty as the area where the individual is free and protected from external interference. Presenting the harm principle, Mill asserted that the limit of individual freedom is the point where one harms the other.[430]

In the 20th century, John Rawls employed the abstract experiment of the veil of ignorance, as part of an effort to redefine liberalism. According to Rawls, any individual, situated behind the veil, unaware of their location in the social order, would prefer an order which is based on principles of justice and fairness.[431] Ronald Dworkin maintained that legal liberalism is a theory of equality, meaning that 'the government treat all those in its charge *as equals,* that is, as entitled to its equal concern and respect'.[432] For Dworkin, this concept of equality demands official neutrality, to be realised as equality before the law and the authorities. He emphasises that the main guardian of individual rights is the justice system, that must remain independent to protect the individual from the state and secure him/her from the danger of the tyranny of the majority that is embedded in the democratic rule.[433] The rule of law, liberal legal thought argues, serves to prevent oppression and protect individual liberty, assuming that 'the law has the power to constrain, confine and regulate the exercise of social and political power'.[434] The teaching in many law schools within liberal democracies is informed by this school of

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[428] Locke (n 7).
[429] Charles De Montesquieu, *The Spirit of the Laws* (Cambridge University Press 1989).
[430] Mill (n 8).
[431] John Rawls, *A Theory of Justice* (Harvard University Press 2009).
[432] Dworkin (n 9) 183.
[433] Dworkin (n 9).
[434] Altman (n 387) 13.

thought, understanding liberal law, as applied equally and in a neutral fashion, working to protect the human from the state and fellow individuals, and blind towards particular identity characteristics.

Following various critical scholars, in this dissertation I assume that the operation of liberal law is much more complex than traditional legal scholars alluded to above. The critique of liberal law is vast and wide-ranging, questioning almost every aspect and concept of this school of thought. Feminist scholars assert that liberal law is not gender neutral, even though the law ostensibly employs a neutral standard and claims that gender is irrelevant for its application.[435] Researchers associated with the critical legal studies movement provide more extensive critiques, contending that the principle of the rule of law needs to be problematised.[436] These scholars tend to agree that the law is indeterminate, that the context for legal decision making is significant, and that law is to some extent a form of politics.[437] In other words, if liberal law claims to be impersonal, universal, objective and clear, the critique of law suggests the opposite. Following this rich body of literature, this thesis understands the law as dependent on and influenced by social, material, and political relations. Simultaneously, it acknowledges the law's attempts to conceal these relations and appear neutral and detached. Coining the term *juridical humanity*, Samera Esmeir rejects the perception of modern law as means to protect the human from other legal and political orders, arguing, rather, that the application of liberal law chains the human to these relations and to the state.[438] Esmeir maintains that the law gains power and superiority through its application, serving to establish control and permit the presence of specific types of violence, in the name of humanity.[439] Esmeir's assertions facilitate our understanding of the relation between modern liberal law and the human as utilised deliberately to constitute domination. Following Esmeir's emphasis on the importance of exploring the law's role in constituting and allowing violence, this inquiry asks to take a step further, suggesting that legal education can be linked to violence and domination.

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[435] MacKinnon (n 387) 99–102.
[436] Altman (n 387) 18–21.
[437] Mark Tushnett, 'Critical Legal Studies : A Political History' (1991) 100 The Yale Law Journal 1515, 1518.
[438] Esmeir (n 387) 16–17.
[439] ibid 1–2, 16–17.

On the one hand, then, liberal law is invoked in the classroom to elide violence, while, on the other hand, the law itself is a vehicle of violence.[440] How, I ask, is state violence rationalised in class so it does not appear to contradict the liberal legal order? How does such violence evade criticism and remains absent from class discussion? And, just as importantly, what is the role of liberal law in producing violence, and how does legal education conceal this side of the law?

2.4 Critical Pedagogy

Another body of literature this research makes use of is critical pedagogy, which focuses on the ability of education to liberate the human and to transform society as a whole. The idea of transformative education aimed at mobilising social and political change through pedagogy has significant value and importance, perhaps in these times more than before.[441] But as Paulo Freire reminds us, education can be a practice of domination as much as it can be a practice of freedom.[442] The assumption that different pedagogies yield diametrically opposed outcomes in reality serves here as a point of departure.

This study makes use of a number of central concepts from the field of critical pedagogy, including the study of schools in context, the idea of the hidden curriculum, the concept of banking education and the notion of symbolic violence. As many of these concepts were generated several decades ago, some demand adjustment. In this context, Joe Kincheloe addresses the importance of the 'recognition of the complexity of everyday life',[443] when discussing critical pedagogy principles in the 21st century. He claims that given the forms of knowledge and methodologies available today, scholars must probe into both 'the purposes of existing educational practices and their consequences'.[444] Building on the work of scholars who highlight the importance of deploying critical pedagogy's key concepts for the inquiry of

[440] Cover (n 12).
[441] Peter Mclaren, 'The Future of Critical Pedagogy' [2019] Educational Philosophy and Theory 1.
[442] Freire (n 388) 81.
[443] Joe L Kincheloe, 'Critical Pedagogy in the Twenty-First Century: Evolution for Survival' in Peter McLaren and Joe L Kincheloe (eds), *Critical Pedagogy: Where are We Now?* (Peter Lang 2007) 13.
[444] ibid.

higher education,[445] I focus on law schools and how they make use of different pedagogical practices, to reach particular targets.

In the *Pedagogy of the Oppressed*, Paulo Freire argues that '[e]ducation is suffering from narration sickness'.[446] For Freire, every teacher-student relationship has a narrative character that involves a subject, the teacher, and listening objects, the students.[447] In what he defines as the banking concept of education, it is the task of the teacher to 'fill' the students, as if they were containers, with different contents of narration.[448]According to Freire '[i]n the banking concept of education, knowledge is a gift bestowed by those who consider themselves knowledgeable, upon those whom they consider to know nothing'.[449] For him, such a form of education demands that students memorise, record, repeat, and basically, store the deposit, without perceiving, realising, or understanding.[450]

Freire claims that the banking concept of education, through its attitudes and practices, 'mirror[s] oppressive society as a whole'.[451] The attitudes and practices of banking education include, on the one hand, an active teacher, one that teaches, knows everything, thinks, talks, disciplines, and chooses the content, and, on the other hand, students who are taught, know nothing, listen, disciplined, comply and adapt.[452] For Freire, 'the teacher is the Subject of the learning process, while the pupils are mere objects'.[453] This study aims to make use of this set of characters, to examine the law school and portray its pedagogical approaches and attitudes.

In his seminal book, Freire describes the pedagogy of the oppressor as contrary to his theory of liberating education. For Freire, the pedagogy of the oppressor is conservative and aims to preserve political and social reality. The more the students work at storing the teachers' deposits, he argues, the less they develop a critical consciousness.[454] This way, according to Freire, they just adapt to the world as it is, and to the fragmented view of reality deposited in

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[445] Eric Margolis and others, 'Peekaboo: Hiding and Outing the Curriculum' in Eric Margolis (ed), *The Hidden Curriculum in Higher Education* (Routledge 2001) 4.
[446] Freire (n 388) 71.
[447] ibid.
[448] ibid 71–72.
[449] ibid 72.
[450] ibid.
[451] ibid 73.
[452] ibid.
[453] ibid.
[454] ibid.

them.[455] Freire concludes that '[t]he educated individual is the adapted person, because she or he is better "fit" for the world'.[456]

Critical pedagogy asks to examine schools within the context in which they operate. Henry Giroux and Anthony Penna argue that when we see schools within their context, we can 'focus on the tacit teaching that goes on in schools and help to uncover the ideological messages embedded in both the content of the formal curriculum and the social relations of the classroom encounter'.[457] Treating law school as an isolated and independent institution, solely providing professional knowledge and skills is, from this perspective, naïve. Law schools, like every educational institution, teach students much more than what is simply outlined in the different modules' syllabuses.

In a similar manner, Michael Apple asserts that while 'the educational and cultural system is an unexceptionally important element in the maintenance of existing relations of domination and exploitation',[458] we must remember that the school is not the entire issue, but part of a much larger framework of social, economic and political relations. For Apple, one must at the same time see the school in context, but not neglect the school by saying that it mirrors reality anyway and therefore does not deserve attention.[459] Following these assertions as well as Althusser's claim regarding Ideological State Apparatuses, this study understands the law school as part of a wide system of institutions, while situating it within the political setting in which it operates.

Scholars claim that the *hidden curriculum* is a valuable concept to employ in the study of higher education.[460] The term hidden curriculum was coined by Phillip Jackson, a functionalist researcher, uncritically referring to all sorts of behaviours and values that students were expected to learn in school in order to meet society's needs, but were not part of the formal curriculum.[461] Over the years, additional definitions of the hidden curriculum were suggested, varying according to the different school of thought. Marxist scholars added a significant component to the functionalist understanding, emphasising that all those

[455] ibid.
[456] ibid 76.
[457] Giroux and Penna (n 388) 21.
[458] Apple, *Education and Power* (n 388) 9.
[459] ibid.
[460] Margolis and others (n 445) 4.
[461] Philip W Jackson, *Life in Classrooms* (Teachers College Press 1990) 33–35.

behaviours that are taught in school are not at all neutral, but work to shape society according to the interest of dominant groups.[462] Critical pedagogy scholars complicated this idea, both to illustrate the agency of the students themselves,[463] and to look for the way in which one can make use of the hidden curriculum to initiate significant social and political change, and promote democracy.[464]

Giroux and Penna define the hidden curriculum as '[…] the unstated norms, values and beliefs that are transmitted to students through the underlying structure of meaning in both the formal content as well as the social relations of school and classroom life'.[465] They further argue that identifying the dichotomy between the hidden curriculum and the official one, allows to identify ideological assumptions in the classroom.[466] In a similar manner, Apple emphasises the importance of the study of overt and covert knowledge produced in schools and probes their roles in the reproduction of social order.[467] Building on these insights, this thesis seeks to locate the hidden curriculum within law school, and to examine the values and norms as well as behaviours that are tacitly taught to its students. It aims to explore the different forms of knowledge that are produced within the school, and the manner in which they are introduced and transferred to students. Giroux and Penna argue that the question we should address in this context is 'what is learned in school?'[468] To address this question, I provide an account of both the overt and covert knowledge that is produced and transmitted in law school.

One of Apple's main critiques of the neo-Marxist scholarship in this particular field is that it fails to actually enter schools in order to understand how these patterns of reproduction works on the ground. He claims that one must explore three basic elements, including daily interactions and regularities that carry norms and values, formal school knowledge to be found in the formal curriculum, teaching materials and texts, and the educators' perspectives on education and pedagogy, that are at the base of how they operate within school.[469] For

[462] Margolis and others (n 445) 7.
[463] Apple, *Education and Power* (n 388) 13.
[464] Henry A Giroux, *On Critical Pedagogy* (The Continuum International Publishing Group 2011).
[465] Giroux and Penna (n 388) 22.
[466] ibid 38.
[467] Apple, *Education and Power* (n 388) 9.
[468] Giroux and Penna (n 388) 23.
[469] Apple, *Education and Power* (n 388) 18–19.

Apple, the key to understanding 'how the day to day meanings and practices that are so standard in classrooms […] tended to be less the instruments of help and more part of a complex process of the economic and cultural reproduction'[470] is by studying these three elements through on the ground fieldwork. While this inquiry is mainly focused on juridical and relatedly political reproduction, it aims to develop Apple's assertions, both in probing his three fundamental elements, and in his demand for empirical veracity. I therefore undertook protracted ethnographic fieldwork that involved participant observation, allowing me to experience the daily routine as well as specific interactions and encounters within law school. In addition, to exploring the formal curricula, I analyse several textual materials, including syllabuses, class materials, case law and exam forms. Finally, I investigate the consequences of the particular form of knowledge production within law school.

In 'Reproduction in Education', Pierre Bourdieu and Jean-Claude Passeron argue that '[a]ll pedagogic action is, objectively, symbolic violence insofar as it is the imposition of a cultural arbitrary by an arbitrary power'.[471] Understanding symbolic violence as the power 'to impose meanings and to impose them as legitimate by concealing the power relations which are the basis of its force',[472] Bourdieu and Passeron dismiss individual autonomy and agency within the educational context in this instance, because of the lack of awareness of those hidden power relations among both students and professors. While disagreeing with Bourdieu and Passeron's dismissal of human agency, their assertion that the dominant pedagogic action 'is the one which most fully, though always indirectly, corresponds to the objective interests […] of the dominant groups or classes, both by its mode of imposition and by its delimitation of what and on whom, it imposes',[473] describes a situation in which it is almost impossible for specific individuals to question, object or reject pedagogic actions.

Many theoreticians agree that on the level of teachers and other education workers, the vast majority of the pedagogical action that serves dominant groups in reproducing social order and forming consent is unintentional or done unknowingly.[474] Yet, the view of 'students as

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[470] ibid 19.
[471] Pierre Bourdieu and Jean-Claude Passeron, *Reproduction in Education, Society and Culture* (Sage Publications 1990) 5.
[472] ibid 4.
[473] ibid 7.
[474] Althusser (n 11) 31; Apple, *Education and Power* (n 388) 11–12; Freire (n 388).

passive internalisers of pre-given social messages',[475] is challenged by various scholars, especially by Apple who insists on the existence of critical student agency within institutions of education. This thesis accepts Bourdieu and Passeron's idea of pedagogical action as a practice of symbolic violence, while acknowledging Apple's assertion that critical agency is empirically evidenced in a questioning of knowledge presented as objective and neutral.[476]

2.5 Settler Colonialism

Settler colonial studies is often associated with Patrick Wolfe, who contributed to its development and expansion as a field, but includes the work of many other scholars who take part in ongoing debates on its essence and fundamental characteristics. This section opens with a concise review of the settler colonial paradigm, then turns to offer a cursory outline of the literature that specifically concentrates on the settler colonial aspects of the Zionist project and the Israeli regime, and then proceeds to discuss studies in settler colonial education.

The settler colonial paradigm offers a series of characteristics that distinguish settler colonial regimes from other colonial formations. Territory is the fundamental feature of settler colonialism. As Wolfe puts it, 'territory is settler colonialism's specific, irreducible element'.[477] As settler colonial societies aim to establish a polity in a 'new' location, '[t]he primary object of settler-colonisation is the land itself'.[478] But 'the territorialisation of the settler community', as Lorenzo Veracini stresses, 'is ultimately premised on a parallel and necessary deterritorialisation (i.e., the transfer) of indigenous outsiders'.[479] In other words, it is important to notice, that the fundamental need to take over land and gain control over a territory, always involves some sort of displacement and replacement, which amounts to elimination of indigenous peoples.

'The logic of elimination […] in its specificity to settler colonialism, is premised on the securing—the obtaining and the maintaining—of territory. This logic certainly requires the

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[475] Apple, *Education and Power* (n 388) 13.
[476] Michael W Apple, *Educating the "Right" Way: Markets, Standards, God, and Inequality* (Routledge 2006) 5.
[477] Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 17) 388.
[478] Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (n 19) 163.
[479] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 81.

elimination of the owners of that territory, but not in any particular way'.[480] Furthermore, 'elimination is an organising principal of settler-colonial society rather than a one-off (and superseded) occurrence'.[481] In other words, according to Wolfe, settler colonialism works to eliminate the native, but elimination in his view is also ongoing and therefore its methods can change over time. As elaborated below, the elimination of the native can involve pure violence, i.e., genocide or direct expulsion, but can also take place on a discursive level or through assimilation. What matters is that 'all settler projects are foundationally premised on fantasies of ultimately "cleansing" the settler body politic of its (indigenous and exogenous) alterities'.[482]

The importance of territory and the logic of elimination bring us to the third characteristic of settler colonialism, that it is 'a structure rather than an event'.[483] Wolfe explains that this has two meanings, one, that settler colonialism is 'a complex social formation', and the other refers to its 'continuity through time'.[484] In other words, settler colonialism is both an intricate social structure that involves a variety of agencies and institutions as well as an ongoing and continuous project, that should not be understood as a past and sealed event, but regarded as a continuing formation.

For Wolfe, settler colonialism constitutes one type of colonialism,[485] and its 'wider context of analysis is the heterogeneous phenomenon of colonialism'.[486] Veracini, on the other hand, argues that settler colonialism and colonialism 'should not only be seen as separate but also construed as antithetical'.[487] Settler colonialism is distinguished from other forms of colonialism in a variety of aspects. Most basic is that in settler colonial projects, '[t]he colonisers come to stay'.[488] In Veracini's words, '[i]t is an *animus manendi* that distinguishes

[480] Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 17) 402.
[481] ibid 388.
[482] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 33–34; Veracini deploys a different term to Wolfe's 'elimination', presenting a variety of 'transferist' strategies that 'aim to manipulate the population economy by discursively or practically emptying the indigenous sector of the population system (or sections of it), [and] share a transferist rationale'.
[483] Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 17) 390.
[484] ibid.
[485] Veracini, 'Patrick Wolfe's Dialectics' (n 329) 250.
[486] Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (n 19) 6.
[487] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 11–12.
[488] Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (n 19) 2.

the settler from the other colonists – as the very word "settler" implies, it is the *intention* to stay […] that contributes the crucial differentiating trait'.[489] Another central difference that Wolfe emphasises is that '[…] settler colonies were not primarily established to extract surplus value from indigenous labour. Rather, they are premised on displacing indigenes from (or replacing them on) the land […]'.[490] In other words, settler colonialism is not premised on exploitation of indigenous communities but wishes to replace them. This particular assertion has been challenged by different scholars who argue that in fact, many settler colonial societies were built on the exploitation of indigenous populations, rather than an effort to eliminate them, or involved both policies of exploitation and elimination simultaneously.[491]

Sai Englert, for instance, argues that Wolfe's and Veracini's approach to settler colonialism 'has ended up limiting its scope unduly', as 'numerous settler societies were built on the exploitation of indigenous peoples'.[492] Englert maintains that instead of focusing on specific settler colonial methods, research should concentrate on the objectives of such regimes, and analyse '[…] the multiplicity of settler strategies within an overall strategy of accumulation'.[493] Adopting the concept of accumulation by dispossession, Englert claims, allows a broader understanding of settler colonial strategies, 'including exploitation and/or elimination of the natives',[494] as well as studying 'the internal social relations within settler colonial societies'.[495] In a similar manner, Robin Kelley asserts that settler colonial regimes in the African continent are excluded from Wolfe's theory.[496] The reason, according to Kelley, is that African settler colonialism does not coincide with Wolfe's logic of elimination.[497] Kelley brings South Africa as an example of a white settlement that 'wanted the land *and* the labour, but not the *people*',[498] a settler colonial situation that Wolfe ignores as it does not fit his limited definition. Shannon Speed also argues that while Latin American states are in fact

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[489] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 53.
[490] Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (n 19) 1.
[491] Kelley (n 336) 271; Speed (n 336) 785; Englert (n 336) 1647.
[492] Englert (n 336) 1647.
[493] ibid 1657.
[494] ibid 1658.
[495] ibid.
[496] Kelley (n 336) 269.
[497] ibid.
[498] ibid.

settler colonial states, they are not recognised as such due to Wolfe's narrow definition,[499] and specifically, due to his 'land–labour binary'.[500] 'In Latin America, as elsewhere on the continent, white European settlers invaded, occupied, and stayed'.[501] These scholars suggest that a broader approach to settler colonialism allows both the study of more settler colonial regimes but also a more thorough scrutiny of settler colonial societies formations.

The division of society into groups in settler colonial states is described differently by various scholars. Mahmood Mamdani emphasises the settler-native relation, claiming that 'settlers and natives belong together. You cannot have one without the other, for it is the relationship between them that makes one a settler and the other a native'.[502] Thus, Mamdani identifies two central groups in the settler colonial realm, with any person that is not native tagged as a settler, but suggests some distribution within the group of settlers.[503] Wolfe, similarly, asserts that there are only two relevant groups, the indigenous and the settlers, hence everyone who is not indigenous is a settler.[504] Veracini recognises three relevant groups in the settler-colonial setting, the indigenous, the settler, and the exogenous other,[505] who is not indigenous nor a settler. Caroline Elkins and Susan Pedersen classify a four-way relationship, involving 'an imperial metropole where sovereignty formally resides, a local administration charged with maintaining order and authority, an indigenous population significant enough in size and tenacity to make its presence felt, and an often demanding and well-connected settler community'.[506]

Another interesting characteristic of settler colonialism, particularly for this study, is that 'settler colonialism obscures the conditions of its own production'.[507] Thus, settler colonialism is a regime that in many cases manages to remain invisible. Israel, as Veracini explains, is one settler colonial state in which, similar to the United States, 'the very invisibility of settler colonialism is most entrenched. The more it goes without saying, the

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[499] Speed (n 336) 783.
[500] ibid.
[501] ibid 788.
[502] Mahmood Mamdani, 'When Does a Settler Become a Native? Reflections of the Colonial Roots of Citizenship in Equatorial and South Africa', *Inaugral Lecture as A C Jordan Professor of African Studies* (1998) 1.
[503] ibid 2.
[504] Veracini, 'Patrick Wolfe's Dialectics' (n 329) 250.
[505] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 16.
[506] Elkins and Pedersen (n 332) 4.
[507] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 14.

better it covers its tracks'.[508] While Veracini's analysis erases the Palestinian perspective—for them settler colonialism was always visible—in the international arena Israeli settler colonialism has become more visible since the breakdown of the Oslo 'peace process'. The visibility of the colonial project is highly relevant for this thesis, which probes into the position of settler colonialism within legal education, and the manners in which law studies help produce its invisibility, which works, in turn, to bolster the settler colonial regime.

Settler colonialism is also characterised by supremacy. Caroline Elkins and Susan Pedersen highlight this idea when they write that 'settler colonialism is defined […] also by a particular structure of privilege',[509] and is 'marked by pervasive inequalities, usually codified in law, between settler and indigenous populations'.[510] Raef Zreik describes the connection between the settler and the law, pointing out that 'unlike the [immigrant], the settler colonialist refuses to come under local laws. He is the law. He brings with himself his own law, his totality, and his terms of reference. He accepts no partners in making the law. The native can benefit from the colonialist's arrangements as a contingent beneficiary, but he cannot be the co-author of the nomos of the land'.[511]

2.5.1 Settler Colonialism in Israel/Palestine

The concept of settler colonialism had been raised much earlier than Patrick Wolfe and Lorenzo Veracini's work, in the context of Israel/Palestine. Already in a paper published in 1965, Fayez Sayegh referred to the 'Zionist settler-community' and the 'Zionist settler-state', emphasising Israel's discriminatory character, and its pressure for territorial expansion.[512] More recently, several scholars have defined the Zionist enterprise, and later the State of Israel, as a settler colonial project.[513] As Raef Zreik asserts, 'Zionism, in its praxis and tools, is settler colonialism. Its takeover of the land, its dream of the disappearance of the native, the importance it allocates to the frontier, its expanding nature and the stories that it tells

[508] ibid 15.
[509] Elkins and Pedersen (n 332) 4.
[510] ibid.
[511] Zreik (n 325) 357.
[512] Sayegh (n 339).
[513] Rouhana and Sabbagh-khoury (n 325) 205; Veracini, *Israel and Settler Society* (n 325) 1; Veracini, 'What Can Settler Colonial Studies Offer to an Interpretation of the Conflict in Israel–Palestine?' (n 325) 268; Zreik (n 325) 358–360; Evri and Kotef (n 325) 3.

itself about the land as being terra nullius all match the settler-colonial paradigm'.[514] While such researchers tend to agree as to the regime's definition, some differ as to the specific territory in which settler colonialism is carried out. Veracini, for instance, argues that Israeli settler colonialism takes place within the 1949 armistice lines, but not in the Palestinian territories occupied in 1967, that are subject to military occupation.[515] Other scholars reject this argument, claiming that the Zionist settler colonial project prevails between the Jordan River and the Mediterranean Sea.[516] Rana Barakat asserts that the only difference between Israel within the Green Line and the West Bank is the context, given the large number of Palestinians who still live in the occupied territories.[517] Barakat goes further to criticise Veracini's attempts to evaluate the success or failure of the Israeli settler colonial project, contending that he is employing the settler's perspective in his analysis.[518] Another significant distinction is made by Zreik, who emphasises that Zionism is 'a settler project and a national project at the same time',[519] and that 'for Zionism the site of the nation is the site of the colony itself'.[520] 'The national project could not be achieved without colonial practices and the dispossession of the native', according to Zreik, but 'its colonial nature does not make it less national, and its national nature does not make it less colonial'.[521] Therefore, Zreik asserts that 'Israel falls within the paradigm of settler colonialism, but as a special case of that paradigm',[522] leaving limited space for comparison to other settler colonial regimes.

The advantage of employing the settler colonial paradigm when scrutinising the Israeli regime, is that it helps to explain the fragmentation of the Palestinian people.[523] As Brenna Bhandar and Rafeef Ziadah stress, settler colonialism 'helps us to move beyond the Oslo narrative of conflict resolution and dialogue between two equal sides to a serious analysis of the Zionist project in Palestine'.[524] They contend that the Israeli settler colonial project 'is

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[514] Zreik (n 325) 359.
[515] Lorenzo Veracini, 'The Other Shift: Settler Colonialism, Israel, and the Occupation' (2013) 42 Journal of Palestine Studies 26, 29.
[516] Barakat (n 338) 350–351; Cohen and Gordon (n 123) 210–216.
[517] Barakat (n 338) 350–351.
[518] ibid 351.
[519] Zreik (n 325) 359.
[520] ibid.
[521] ibid.
[522] ibid.
[523] Brenna Bhandar and Rafeef Ziadah, 'Acts and Omissions: Framing Settler Colonialism in Palestine Studies' 10.
[524] ibid.

rooted in dispossession, and maintained through a sophisticated matrix of apartheid policies against Palestinians everywhere, not just in the territories occupied in 1967'.[525] Furthermore, they argue that 'the strength of using a settler-colonial framework in Palestine Studies, is precisely its ability to historicize the colonization of Palestine as a process that began long before the 1948 Nakba'.[526]

Veracini presents a comprehensive account of the variety of transfer strategies that are used by settler colonial regimes, in an attempt to eliminate the native, some of which are clearly relevant to the Zionist-Israeli project. These strategies include *ethnic transfer*, which involves forced deportation of indigenous communities, akin to the consequences of the 1948 war, and later on the 1967 war. Veracini emphasises that 'wherever they end up, they cease being indigenous',[527] thus, while both internally displaced Palestinians and Palestinian refugees in exile lost their land they 'are not considered indigenous to the land'.[528] *Transfer by conceptual displacement*, a strategy that 'allows for the possibility of discursively displacing indigenous people to the exterior of the settler locale',[529] for instance, by referring to Palestinians as 'Arabs', thus discursively suggesting that they are native to a much larger area than Palestine itself.[530] It also includes 'representations of indigenous people as pathologically mobile and "nomadic"',[531] a very common issue with regards to the Bedouin community in the Naqab desert. *Narrative transfer* is a strategy that works to constitute the settlers themselves as indigenous to the land. It promotes a narrative that either present both the native population and the settler society as indigenous to the land, or insinuate that the indigenous people is in fact also a settler community. Both narratives works to deny and erase indigenous connection to the land.[532] *Transfer by coerced lifestyle change* is a strategy that eliminates 'the indigenous way of life and social and political organisation'.[533] 'Enforced sedentarisation, for example, may look like the absence of transfer, but efforts to immobilise

[525] ibid.
[526] ibid.
[527] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 35.
[528] ibid.
[529] ibid.
[530] ibid.
[531] ibid 36.
[532] ibid 42–43.
[533] ibid 44.

indigenous people necessarily imply a degree of displacement',[534] a strategy which is also relevant to Bedouin communities in Israel and the occupied territories.

2.5.2 Settler Colonialism and Education

The literature focusing on the intersection of settler colonialism and education is limited. Most of the scholars who work on these issues are affiliated with the field of Indigenous Studies, and their research is almost exclusively focused on North America, mostly the United States but also Canada. These scholars focus mainly on the curriculum, as well as on the field of curriculum studies.

Eve Tuck and Wayne Yang define 'settler moves to innocence', as 'strategies or positionings that attempt to relieve the settler of feelings of guilt or responsibility without giving up land or power or privilege, without having to change much at all'.[535] With more and more voices and support for the decolonisation of the academy, Tuck and Yang underscore the 'excuses, distractions, and diversions from decolonization',[536] arguing that it is settler anxiety and concerns for settler futurity, that render different attempts of decolonisation a failure.[537]

Eve Tuck and Ruben Gaztambide-Fernandez exhume 'the ways in which curriculum and its history in the United States has invested in settler colonialism, and the permanence of the settler-colonial nation state'.[538] They focus on 'the settler colonial curricular project of replacement, which aims to vanish Indigenous peoples and replace them with settlers, who see themselves as the rightful claimants to land, and indeed, as indigenous'.[539] Delving into some classical texts, Tuck and Gaztambide-Fernandez argue that the academic field of curriculum studies, mainly in its early days, promoted the logic of replacement of the native.[540] Another significant insight they share, is that 'the settler colonial curricular project of replacement seems to happen organically, without intent, even though Indigenous erasure

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[534] ibid.
[535] Eve Tuck and K Wayne Yang, 'Decolonization Is Not a Metaphor' (2012) 1 Decolonization: Indigeneity, Education & Society 1, 10.
[536] ibid.
[537] ibid 35–36.
[538] Eve Tuck and Rubén A Gaztambide-Fernández, 'Curriculum, Replacement, and Settler Futurity' (2013) 29 73.
[539] ibid.
[540] ibid 76.

is the arch aim of settler colonialism'.[541] As we will see, similar processes can be identified in the Israeli law schools.

Dolores Calderón examines social studies curriculum in the United States, through secondary level education textbooks.[542] Focusing on settler colonial narratives, Calderon concentrates both on the presence of settler colonial ideologies and on the representation of American Indians in textbooks,[543] and how these maintain settler colonialism tropes.[544] Anna Lees, Tasha Tropp Laman and Dolores Calderón question whether land education can thwart settler colonialism and reduce its significant impact on compulsory education.[545] Their initial research that focuses on teaching candidates, found that land education can contribute to reduce ignorance and raise awareness.[546] In another research of social studies curriculum textbooks, Calderon examines how land education advances place-based education, specifically within the scope of promoting indigeneity and impeding settler colonialism.[547] She argues that the presence of settler colonial ideologies within textbooks reinforce the settler colonial logic and leave very little room for counter ideas to be addressed.[548]

Aiming to expose how 'settler colonialism has shaped schooling and educational research in the United States and other settler colonial nation-states',[549] Tuck and Yung call on other scholars to 'join […] in these efforts, so that settler colonial structuring and Indigenous critiques of that structuring are no longer rendered invisible'.[550] Despite the insights of these scholars, the field of settler colonial pedagogy is relatively new and not fully developed, while the analysis of settler colonial pedagogies in the field of legal education is virtually non-existent.

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[541] ibid 79.
[542] Dolores Calderon, 'Uncovering Settler Grammars in Curriculum' (2014) 50 Educational Studies 313, 314–315.
[543] ibid 315.
[544] ibid 316.
[545] Anna Lees, Tasha Tropp Laman and Dolores Calderón, '"Why Didn't I Know This?": Land Education as an Antidote to Settler Colonialism in Early Childhood Teacher Education' (2021) 60 Theory Into Practice 279, 279.
[546] ibid 286–287.
[547] Dolores Calderon, 'Speaking Back to Manifest Destinies: A Land Education-Based Approach to Critical Curriculum Inquiry' (2014) 20 Environmental Education Research 24, 24.
[548] ibid 25.
[549] Tuck and Yang (n 535) 2.
[550] ibid 3.

2.6 Legal Education

In recent years, legal education and the law degree, have encountered criticism from a variety of directions, including the legal profession, the academy, law students and society at large. Questions regarding the value of an LLB in times of significant change to the legal profession, claims that law schools fail to adequately prepare students for the legal practice, and resentment over the high debts accumulated by law students have become common.[551] Harry Edwards argues that many law schools 'have abandoned their proper place, by emphasising abstract theory at the expense of practical scholarship and pedagogy'.[552] From a slightly different perspective, Fiona Cownie found that legal academics are moving away from pure concerns with legal doctrines towards the heart of academy, turning into 'academic lawyers' in a manner that incorporates wider data and material in their research and teaching, and distances them from the legal profession as well as the challenges it encounters.[553] These transitions in the realm of legal education are addressed by many scholars, and bear important implications for the training of lawyers and for the legal academy. Yet, this research considers such studies as an *internal* critique, one that overlooks the wider social and political consequences of the ongoing transformation process law faculties are undergoing around the globe.

These internal questions are tied to the ongoing disputes regarding the ends of legal education. As Fiona Cownie indicates, the underlying question of such debates is 'do law schools exist to train lawyers or to offer a liberal legal education?'[554] In a similar manner, Benjamin Spencer notes that there are two distinct perspectives regarding the role of law schools—a scholarly institution, or a professional training provider. For Spencer, regardless of the perspective one adheres to, high quality legal education is vital for the law itself and for the administration of justice, as law schools have a significant social impact.[555] According to Anthony Bradney, students provided with liberal legal education are 'in a better position,

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[551] A Benjamin Spencer, 'The Law School Critique in Historical Perspective' (2012) 69 Washington and Lee Law Review 1949, 1952.
[552] Harry T Edwards, 'The Growing Disjunction between Legal Education and the Legal Profession' (1992) 91 Michigan Law Review 34, 34.
[553] Cownie, *Legal Academics: Culture and Identities* (n 390) 198–199.
[554] Fiona Cownie, 'Introduction: Contextualising Stakeholders in the Law School' in Fiona Cownie (ed), *Stakeholders in the Law School* (Bloomsbury Publishing 2010) 2.
[555] Spencer (n 551) 1957–1959.

at least in the long run, to adapt to new demands, building on the varied languages that they have learnt in the law school' and therefore, liberal legal education might be able to also cover vocational demands.[556] Cownie asserts that for legal academics to be able to take part in this discussion they should have 'knowledge of the theory and philosophy of education'.[557] Embracing such theories, Cownie explains, would not only improve legal education provided to students, but allow legal academics 'to explain what we believe the purpose of legal education to be, in philosophical terms, and to work out the implications of that philosophy for teaching methods, methods of assessment and course content'.[558] Cownie connects this issue to a wider controversy surrounding higher education as a whole, asserting that '[w]ithin the liberal tradition, teaching has commonly been seen as a less important function of the university'.[559]

Yet, according to Bradney, liberal education holds a fundamental role in the field of legal education, as '[i]n the case of the university law school [its] core business is liberal education'.[560] For Bradney, liberal education bears specific implications for the law school, including, for instance, the imposition of a liberal curriculum, one that educates students as to questions that can be raised regarding the law and the different arguments that can be made in return,[561] as well as the inculcation in students of 'an awareness of the all-pervasive nature of values and questions about values in the world that surrounds them'.[562] Critical scholars take this dispute surrounding legal education even further, understanding that legal education not only impacts, but produces reality. Duncan Kennedy maintains that legal education in the United States legitimises and even creates social hierarchies, through university rankings, the tenure system and the grading method.[563] In a similar manner, Lucille Jewel emphasises the tension between the need to provide students the essential skills and knowledge to become successful lawyers, and the understanding that cooperating with that system of symbolic

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[556] Anthony Bradney, *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* (Hart Publishing 2003) 104.
[557] Fiona Cownie, 'The Importance of Theory in Law Teaching' (2000) 7 International Journal of the Legal Profession 225, 225.
[558] ibid 236.
[559] ibid 228.
[560] Bradney (n 556) 84.
[561] ibid 104.
[562] ibid 90.
[563] Duncan Kennedy, 'Liberal Values in Legal Education' (1986) 10 Nova Law Journal 603, 604–607.

capital only reproduces social hierarchies and promotes advantaged groups.[564] Building on insights that acknowledge the wider constitutive influence of legal education, this research aims to examine the pedagogic mechanisms used in Israel and to interrogate their broader legal and political implications.

A variety of teaching methods exists in the field of legal education, including the case method, the lecture-textbook method, the problem method, the discussion-textbook method, and the adversarial method.[565] Yet scholars have shown that while an ongoing debate has been carried out regarding legal teaching methods,[566] since its introduction at the Harvard Law School in 1870, the case method continues to prevail in the field of American legal education.[567] According to the case method, a court decision is used to demonstrate the principles of the law, then, a class discussion is held, and finally, when the central issues are clarified, an analysis of the issue is shared.[568] While there exists pedagogical criticism of that method,[569] its supporters claim that it is mainly castigated for its misuse, and that it has a pedagogical value.[570] These internal debates over teaching methods are important for the understanding of the inner legal discourse and its partial blindness towards its wider implications.

Another set of critiques of the case law method, question the social and political impact of the reasoning processes it generates. Elizabeth Mertz asserts that the case method fails to promote students' ability to engage in legal analysis, and produces cultural dominance through pedagogical linguistic processes.[571] Kennedy maintains that this 'value-neutral' doctrinal method is in itself a right-wing conservative teaching method, that makes the legal

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[564] Lucille A Jewel, 'Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy' (2008) 56 Buffalo Law Review 1155, 1158.
[565] Paul F Teich, 'Research on American Law Teaching: Is There a Case against the Case System' (1986) 36 Journal of Legal Education 167, 167.
[566] Cynthia G Hawkins-León, 'The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Method Continues' (1998) 1 Brigham Young University Education and Law Journal.
[567] David Garner, 'The Continuing Vitality of the Case Method in the Twenty-First Century' (2000) 2 Brigham Young University Education and Law Journal 307, 344–345.
[568] Harvard Law School, 'The Case Study Teaching Method' <https://casestudies.law.harvard.edu/the-case-study-teaching-method/> accessed 12 December 2020.
[569] Spencer (n 551) 2030, 2062.
[570] Jeffrey D Jackson, 'Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?' (2007) 43 California Western Law Review 267, 308.
[571] Mertz (n 390) 27–28, 207–298.

system seem inevitable,[572] and that the legal reasoning that is taught in law schools is directed to defend the social and political status quo.[573] Following these scholars, this research aims to analyse the operation of Israeli legal education and its case law methods in order to reveal the ideologies and values it instructs and promotes.

The South African case presents some important insights, as it provides the opportunity to observe the changing process of legal education in light of the political transformation from apartheid to democracy. As the South African legal field played a central role in legitimising the apartheid segregation regime, shortly after the 1994 elections, it was widely acknowledged that the legal education system must undergo a dramatic change.[574] Following this understanding, South African scholars maintain that it is one of the goals of legal education to produce graduates that are qualified to fulfil the role of advancing constitutional democracy.[575] While as aforementioned, American and Israeli scholars are mainly concerned with generating 'good lawyers', South Africa presents a different perception of the post-apartheid legal vocation. I aim to utilise these straightforward acknowledgments of the legal field's role both in preserving apartheid and in the process of democratisation, to examine the patterns of operation of legal education in the Israeli apartheid political setting (for elaboration on the concept of apartheid see Section 1.4).

Although educational segregation ended in 1994, former racial divisions among legal faculties are still evident in South Africa,[576] and while the role of legal education in the democratisation process and the importance of teaching legal ethics were realised, scholars maintain that not enough efforts have been made to clarify its practical meanings.[577] Scholars assert that to promote equality within the South African legal education system, there is a need for altering curriculums, adjusting teaching methods, and supporting students from poor

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[572] Kennedy, 'Liberal Values in Legal Education' (n 563) 608–610.
[573] Kennedy, 'Legal Education as Training for Hierarchy' (n 390) 62.
[574] Nicola Whitear-Nel and Warren Freedman, 'A Historical Review of the Development of the Post-Apartheid South African LLB Degree - With Particular Reference to Legal Ethics' (2015) 21 Fundamina 234, 234–235.
[575] Peggy Maisel, 'Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn From South Africa' (2006) 30 Fordham International Law Journal 374; Joel M Modiri and Karin Van Marle, '"What Does Changing the World Entail?" Law, Critique and Legal Education in the Time of Post-Apartheid' (2012) 129 The South African Law Journal 209; Geo Quinot, 'Transformative Legal Education' (2012) 129 The South African Law Journal 411; Joel M Modiri, 'Transformation, Tension and Transgression: Reflections on the Culture and Ideology of South African Legal Education' (2013) 24 Stellenbosch Law Review 455; Greenbaum (n 390).
[576] Iya (n 390) 357–358, 362.
[577] Modiri (n 575); Whitear-Nel and Freedman (n 574) 234–235, 250.

educational backgrounds,[578] in an effort to formulate critical legal teaching.[579] In addition, scholars suggest expanding legal clinics, in order to expose law students to the reality of oppressed groups and at the same time, grant these communities with legal representation.[580]

Clinical legal education is viewed by many as a means to promote social change and increase access to justice. In some areas of the world, where a transition from autocratic and dictatorial regimes has been carried out, legal clinics were sought as a tool to reform prevalent structures of legal education.[581] Scholars found that clinical legal education serves to promote equal justice particularly in developing countries.[582] Richard Wilson argues that an important benefit of clinical education rests in its ability to engage students with the community, realise the right for equal access to justice, and reinforce the belief of the community in the idea of equal justice.[583] These findings are very important for my research since, on the one hand, clinical education in Israel is evolving and engages students with disadvantaged groups, yet on the other hand, it does not involve the Palestinian community in the West Bank, nor the Palestinian community under military siege in Gaza strip, and therefore, its implications should be cautiously addressed. Moreover, in recent years the clinics in Israeli law schools have been subjected to a well-orchestrated attack by the education minister, who aimed to restrict the kind of work they carry out.[584]

The literature on Israeli legal education is very limited in scope,[585] and mainly considers internal dilemmas informing the daily operations of law faculties, rather than using the juridical field itself as an object of study. Some scholars highlight the importance of equipping students with legal knowledge,[586] while several researchers emphasise the need for

578 Lesley Greenbaum, 'The Four-Year Undergraduate LLB: Progress and Pitfalls' (2010) 35 Journal for Juridical Science 1, 23–24.
579 Modiri (n 575) 478–489.
580 Maisel (n 575) 382.
581 R Wilson, 'Training for Justice: The Global Reach of Clinical Legal Education' (2004) 22 Penn State International Law Review 421, 424.
582 Maisel (n 575) 419.
583 Wilson (n 581) 431.
584 Or Kashti and Shira Kadari-Ovadia, 'Israel's Council for Higher Education Tightens Supervision of Legal Aid Clinics' *Haaretz* (18 December 2018) <https://bit.ly/2ClqrcO>.
585 Becher (n 384) 9.
586 Daphne Barak-Erez, 'As for the One Who Knows Not How to Ask – Legal Education Facing the Inability to Know Everything' (2017) 9 Ma'asei Mishpat 181.

the development of critical legal thinking.[587] Others argue that law schools should focus on granting the skills demanded by the contemporary legal profession.[588] This literature is useful for this research as it concentrates on the role of legal education in generating 'adequate' graduates. Such studies expect Israeli law schools to continue inculcating students with a *universalising attitude*, that according to Bourdieu 'constitutes the entry ticket into the juridical field'.[589] They want law schools to keep on providing students with the specific knowledge and skills required to reproduce the operation of the juridical field.[590]

The literature that focuses on the relation between law schools and the broader social context they operate within is even more limited. It discusses, for example, how Israeli law schools generate 'spiritually disabled' students who lack knowledge in classical philosophy and the humanist tradition and are therefore incapable of fulfilling the jurists' social role to distribute and implement western-liberal values.[591] Others stress the importance of advancing clinical education for the development of social responsibility,[592] and the broader need for a value-focused education.[593] Such studies, while moving towards contextualising the Israeli legal education, tend to overlook both the complex political atmosphere it is located in and the actual strategies and mechanisms used in the classroom to produce the professional lawyer.

A cursory glance at the subject of legal education in the broader political context, Rabea Eghbariah emphasises that curriculums in Israeli law schools directly involve political issues. Yet, he argues that such matters are not contextualized to address the role law plays with

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[587] Roy Cohen, 'The Jurist of Legal Education: Liberal-Legal Learning Process and Professional Skills' (2014) 19 HaMishpat 283; Zvi Triger and Menachem Mautner, 'A Dialogue on Legal Education' (2014) 19 HaMishpat 79.
[588] David F Chavkin, 'Developing Values in the Lawyers of Tomorrow: Potential Lessons from the United States' (2005) 2 Law and Business 381; Cohen, 'The Jurist of Legal Education: Liberal-Legal Learning Process and Professional Skills' (n 587); Karni Perlman, 'Dispute Resolution and Appropriate/Alternative Legal Education' (2014) 19 HaMishpat 235.
[589] Bourdieu (n 417) 820.
[590] ibid.
[591] Triger and Mautner (n 587) 141–142.
[592] Stephen Wizner, 'The Law School Clinic: Legal Education in The Public Interest' (2001) 25 Tel Aviv University Law Review 369; Neta Ziv, 'Legal Education and Social Responsibility: Between the Law School and the Community' (2001) 25 Tel Aviv University Law Review 385; Iris Ilotovich-segal and Eli Bukspan, 'Legal Representation by Students in Academic Clinics in View of the Right for Access to the Law and the Education for Social Responsibility' (2005) 2 Law and Business 427.
[593] Ziv (n 592); Yuval Elbashan, 'About the Absence of Social Justice in Legal Education in Israel' (2003) 3 Aley Mishpat 7; Triger and Mautner (n 587).

regards to the Palestinian community more broadly.[594] This research seeks to further explore Egabariah's initial arguments regarding the firm relation among Israeli legal education and the political reality, suggesting that it is misguided.[595] But this research aims to go much further, asking both what is taught in law school and the pedagogical methods that are deployed. It shows how fragments of knowledge are delivered to students in a way that renders it difficult if not impossible for student to connect the pieces of the puzzle into one picture. Finally, it asks how these methods inculcate future lawyers into a particular ideology.

The Israeli legal education system is overtly discriminatory in nature, as Palestinian students from the Occupied Territories, although subject to Israeli domination, cannot enrol in Israeli law faculties. Such segregation in legal education echoes the segregation apartheid South Africa[596] and in the United States under the Jim Crow laws.[597] Drawing on five distinct bodies of literature, including Marxist theory, theoretical critiques of the rule of law, critical pedagogy, settler colonial theory and legal education, this research aims to advance our understanding of Israeli legal education and its manner of operation within a settler colonial apartheid regime. The thesis hopes to fill in a lacuna in the literature by offering a critical account of Israeli legal education and a more general understanding of legal education within settler colonial settings. To do so it describes a set of settler colonial pedagogies that are deployed in the classroom.

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[594] Rabea Eghbariah, 'Arab-Palestinian Students in Israeli Law Schools: A Critical Reading of Legal Education in Israel' (2017) 9 Ma'asei Mishpat 219, 219–223.
[595] ibid 223.
[596] Iya (n 390) 358.
[597] Barak Atiram, 'Socially-Driven Class Actions: The Legacy of Briggs' (2017) 23 Texas Journal on Civil Liberties and Civil Rights 1, 12–15.

Chapter 3: Research Trajectory, Methodological Framework and Ethical Considerations

This research emerged from my decision to study law. I was working full-time for a human rights organisation, and already held an MA in political science. Law school, I thought, could become my self-enrichment afternoon activity. Following a short survey of the various available programs, I filled in forms, paid the registration fees, and attached a short cover letter at the school's request. Within a short while I received my acceptance letter, and so, I went back to school.

My first semester in law school can be accurately described as both a fascinating and disturbing experience. Fascinating because it was very compelling to be properly introduced to a field that I wrongly assumed I was acquainted with already. Learning from scratch the process of legal reasoning, being able to appreciate the rationale of judicial interpretation, and recognising the principles of the Israeli legal system, all made me realise that the opportunity presented by studying law would allow me to grasp the logic of the judicial field. It was to prove disturbing, because I was constantly perplexed by the inconsistencies between the principles and characteristics of the legal system that were presented in class, and the actual reality of the outside world, as I understood it.

The ongoing and deepening tension arising from my attraction to and irritation with law school had two significant outcomes. First, instead of admitting that going back to school was a bad idea and dropping out immediately, the classes became my research setting. As my frustration began to rise, I applied for a PhD programme and enrolled as a PhD candidate in the beginning of my second year. Treating legal education as a site of inquiry allowed me not only to recognise and address why I felt unsettled in law school, it revived my interest in the study materials, class discussions, and lectures. Second, the persistent feeling of failing to bridge law with the reality surrounding me, engendered a hypothesis, one that would take the course of my doctoral studies to refute.

My initial hypothesis was that the complex legal system—made up of Mandatory laws, Jordanian laws, military decrees, and Israeli domestic law and precedent—that had evolved in

the West Bank over the previous 50 years,[598] *contradicted* the most fundamental principles informing the Israeli juridical system. After all, numerous studies have shown that the Supreme Court has sanctioned the establishment of scores of illegal civilian settlements within the occupied territory, it has permitted extensive use of deportations, administrative detentions,[599] extra-judicial executions,[600] and the construction of a 'Barrier' that detaches occupied lands from their lawful owners.[601] Former Supreme Court Chief Justice, Aharon Barak, has described the principles of the Israeli judicial system as 'principles of equality, justice, morals'. They spread, he wrote, 'over social objectives of separation of powers, rule of law, freedom of expression, freedom of procession, religion, occupation, human dignity, righteousness of the law, public safety and security, the democratic values of the state and its very existence. These principles include good faith, natural justice, fairness and reasonableness'.[602] Law school, I assumed, makes use of numerous mechanisms to obscure the inconsistencies between the legal principles Barak refers to and the actual legal practice. At that stage, I wanted to understand how these inconsistencies are elided, or, in other words, how do law schools produce the insider's common sense, where insider refers to me and my fellow law students. Therefore, the question that informed my research was: *what does it mean to study liberal law in an apartheid political setting*?

There is no doubt that my positionality had a significant influence on this research. Conducting this research as a white Jewish woman, an Israeli citizen, holding two academic degrees, allowed me to register to school and access the field easily. It also assisted me in forming connections with students and lecturers both easily and rapidly. My influence on the field itself was rather limited, as I was a regular student in a group of about 75 students who frequented most lectures. Thus, even though I participated in class discussions and raised questions, my contribution during lectures was quite moderate. Yet, being a left activist,

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[598] Weill (n 276).
[599] David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press 2002) 129–135; Sfard, *The Wall and the Gate: Israel, Palestine, and the Legal Battle for Human Rights* (n 164).
[600] Gordon (n 159) 201–207.
[601] Gross, *The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation* (n 184); Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (n 194).
[602] *Borochov v Yefet* [1985] Supreme Court CA 677/83, 39(iii) PD 205.

working for a human rights organisation, informed my research and influenced the meanings I assigned to encounters in my fieldwork, as well as my general focus.

3.1 Methodological Framework

My research began as an autoethnography, where I decided to turn my experience as a first-year law student into an inquiry into legal education. I decided to focus on institutions of higher education in Israel in general, and law schools in particular, where individuals that constitute a relatively powerful group within Israeli society work. As an enrolled LLB student seeking to study the setting within which I was already situated, I turned to the methodological literature in search for a proper definition that would suit my research project. After a while, I came to realise that a combination of autoethnography and critical ethnography was an accurate characterisation of my research.

Autoethnographic projects take place 'where we are',[603] and since I was already present in the field and an actor within it, it best described the circumstances in which I wanted to carry out research. This methodology is based on empirical observation and experience-based fieldwork,[604] which suited the observational stage of my research, as an enrolled law student. Critical ethnography assumes 'an ethical responsibility to address processes of unfairness or injustice within a particular lived domain'.[605] This distinct commitment inherent in critical ethnography, provided the wider framework for my research, and positioned my initial perspectives on law school within a methodological tradition. Critical ethnography is based on three data collection methods that I was planning to use—direct observation, interviewing, and textual analysis. Furthermore, it is a flexible framework within which critical methods can be applied and adjusted in accordance with a specific research layout, to suit its purposes, questions and particular field.[606]

Following my understanding that the inconsistencies between law as presented in class and law in reality are a reflection of a structural phenomena and not unique to one law school, I found critical ethnography a more appropriate methodological and theoretical framework for

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[603] Tony E Adams, Stacy Holman Jones and Carolyn Ellis, *Autoethnography - Understanding Qualitative Research* (2015) 49.
[604] ibid 50.
[605] D Soyini Madison, *Critical Ethnography: Method, Ethics, and Performance* (Sage Publications 2005) 5.
[606] Enrique G Murillo, 'Mojado Crossing along Neoliberal Borderlands' in George W Noblit, Susana Y Flores and Enrique G Murillo (eds), *Postcritical Ethnography: Reinscribing Critique* (Hampton 2004) 157.

my inquiry, as autoethnography would not allow me to look beyond the specific setting in order to examine and assess the structure. In addition, by utilising a perspective directed at identifying and questioning societies' common sense, critical ethnography would allow me to examine, expose and challenge the manners of operation of power and domination within a given law school in particular and the Israeli judicial field in general.[607] In Madison's words, '[t]he critical ethnographer also takes us beneath surface appearances, disrupts the status quo, and unsettles both neutrality and taken-for-granted assumptions by bringing to light underlying and obscure operations of power and control'.[608] Hence, my research that began as an autoethnography, developed into a wider critical inquiry, which made use of several methods as part of an effort to provide an in-depth account of legal education in Israel.

3.2 Data Collection

The first part of my inquiry lasted over a period of almost four years. The objective of such an extended embedded lived reality phase was first and foremost to go through the entire course experienced by an Israeli law student, including the classes, assignments, exams and other events that constitute the Israeli LLB program. Participating and observing in this setting included keeping field notes alongside minutes of the content of each class, providing detailed descriptions of verbal exchanges and practices, as well as short accounts of their meanings, as I apprehended them in the field.[609]

I decided to continue as an active student who takes part in the program, yet at the same time, observe the setting within which I was studying. I attended all class sessions, taking notes, reading class materials, taking exams and submitting essays, and simultaneously kept field notes of discussions, encounters, and incidents I had observed, while keeping records of my thoughts and reflections on these numerous experiences.

Over four years, my study materials received the same bifurcated approach, one of a regular law student who needed to memorise material for the exams, and the other of a critical scholar who tried to critically understand some of the underpinnings informing the material and the way it was transmitted to students. I was reading case law both for class and for my

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[607] Madison (n 605) 5; Jim Thomas, *Doing Critical Ethnography*, vol 26 (Sage Publications 1993) 3–4.
[608] Madison (n 605) 5.
[609] Bruce Lawrence Berg and Howard Lune, *Qualitative Research Methods for the Social Science* (Pearson 2012) 229–30.

own research, aiming simultaneously to understand court decisions within the scope of my class, and critically examining the same texts as well as the manner in which it was presented and analysed by my teachers in order to better understand the logic of the Israeli judicial field and how it operates. Course syllabuses and examination papers received the very same treatment, as I was using them for both my LLB and my PhD. Thus, my research makes use of two types of written documents, teaching materials and formal legal documents. The first category of documents includes courses syllabuses, exam papers, and class notes. The second category consists of formal legislation and court decisions, especially the Supreme Court judgments, that were taught in various classes.

Throughout my observations I paid attention to pedagogical methods employed in the classroom, including the place and time allocated for class discussions, any direct mentions of the occupation and the West Bank, *as well as* to the absence of such utterances from class discussion. I considered the way Supreme Court rulings were framed in the classroom and whether that framing was informed by the broader social and political context, as well as how the events and interactions that appeared in court rulings themselves were portrayed and discussed in class. Furthermore, I looked at how a link is drawn between the boundaries of legal arguments in the ruling themselves and the opinions expressed by the Justices, on the one hand, and the analysis of these rulings in the classroom. Another focus of my observations was how class discussions and teachers' remarks treated and formed the legal subject, and demarcated the primary characteristics associated with the human. I paid attention to the ways we speak about noncitizen Palestinians and Israeli citizens, trying to understand who stands behind the veil of our objective figures, who exactly is a victim in our discourse and who is not, as well as the conditions that determined what was said about each case in class. At one point, I also started looking at linguistic practices that serve to universalise and neutralise discussions and the role of these practices within legal pedagogy.

3.3 Re-entering the Field

My decision to transform law school from a personal venture aimed at acquiring a legal degree to a site of critical investigation led to a series of difficulties that I had to address. The first and most pressing issue from my perspective, was the fact, that I was not only present, but already embedded within the very field that I was planning to study. My previous

knowledge about fieldwork did not apply to the new circumstances. Questions regarding access to the field, positionality, gaining institutional approval and receiving subjects' informed consent, are all typically, and (maybe) ideally, addressed before entering the field. Facing less than optimal conditions, I began forming my research design in order to rapidly address both methodological aspects and ethical considerations.

From an ethical perspective, I was attempting to formulate an approach that would successfully capture both the potential influence of my research on its participants as well as my own embeddedness in the field and its impact on research. Misjudgement could result in paralysing the whole inquiry.[610] Instead of making categorical ethical decisions, following Martyn Hammersley and Anna Traianou I began taking into account the particular circumstances of my research; more specifically, I began by examining the necessity and meaning of informed consent and whether it was indeed required within a classroom setting.[611] Hammersley and Traianou emphasise that in many field observations no consent need or should be sought, both practically and ethically.[612] From a practical point of view, my research did not require any consent in order to enter the field, given that I was a regular LLB student, paying full tuition, and fulfilling all learning obligations and tasks. Being a student granted me the ability to be present in classes, so I did not need any further approval in order to access the field. In this manner, not gaining approval did not prevent or hinder the inquiry. Furthermore, I was never interested in the individual students since the goal of conducting participant observation was to study underlying structures and pedagogical mechanisms.

From an ethical perspective, I needed to take into account a number of significant issues. The expectation of privacy in the particular space in which observations were taking place was first among these. While such an expectation is clear in private spaces, college classes can be classified as a public space, or at least public-like spaces, where participants (i.e., students and professors) have less expectations for privacy. Although some researchers feel that

[610] Amia Lieblich and Hadas Wiseman, 'Ethical Considerations in Narrative Research - Issues, Thoughts and Reflections' in Amia Lieblich and others (eds), *Issues in Qualitative Research – Ethics and Quality Criterion* (Association for the Study of the Multidimensional Person, Israeli Center for Qualitative Research of People and Societies 2010) 45.
[611] Marytn Hammersley and Anna Traianou, *Ethics in Qualitative Research - Controversies and Contexts* (Sage 2012) 83, 98.
[612] ibid.

people have the right not to be observed for research purposes,[613] others argue that there is no ethical need for consent in a public setting.[614] A college classroom might not be completely public, but it can be viewed as such to some extent.[615] The field observations I conducted took place in classes attended by dozens of students, some of whom recorded the lectures, and even though classes are designated for students, they are public in the sense that nothing prevents non-students from entering the classroom. Thus, a study that is carried out within such a setting, where there is less expectation for privacy, circumvents ethical requirement for informed consent.[616]

Nonetheless, I decided to advise my lecturers, as participants in my study, that I was conducting field research that involved participant observation as a student in their classroom and sought their informed consent. Even though my understanding that such consent was not needed, it felt a better path to choose. Considering that my observations were planned to last about three years, I assumed that the relatively long period would largely reduce the 'Hawthorne Effect', whereby sharing information about the study and its nature with participants may affect and even invalidate findings.[617] In this case, there was plenty of time for my lecturers to get used to the fact they are being observed. As for the time and effort, I was relying on a naïve assumption that as a student in a research institution I would not only be granted approval relatively easily, but even be offered assistance and support.

3.4 Seeking Informed Consent

As my initial research plan crystalised, I reached out to the appropriate authority in the college, asking for a meeting. Our first meeting was quite helpful as I presented my idea to conduct participant observation throughout my studies at the Law School. The manager was very supportive and suggested that I read the work of certain scholars. 'I will speak to you in the most honest way', the manager said before making clear that their role was to protect the institution's reputation and good name, while also stressing that as a student in the law school, it was in my own interest as well: 'in general, as far as I'm concerned, anything that

[613] Berg and Lune (n 609) 85.
[614] Hammersley and Traianou (n 611) 84.
[615] ibid.
[616] ibid 84–85.
[617] Berg and Lune (n 609) 83.

can help you carry out interesting research is fine, but I also have the institutional side in me that is a bit worried. For example, I tell myself that it's all a matter of attitude, like media people can make a scoop out of something that isn't a scoop, for example, "that our college doesn't offer any course about the occupation". Let's find one law school in Israel that has one, and then we'll talk, you know, so there's a part of me that says, wait a second, I don't know, I don't want the name of the school, the students, and the lecturers to be damaged'.[618]

The manager then stated: 'I also can't stop you from taking notes, like, it seems stupid to me, I'm now a judge who allows you to carry out observations or not in class, like, I don't think I have that kind of prerogative. The truth is that I don't know what official confirmation I can give you'.[619] I then explained that I preferred to let all my lecturers know about the research and receive their consent at the outset, so the manager suggested that I approach every professor directly, stressing, 'I don't think that this is my place, I think that it is in front of every professor, she/he has freedom in her/his classroom, he/she can tell you "listen, it doesn't suit me, I'm not comfortable with it, I ask you not to do it", or "it's fine, there's no problem"'.[620]

The manager emphasised that they thought maintaining the anonymity of the institution would help a lot, and said: 'I have an institution that has a good name, I want to keep it that way, and the last thing I want is "we read in Michal's [dissertation] that this college comes out as racist because the subject is a Jewish straight man, etc."'.[621]

Although very supportive and helpful, our first meeting did end with a series of questionable requests. First, the manager directly said: 'I do ask that if you feel […] there are things you want to consult with me on or you want to inform me about, that you will come and tell me'.[622] To my answer, that it would be helpful to know if there were specific ways that the manager believed would enhance the anonymity of the institution, they suddenly suggested that I run any publication by them, 'so, come and share with me before you publish a text, like, even just for publication, I don't need your full dissertation, then share it with me, or

[618] 'Meeting with College Manager' (14 November 2017).
[619] ibid.
[620] ibid.
[621] ibid.
[622] ibid.

with whoever will replace me'.[623] Third, they requested that 'if during your research you find things that I need to know about, regardless of your study, whether personal hardships or structural problems, things you want to say "listen, I think it's something that needs to be addressed", please let me know'.[624] In other words, the academic manager intimated that I consult the institution before publishing any part of my research, and that it would be appreciated if, as the fieldwork proceeds, I would share and discuss my findings with them. It was implicit in that conversation that I was being asked to report about different incidents so they would be taken care of, and that I must present my findings so that the institution might moderate them and control their publication. Such demands to review, intervene and even edit research findings, often occur in the study of powerful groups. Bruce Berg and Howard Lune emphasise that researchers must reject such conditions, that would undermine the research's reliability and credibility.[625]

Following that meeting, I presented my research project to several lecturers in the law school, and they expressed some interest and willingness to allow the observations and to participate in my study. 'Really?' one of them asked, 'you want to observe me? Funny…'.[626] Another lecturer was facetious, asking 'but if it is anonymous, how will everyone know who your amazing teacher is?'.[627] That teacher claimed they were not authorised to grant consent, and asked me to first gain formal approval from someone in the institution's management. I then contacted the manager again by email, and to their request, elaborated about my project:

> My PhD inquiry will be based on ethnographic research, for which I ask to carry out participant observation in the various modules offered by the law school, while studying on the LLB program […] My research field is legal education – the lectures, the syllabuses, and the various legislation and reading materials […] For this purpose, I will be requesting your approval to observe classes, write notes and record them for research use only […] The research will maintain anonymity and will not display names. In addition, I plan to contact all my teachers and receive their individual consent. I have already spoken to some of them, and they have agreed, but requested your consent and approval before they sign a consent form.[628]

[623] ibid.
[624] ibid.
[625] Berg and Lune (n 609) 87.
[626] 'Conversation with Law Professor' (24 November 2017).
[627] 'Conversation with Law Professor' (21 November 2017).
[628] Michal Rotem, 'Request for Another Meeting' (6 December 2017).

The manager agreed to meet again, and based on our first meeting, I expected encouragement and support. Instead, within three weeks of our first meeting, the academic manager arrived with a series of arguments that concluded my research could not be carried out at all. 'I went through a very significant process of inquiries', the manager explained, 'my optimistic casualness, that it seemed that it will be fine […] changed from end to end, I realised that there are several layers here'.[629] The first argument made by the manager, was that there was an ethical issue here, explaining that after I apply and gain the university ethics committee approval for my research, I must submit another request that included my full research proposal to the college's ethics committee, even though I was carrying out my PhD at a different university. The manager stressed that should I receive such approval, I would still have to talk with each professor and receive their own approval, and provide them with a signed commitment form, in which I committed to maintain their confidentiality. 'That's the procedure', the manager stressed.[630]

The second argument had to do with the institution's reputation. 'Another issue that had bothered me during our previous meeting', the manager asserted, 'has to do with the anonymity of the institution, which is currently impossible'.[631] The problem, that according to the manager worries not only them but also several officials they consulted with in the college, is that 'the findings might be very critical, but that such a critique is relevant for Israeli legal education as a whole, or even to legal education in the twenty-first century in general'.[632] Claiming to have consulted experts in qualitative research, the manager argued that to be representative and reliable, such research must be conducted in several institutions, and that even if I aimed to provide insights as to Israeli legal education, 'it comes out as a study of this specific institution, whether you like it or not'.[633] 'You see, that's my perspective',[634] the manager said.

The third argument addressed my legal future: 'I will tell you honestly, from your perspective as a student in this college […] every academic publication that might be interpreted as "here

[629] 'Meeting with College Manager' (8 December 2017).
[630] ibid.
[631] ibid.
[632] ibid.
[633] ibid.
[634] ibid.

[at their Law School] students' eyes are closed, and they are indoctrinated", and I don't know what. You know. So as a future alumnus of this college, from your professional aspect as a jurist, you don't want to say, "I studied at this institution on which I wrote my profound doctorate"'.[635]

The manager then summed up, 'and then I tell myself, OK, […] what am I actually saying to you? That you cannot do your PhD research, because you won't conduct an intensive participant observation in three different institutions'.[636] Then the manager turned to suggest different layouts that would satisfy the institution's concerns but had little or nothing to do with my research. The manager stressed that it was not only their position, but that they consulted with others in different positions in the university who did not want me to proceed with my plan finally finishing with: 'I am in favour of your research question, and that you do this PhD'. 'That's it, I really don't want to break your spirit, I want you to proceed in this direction, and I don't want to be an academic technocrat who puts obstacles in your way'.[637]

The academic manager's unexpected response was problematic for a number of reasons. As Hammersley and Traianou point out, the act of obtaining institutional consent sometimes works to waive individuals' autonomy. In a situation where individuals in the field express genuine interest to participate in a study, but a gatekeeper or the institution itself does not permit the research to be carried out, the individuals' free will is actually restricted by the decision to seek consent. Those responsible for providing permission often perceive themselves as gatekeepers whose role is to protect the institution and/or to advance its interests. They use their position of power to advance personal and institutional agendas, which may differ from other players in that very institution.[638] Even though some of the lecturers expressed interest in participating in the study, the academic manager tried to obstruct the research by introducing a number of unacceptable conditions.

Pierre Bourdieu contends that '[t]he terrain where people struggle for the appropriate, just, legitimate way of speaking the social world cannot be eternally excluded from the analysis - even if the claim to legitimate discourse tacitly or explicitly implies the refusal of that

[635] ibid.
[636] ibid.
[637] ibid.
[638] Hammersley and Traianou (n 611) 87.

objectification'.[639] Bourdieu goes on stressing that '[t]hose who claim the monopoly of thought about the social world do not expect to be thought sociologically.'[640] Therefore, it should be expected that when investigating the field of law studies in Israel, and the manners in which it operates one will encounter many difficulties since the field strives to protect itself from external critique.

Consequently, there are a variety of ethical justifications for choosing latent or even covert research strategies when studying elites and powerful groups.[641] After all, the ethical principles' main purpose is to protect those in need of protection and are not to be utilised to prevent research of powerful groups and institutions. Pointing to the fact that most social scientists tend to avoid the study of dominant groups, Berg and Lune explain that researchers tend to study disadvantaged groups, since powerful actors tend to set conditions such as the right to review and even edit research findings, and employ different strategies to protect their interests.[642]

There are those who argue that the choice not to seek informed consent in face of the inability to investigate a certain field or group is form of 'ethical relativism' since it presupposes that the researcher's right to study a phenomenon exceeds the right of the participants for informed consent.[643] This view, however, fails to take into account the power relations inherent to the situation. In my case, I tried to obtain the right to study academic staff, those who regularly conduct research and also study others, yet remain protected from becoming research subjects by imposing restrictions and utilising institutional ethics committees. It is precisely in such circumstances, as Berg and Lune maintain, that it is ethically justifiable to conduct covert research among dominant groups, since it is often the only way to carry out such studies.[644]

This is the reason why I decided not to discuss my research with the academic manager at the law school. I realised that accepting the conditions set by the academic manager could

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[639] Pierre Bourdieu, *Sociology in Question* (Sage 1993) 37.
[640] ibid.
[641] Penny Green, 'Researching the Turkish State' in Steve Tombs and Dave Whyte (eds), *Unmasking the Crimes of the Powerful* (Peter Lang 2003).
[642] Berg and Lune (n 609) 86–87.
[643] ibid 85.
[644] ibid 86–87.

jeopardise my whole research project.[645] Even if I did gain institutional approval, the academic manager's demand to share my research design would reveal its questions and hypotheses. In such a situation, I would lose control over the project, not knowing who had access to which documents, which players in the field were exposed to information and to what degree, as well as what (if any) directives were given to participants and by whom.

The ethics committee in the university I was doing my PhD studies was made aware of my interactions with the manager and approved my research plan, to be carried out as a participant observation throughout my studies as a law student. The committee agreed that in face of my efforts to gain approval and the institution's defensive reaction and unreasonable demands, I should relinquish my attempts to gain consent, and carry on with my research project.

3.5 An Insider in the Field

The position of an insider to the research setting constitutes several key advantages, along with a number of risks. Roni Berger maintains that the insider position provides easy access to the field, and the researcher usually arrives with prior knowledge of the subject matter and understands nuances. According to Berger, it also facilitates access in terms of prior awareness of interesting instances within the field, and better understanding of the language and the collected data.[646] However, as Melanie Greene asserts, it threatens the validity of the study, since the researcher is simultaneously a subject and an object, with no significant distinction from the field.[647] Moreover, Berger suggests that there is a risk of projection of the researcher's values, beliefs and perceptions on the participants.[648] This position, as Naama Sabar Ben-Yehoshua notes, might as well lead participants to conceal or divert information,[649] as well as assume the researcher is aware of matters that are taken for granted,

[645] At the risk of complete denial, the researcher can operate in the absence of informed consent and institutional approval even if ethically there is a place to obtain them; Hammersley and Traianou (n 611) 98.
[646] Roni Berger, 'Now I See It, Now I Don't: Researcher's Position and Reflexivity in Qualitative Research' (2015) 15 Qualitative Research 219, 224–225.
[647] Melanie J Greene, 'On the Inside Looking In: Methodological Insights and Challenges in Conducting Qualitative Insider Research' (2014) 19 The Qualitative Report 1, 6.
[648] Berger (n 646) 224.
[649] Naama Sabar Ben-Yehoshua, 'Ethnography in Education' in Naama Sabar Ben-Yehoshua (ed), *Traditions and Genres in Qualitative Research - Philosophies, Strategies and Advanced Tools* (Mofet Institute 2016) 96.

and therefore share less data.[650] In addition, a researcher who comes from within may not pay attention to the self-evident.[651]

To cope with such risks, Greene maintains that researchers should be constantly aware of their dual role, as researchers and subjects, and control its impact on the research.[652] It requires a deliberate and ongoing process of reflection, to manage the tension among the researcher's deep understanding of matters and the risk of projecting her own experiences on the participants.[653] Reflection also facilitates the researcher's recognition of her position, as well as awareness of the impact of that position on the data collection and the study participants. In cases where the researcher is familiar with the research setting, she must be open and sensitive to the environment, precisely because everything seems familiar and clear.[654] In this context, it is important to notice that positionality does not address solely the researcher's actual position in the field, but as well includes her personal characteristics, such as gender, beliefs, biases, age, political views, and ideologies.[655]

3.6 The Field

As mentioned, shortly after the beginning of my LLB studies, the law school became the field of my PhD research. While 'law school' suggests that there is one building, or even one room, that had constituted my research setting, it was in fact an amorphous space. From the classroom itself, the library, and the lawns, through long hours of intense reading and writing assignments at home, in a café, or practicing in court, to online classes during the Covid-19 pandemic, my research field had spread to almost every part of my day, and nearly every place I attended, for a period of roughly four years.

I studied my four-year LLB in a law school in a public college in Israel. As mine was an evening higher education program, it lasted eleven semesters, with most classes taking place in the late evening and on Friday mornings. Three and a half years of my studies were taught in-person, and the last semester took place online, due to Covid-19 lockdowns. Most of our required classes took place in a large lecture hall, with terraced seats for the students, an

[650] Berger (n 646) 225.
[651] Sabar Ben-Yehoshua (n 649) 96.
[652] Greene (n 647) 6.
[653] Berger (n 646) 229–30.
[654] Sabar Ben-Yehoshua (n 649) 94.
[655] Berger (n 646) 220.

elevated stage for the professor to stand on, and an amplification system to make sure that everybody heard the lecture. Elective modules were assigned to smaller seminar rooms. We spent quite a lot of time outside, during breaks and gaps in our timetable, sitting together on the benches. As our classes took place at night and on Fridays, the central resentment of my fellow classmates had been the working hours of the cafeteria, that closed long before we finished studying.

Joining an evening higher education program had not been a deliberate research decision, as I enrolled in the program before my decision to pursue a PhD degree and to use law school as a field of autoethnographic scrutiny. On the one hand, studying in a class of mostly older students than those attending regular law programs offers different class dynamics and brings a much more diverse group of students to the classroom, with different life experiences and a variety of skills and expertise. On the other hand, the syllabuses, class materials and reading lists, evaluation components and textbooks are the same for both programs, bridging the difference between morning and evening classes. As I studied in both morning and evening programs within higher education, and taught for several years in morning programs, I found evening school to bring many more opportunities for discussion and more heterogeneous knowledge and experience that was evidently missing among younger students. This richness and diversity often contributed to our discussions and debates, yet in many situations interrupted the course of our studies, with students providing unrelated examples and raising irrelevant issues that they had wished to share.

At the outset, we were a class of about ninety students, with a number of students dropping out throughout our studies, the most significant at the end of the first year. The vast majority of students were Jewish citizens of Israel, with a handful of Palestinian citizens from the Bedouin community. The situation was even more distorted among our teaching staff, as we had only Jewish professors teaching us for four years of modules, seminars and workshops, and only one Bedouin Palestinian tutor, out of seven tutorials we had in law school. While our class was balanced across gender, with a similar number of male and female students, our teaching staff was asymmetric, most of our professors and tutors were males.

The 22 required mandatory modules we all had to take filled almost our timetable. Our assessment consisted largely of written assignments and final exams, and module

requirements included both regular attendance and keeping up with the required reading. Attending almost all the classes, while taking both class and field notes, as well as reading all the required texts throughout my law studies, left me with an enormous amount of data that I had to synthesise, organise and evaluate.

3.7 The Focal Point

The process of choosing modules and moments to focus on while leaving many other situations, discussions, and court decisions aside was an ongoing endeavour that began when I started law school and has persisted throughout my studies. It started from my field notes and observations in the classroom, in which I began identifying moments that I planned to revisit and reflect upon later, and continued during my regular reading for class, when I slowly accumulated legal texts that I found interesting and relevant. It took me a while to accept that some more systematic decisions must be made in order to allow me to concentrate and probe the significant amount of data that I had collected in four years.

First, I decided to focus on required modules only, and leave electives, seminars, and legal practice modules aside. The main reason is that required modules like criminal law, contract law, constitutional law, etc., tend to be similar across Israeli law schools, as their syllabuses incorporate leading court decisions and precedents. In fact, some of my professors were teaching the same modules in a number of institutions at the same time. Another reason for my decision was that most of the elective modules that were offered in my law school did not have much to do with my research, so it constituted a convenient distinction to begin focusing and sorting out the collected data.

Then, I decided to concentrate on modules that focus on substantial or procedural areas of the law, like corporate law or land law, and criminal procedure or civil procedure, and leave more technical courses, like legal writing, academic writing or locating legal information aside. While modules that were openly directed at providing students with a specific professional skill or knowledge were very interesting to study, as they provide a glimpse of what students were expected to be able to actually do, I found their content less relevant for my research.

At that point, when I was left with mandatory modules that concentrate on substantial or procedural law only, I delved once again into the data, reading and rereading my notes, the syllabuses, and the reading materials, listening again to lectures, looking at exam sheets and assignment instructions, and probing PowerPoint presentations and class announcements. In this ongoing process, I was simultaneously investigating those moments in which Israel's occupation, the apartheid regime, or the Palestinian subject appeared, explicitly or implicitly in the classroom and study materials, and for the specific places in which these issues could or should have appeared, but where there was only silence. One might argue, correctly, that the occupation, apartheid, and the Palestinians could have been mentioned in every moment in every class. Yet, I sought to identify actual moments in which such issues could have been raised, but for some reason remained outside our classroom. I have been trying to locate those points in time, where something remained unsaid, yet it was precise enough for me to be able to assert what was exactly missing, how it could have been brought to light, and be able to suggest a reasonable and meaningful explanation for its absence.

For that reason, I decided to leave aside a series of modules that did not mention any of the issues this thesis is examining, including contract law, family law, corporate law, tax law, land law, tort law, labour law, evidence law, economic analysis of the law, jurisprudence, and professional ethics. The fact the none of these basic modules discusses Israel's domination over the West Bank, with relations to the specific subjects of the module is not surprising, as the focus on Israel within the Green Line serves to portray Israel as a liberal state, and conceal its settler colonial aspirations. Yet, one could expect that an Israeli legal land law module would discuss, even briefly, land and property law issues in the West Bank, as they play such a significant role in the ongoing dispossession of the Palestinian community. I did refer to one entire field of Israeli law that was totally absent from our curriculum, that is, military law and the military legal system in the West Bank (see chapter 4).

The modules that I discuss and analyse in my dissertation are, therefore, introduction to law, criminal law, constitutional law, administrative law, civil procedure, criminal procedure, and public international law.

Chapter 4: Silences and Utterances

Silence is a central settler colonial pedagogy which serves to ignore aspects of the law and of reality itself, which might undermine the settler colonial effort.[656] Yet, in the classroom, silence and utterance always work together. Silence about one issue is simultaneously accompanied by an utterance about another, and together the silence and utterance provide a blinkered perspective of both the legal and political reality. Thus, to understand why Israeli law schools do not deal with specific elements of Israel's colonial project, it is also important to shed light on what these higher education institutions do teach, and what perception of the Israeli judicial field and legal system they create, as well as specifically how higher education institutions incorporate the Palestinian within the curriculum. This chapter thus sets out to analyse both aspects of the Israeli legal system that are absent from the curriculum alongside the moments in which Palestinians are deliberately brought into the discussion.

Different types of silence can be identified within the law classroom. Complete silence is when issues that one could have expected to be central to the curriculum are not mentioned at all. Silence may also be attained through an utterance about something else, a diversion or displacement from a relevant topic. And there is the silence of partial utterance in which only the self-serving circumstances of a case or an issue are discussed at the expense of relevant issues that are ignored. Emphasising the liberal while silencing the settler colonial, involves a high volume of utterances regarding liberal aspects of the class material, and almost complete silence as to the settler colonial aspects of the curriculum.

Silence is present in every classroom. Complete silence is evident in the complete absence of the military legal system in the occupied territories from the curriculum, including military law itself and the Military Court System. Law schools also abstain from educating students about the complex application of Israeli law to Israeli settlers who reside in the occupied territories beyond the State's internationally recognised borders. Discussions in law school classes tend to be silent as well as to the identity (e.g., ethnic, religious, settler) of the legal subject. Although almost every case mentioned in the classroom involves Jewish subjects, the subject is treated as both abstract and universal. Utterances are deployed to shift the focus

[656] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 15.

from identity markers, as well as their relevance to the matter discussed, thus reinforcing the silence.

One can point to no more than five moments per module, and in many of them much less than that and even none, in which 'Arab' issues—from Sharia Law through matter of discrimination to house demolitions in the West Bank and the 'Separation Barrier's' route—are suddenly discussed in class, but these moments are far and few between out of hundreds of cases that are taught throughout the Israeli LLB studies. It is consequently important to try and understand why 'Arab cases' are brought to class when they are, what is said about them and also what is missing? At times, law professors cherry pick, making use only of cases that fit their effort to present the Israeli legal system as liberal, yet even in these cases they tend to disregard the context in which the case is adjudicated, in a manner that deems them more aligned with a liberal worldview. In other situations, cases concerning Palestinian petitioners serve to emphasise the liberal aspects of Israel in general, and the Israeli juridical field in particular, while settler colonial aspects are muted.

The effort of the Israeli juridical field to maintain the image of a liberal legal system lies in the endeavour to mask the Israeli settler colonial apartheid regime. Exposing the fact that the Israeli legal system applies in different manners to the entire area between the river and the sea, while administering the lives of both citizens and noncitizens according to varying laws, would jeopardise the Israeli settler colonial project. Acknowledging that there is one united territory subject to Israeli domination, will thwart Israel's continuous effort to take over as much land as possible, without granting citizenship to the people living on that land. The Israeli liberal legal system thus works to hide and facilitate Israel's regime of privilege and segregation, by maintaining an image of a legal system that is able to remain independent, review government actions and Knesset legislation and evaluate Israeli military operation when needed.

4.1 Complete Silence

It will be argued that silence is a central tool through which settler colonial pedagogy operates. The effort to produce the Israeli juridical field as a liberal democratic social formation situated within a settler colonial reality requires the ability to mute some aspects of

the law and the legal system. This could involve silencing an entire branch of the law, such as military law by rendering it absent from the Law School curriculum, or it might involve suppressing knowledge in relation to structural illegality. In many situations silence and utterance work together, silencing one aspect of a case and then highlighting other facets.

4.1.1 The Military Legal System

During the first term of my first year in law school my Introduction to Law professor mapped the Israeli judicial field for us. From the central judicial system, including the Magistrates' Courts, the District Courts, as well as the Supreme Court which also serves as the High Court of Justice; to the specialised courts, including Labour Courts, Religious Courts, Antitrust Courts, Immigration Courts, and the Military Courts (a military unit that has jurisdiction over Israeli soldiers only).[657] The professor dedicated a few minutes to each type of court, but did not mention the Military Court system in the West Bank (that tries noncitizen Palestinians, and has over the years tried hundreds of thousands of cases, often sentencing Palestinians to many years of imprisonment). Even if one could argue that it is in fact formally distinct from the Israeli judiciary the professor did not even acknowledge the existence of the Military Courts. It was as if the Military Courts in the West Bank do not exist, or at least have nothing to do with the Israeli judicial system. If, as Pierre Bourdieu maintains, the *juridical field* is 'an entire social universe […], which is in practice relatively independent of external determinations and pressures',[658] whose functioning is formed, along other factors, by education and tradition, and 'it is within this universe that juridical authority is produced and exercised',[659] then the professor's description of the Israeli Court System at such an early stage in the LLB program can be interpreted as a first step in drawing the boundaries of the Israeli juridical field.

In 2020, 8,761 new cases were dealt with in the Israeli Military Courts in the occupied Palestinian territories.[660] 1,168 of those cases were in fact administrative detention orders,[661] meaning that the judges needed to approve that the Palestinian detainees could be held in

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[657] 'Introduction to Law Lecture' (13 January 2017).
[658] Bourdieu (n 417) 816.
[659] ibid.
[660] Israeli Defence Force, *Concluding Report 2020 According to the Freedom of Information Act, 5758-1998*, pp 82–3 <https://www.idf.il/media/4qnbut53/%D7%93%D7%95%D7%97-%D7%A9%D7%A0%D7%AA%D7%99-2020.pdf> accessed 19 March 2022.
[661] ibid 83.

confinement without trial. Another 2,544 new cases were discussed in the Military Court of Appeals, including 1,093 (42.9%) appeals regarding administrative detention.[662] In March 2022, 4,330 Palestinians were incarcerated in Israeli prisons, including 490 administrative detainees, who are being held without trial.[663] Yet, Israeli Law Schools do not consider this system as an integral part of the Israeli juridical field and therefore it does not feature as a part of the LLB program. One can finish a law degree without knowing anything about military law, Military Courts, or the very existence of the military legal system. As my Criminal Law professor described it once while discussing the law that applies to the West Bank, 'criminal lawyers have no idea what's going on [in Military Courts], except for a few people who actually work there'.[664] Thus, the manner in which Israeli law schools apprehend the relation of the Military Court System to the Israeli juridical field, that is, the manner in which the juridical field itself sees that very relation, is reproduced through the LLB program, maintaining the Military Court System as an external feature of this social universe.[665]

Israel established the military legal system in the West Bank already in the midst of the 1967 war, conferring on the military the authority to legislate, prosecute, and sentence noncitizen Palestinians for criminal and security offences.[666] The power to establish the military regime in the West Bank and Gaza Strip derives from Article 43 of the Hague Regulations, allowing the occupying power to 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.[667] The power to establish the Military Court System in the occupied territories derives specifically from the Fourth Geneva Convention,[668] even though Israel claims that the Convention does not apply to the West Bank and Gaza Strip.

[662] ibid.
[663] Addameer - Prisoner Support and Human Rights Association, 'Statistics 10-03-2022' <https://www.addameer.org/statistics/2022/03> accessed 19 March 2022.
[664] 'Criminal Law Lecture' (24 January 2017).
[665] Bourdieu (n 417) 816.
[666] Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (n 190) 1–3; Weill (n 276) 396; Aharon Mishnayot, 'The Law and Jurisdiction in Judea and Samaria: Between the Current Situation and the Desirable Situation' [2014] SSRN Electronic Journal 1, 2.
[667] Second International Peace Conference, The Hague, 'Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land' s 43.
[668] International Committee of the Red Cross (ICRC), 'Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)' s 66.

The local, Jordanian law was supposed to remain intact in the West Bank according to the Hague Regulations, while the military commander in charge of maintaining public order can introduce only vital changes to the existing law.[669] Yet, within the first four years of the occupation of the West Bank, the military commander issued more than 200 orders that altered local law and regulated almost every aspect of the lives of the Palestinians under Israeli occupation.[670] Within 15 years of occupation, more than 1,000 military orders had been published, each equivalent to a new legislated law or an amendment to existing laws.[671] Over the years, and as the occupation has lengthened, Israeli authorities had developed a complex legal system in the territories,[672] formed out of legislation of former regimes, as well as military decrees, ordinances and proclamations adopted by the military commander.[673] Moreover, military law in the West Bank has adopted large parts of Israeli domestic law.[674] Nonetheless, many substantial differences between the legal systems exist, both in form and in content.

The military judicial system in the West Bank applies criminal and security laws to noncitizen Palestinians, and prosecutes them on such matters.[675] It comprises of three trial courts, a Military Court, a Military Court of Appeals that was formed in 1989,[676] and a Youth Military Court, established in 2009.[677] In 2004, the Israeli Military Court System was separated from the military prosecution, and thus became more independent.[678] In the Military Courts, both judges and prosecutors are Israeli soldiers that were legally trained, either in Israeli law faculties or by the military's 'School of Military Law'.[679] Defence is provided by trained lawyers, whether they are noncitizen Palestinian, Palestinian citizens of Israel or

[669] Second International Peace Conference, The Hague (n 667) s 43.
[670] Raja Shehadeh, *Occupier's Law: Israel and the West Bank* (Institute of Palestine Studies 1988) viii–ix.
[671] Meron Benvenisti, 'Israel and the Occupied Territories: Data Collection Project' (The West Bank Data Base Project 1982) 1 19.
[672] Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (n 190); Ben-Natan (n 271).
[673] Drori (n 270) 93–94; Eyal Benvenisti, *Legal Dualism: The Absorption of the Occupied Territories into Israel* (Routledge 1990) 1–2.
[674] Ben-Natan (n 271) 46; Mishnayot (n 666).
[675] Weill (n 276) 403.
[676] ibid 402.
[677] Mishnayot (n 666) 6; Hedi Viterbo, *Problematizing Law, Rights, and Childhood in Israel/Palestine* (Cambridge University Press 2021).
[678] Mishnayot (n 666) 4.
[679] Ben-Natan (n 271) 49; Ben Naftali, Sfard and Viterbo (n 168) 265; Smadar Ben-Natan, 'Social Inquiry Self-Proclaimed Human Rights Heroes: The Professional Project of Israeli Military Judges' (2021) 00 Law & Social Inquiry 1, 8.

Jewish Israelis.[680] Even though all hearings take place in Hebrew, with primarily Druze soldiers providing simultaneous translation to Arabic,[681] very few Jewish Israeli lawyers represent Palestinians in these proceedings.[682]

Israeli law schools do not educate their students regarding this massive legal enterprise, which is, in reality, an integral part of the Israeli legal system. The silence of the Law School curriculum as to the military legal system keeps the students, future legal professionals, in the dark as to this significant branch of the Israeli legal system, and thus offer them no training whatsoever about an Israeli legal system to which almost three million Palestinians in the West Bank are subjected.[683] Such silence, as elaborated above, can be attributed to the boundaries drawn by the Israeli juridical field itself which are reproduced through legal education.[684]

Yet, more importantly, this silence works to distinguish the Israeli juridical field from the military legal system in the West Bank, and thus used to reinforce the perception of the Israeli legal system as a liberal system that has nothing to do with the military or the occupation. If there is no specific module about the military legal system, and the Military Courts in the West Bank are not even mentioned in Introduction to Law modules, it can be inferred that this knowledge is not needed within the perimeter of the Israeli legal profession, and that the military legal system is entirely separate from the Israeli legal system. This is consistent with Lorenzo Veracini's description of the invisibility of settler colonialism, '[t]he more it goes without saying, the better it covers its tracks'.[685] In this case, law professors are part of the reproduction of the boundaries of the Israeli juridical field, covering its settler colonial nature while focusing on its allegedly liberal aspects.

4.1.2 Illegality

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[680] Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (n 190) 159; Neta Ziv, 'Navigating the Judicial Terrain Under Israeli Occupation: Palestinian and Israeli Lawyers in the Military Courts' (2018) 42 Fordham International Law Journal 728, 741–746.
[681] Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (n 190) 132–153; Ben-Natan (n 271) 49.
[682] Ben-Natan (n 271) 49; Ziv (n 680) 745.
[683] This figure is calculated by subtracting the number of Palestinian residents of East Jerusalem who are subject to the Israeli domestic legal system, from the number of Palestinians in the West Bank as a whole; Palestinian Central Bureau of Statistics (n 2); Israeli Central Bureau of Statistics, 'Localities and Other Geographical Divisions (Jerusalem)' (n 2).
[684] Bourdieu (n 417) 816.
[685] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 15.

Illegality is inherent to settler colonial reality. Whether in the eyes of international or domestic law, the settler colonial project involves illegal acts, methods, and practices. The most evident illegalities within Israeli settler colonial reality are the land grabs and the movement of a settler population to the occupied territories, two processes that involve frequent and recurring violence. While international law deems both Israeli settlers and settlements illegal, Israeli law is much more complex, aiming, as it were, to legitimise them.

It is legal education's responsibility to inculcate students into this reality of illegalities and to make sense of a reality in which illegalities do not only exist but are promoted by executive and judicial institutions in different ways. It is up to Law Schools to introduce and rationalise this legal reality so students can later join the Israeli juridical field readily accepting the settler colonial logic that endorses illegalities and present them as legal. Accordingly, the law school must play a vital role in bolstering the settler colonial project. Dealing with this concurrent legal and illegal reality in the classroom involves both silences and utterances, directed at making sense of the illegalities that are situated and accepted within the juridical field.

4.1.2.1 Legal application to (illegal) settlers and settlements

Shortly after the 1967 war, as the Israeli illegal settlement enterprise began expanding (in the context of the Israeli government's reluctance to annex the occupied territories), an urgent need emerged to apply Israeli civil law to settlers, i.e., Israeli citizens living outside the State's internationally recognised borders. The goal was to ensure that military law and Military Courts would not apply to them. Following the war, the Green Line became a border between two distinct legal systems, one that was instructed by international law, and the other subject to Israeli domestic law.[686] Yet, soon after the war, the Israeli government rendered the line irrelevant for Israeli Jewish citizens.[687] The Knesset began applying Israeli law to Israelis in the occupied territories, on a personal and extraterritorial basis.[688] In Amnon Rubinstein's words: 'a special law has come into being - the law of the Jewish settlers within the territories

[686] Amnon Rubinstein and Barak Medina, *The constitutional law of the state of Israel* (Schocken Books 1991) 96.
[687] Lisa Hajjar, 'Zionist Politics and the Law: The Meaning of the Green Line' (1994) 2 The Arab Studies Journal 44, 44.
[688] Rubinstein (n 277) 69.

- that undermines the idea of the territorial application of the law of belligerent occupancy'.[689] In other words, the law of settlers is a law of illegality, that works to find legal solutions for an illegal reality.

The formation of the law of settlers, that is, the law that applies exclusively to Israeli Jewish settlers in the West Bank, had been carried out over the years through several mechanisms. 'Personal application', attributing Jewish settlers a unique legal status, by applying Israeli domestic law to them, in a personal extraterritorial manner.[690] This way the law and the courts' jurisdiction apply to a specific person due to the fact that they are Israeli citizens, and not because the law applies to the territory itself. A similar route was adopted with respect to the territory. In this case 'enclave law' was utilised to apply Israeli law to the settlements themselves.[691] 'Civil jurisdiction' has been granted to Israeli civil courts over almost every litigation that involves Israeli citizens, property, or activity, through a minor technical instruction regarding the servicing of legal documents in the occupied territories.[692] Israeli courts also contributed to the application of Israeli law to the occupied territories through the assumption of jurisdiction and the discussion of cases involving Israelis and Palestinians.[693]

Even though in 2023 almost 500,000 Israeli citizens reside in the occupied West Bank,[694] forming close to seven percent of the State's Jewish citizenry, the unique way Israel applied

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[689] ibid 71–72.
[690] This was achieved by the Emergency Regulations (Offences Committed in Israel-Held Areas - Jurisdiction and Legal Assistance), that Israel used to extend its own courts' jurisdiction and apply its Penal Code to its settler citizens, and by the amendment of existing domestic laws, to apply them to Israeli citizens in the occupied territories. See: ibid 69–71; Hajjar, 'Zionist Politics and the Law: The Meaning of the Green Line' (n 687) 47.
[691] See: Rubinstein (n 277) 72–77 The military commander promulgated a series of orders that were all directed at setting unique arrangements for Israeli citizens who reside in the occupied territories. This was done mainly through what Amnon Rubinstein termed the 'enclave law', a unique legislation by the military commander that apply only to the Israeli settlements. Eyal Benvenisti, *The International Law of Occupation* (Oxford University Press 2012) 235–236 The area commanders also published by-laws for the settlements, that were either defined as local or regional councils, based on the structure of municipal units implemented within Israel. Most of the by-laws simply adopted Israeli primary and secondary legislation, including future amendments to the incorporated laws.
[692] See: Benvenisti, *The International Law of Occupation* (n 691) 228; In the Regulation of Procedure (Service of Documents in the Administered Territories), 1969, the Minister of Justice determined that the service of civil legal documents in the occupied Palestinian territories will be carried out in the same way it is instructed to take place in Israel, and will not demand a preliminary court approval as in service abroad. While it seems to be merely a procedural issue, it has a substantive implication, as the serving of a legal document according to procedure, instils jurisdiction for the Israeli court.
[693] ibid 231.
[694] This figure does not include about 230,000 Israeli settlers that reside in occupied East Jerusalem; Peace Now (n 162).

domestic law to Jewish settlers in the occupied territories is not part of the law school curriculum. One might expect that every (or at the very least the legal procedure) module would address the manner in which the specific area of law under study applies to settlers who reside outside Israel's internationally recognised borders but this is not the case. The vast majority of modules during my LLB studies were completely silent as to the law relating to settlers. Only one module, Criminal Law, discussed this issue briefly, as elaborated below.

The complete silence of many modules as to the way the laws they discuss apply to Israeli settlers suggests that the law simply applies to them directly, and that there is no legal difference between Israeli citizens within the Green Line and Israeli settlers who live beyond it. Thus, not only are the vast majority of students who finish their studies unfamiliar with the manner in which Israeli law applies to settlers, many are not even aware of the need for such strategic and evasive manoeuvres. Leaving aside the lack of knowledge as to the law that applies to a rather large portion of the State's population, the silence as to the legal problem itself, combined with the silence as to its solution, suggest that no such problem exists, and works to facilitate and conceal the illegality of the settlement enterprise. This resonates with Mahmood Mamdani's fundamental observation that '[s]ettlers and natives belong together. You cannot have one without the other, for it is the relationship between them that makes one a settler and the other a native'.[695] If, as Mamdani asserts, '[s]ettlers are made by conquest, not just by immigration',[696] then eliminating the native from the discussion while disregarding the occupation that generates this particular characteristic of West Bank settlers, constitutes them as non-settlers.

This, in turn, contributes to the blurring of the Green Line. In addition, it works to erase the illegality of the settlers and the settlements, and to legitimise them as 'citizen settlers'. The clear implication, being that there is no legal issue here and that it is natural for Israeli law to apply to citizens who live outside its internationally recognised borders and within a region where Israel applies military law to Palestinians. So this silence as to the 'how', Israeli domestic law applies to settlers, helps constitute the common sense that it is just the way it is. The illegality is washed by silence.

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[695] Mamdani (n 502) 1.
[696] ibid.

Criminal Law

Criminal Law was a mandatory module that all students were required to complete during our first year. It was an annual module that spread over two terms, formed of lectures and tutorials. Overall, we had 26 lectures of two and a half hours, 11 tutorial sessions of 45 minutes, and another 6 tutorial sessions of one and a half hours. All the sessions took place in-person, in a large lecture hall, with around 75 students present in lectures, and two dozen attending tutorials. The structure of the lectures mainly consisted of a lecture by the professor, accompanied by a PowerPoint presentation, short breaks for questions about the delivered material, and then onwards back to the lecture. Every so often, the professor asked short questions to engage students in the session, but in general, most of the material was delivered in the form of a lecture. Students' assessment included a midterm and a final exam, as well as two written assignments, formed of essay and problem questions. This mode of teaching correlates with what Paulo Freire described as the banking concept of education, in which 'knowledge is a gift bestowed by those who consider themselves knowledgeable, upon those whom they consider to know nothing'.[697] According to Freire, this pedagogy, that is founded on narration, put to use a variety of practices that mirror the oppressive society, in the classroom.[698]

As reflected by the module's description on its syllabus, the module's content was similar to criminal law modules in other law schools in Israel, and even in other countries, as the module focused on the characteristics, goals and limits of criminal law, punishment rationales, constitutional principles, the nature of *actus reus* and *mens rea*, defences and limitations to criminal liability, criminal responsibility in a group or an organisation, territorial and extraterritorial applicability, victim's status, as well as possession, result, and special intent offences.[699]

Even when the application of Israeli law to the West Bank was presented in class, only very specific aspects were discussed. Throughout four years of law studies, Israel's jurisdiction over territories beyond the Green Line was discussed only in my Criminal Law module. It was mentioned as part of the subject of territorial and extraterritorial jurisdiction. 'The

[697] Freire (n 388) 72.
[698] ibid 73.
[699] Criminal Law, 'Module Syllabus'.

problem is Judea and Samaria', my professor stressed when we moved to discuss the application of Israeli criminal law to the occupied territories, 'does Israeli law apply there?'.[700] It was a rhetorical question, that opened our discussion of the applicability of criminal law to Israeli citizens in the West Bank.

The professor then made a short disclaimer, stating that: 'we are not interested in the political aspects of the possession of these territories, we are interested in the legal aspect only'.[701] This statement assumes that the political and the legal can be clearly distinguished, and that law can be taught out of context.[702] This doctrinal approach constitutes what Pierre Bourdieu terms the *neutralisation effect*, 'designed to mark the impersonality of normative utterances and to establish the speaker as universal subject, at once impartial and objective'.[703] Suggesting that one can be objective while discussing this utterly disputed issue and presenting the explanation as neutral works to establish a specific interpretation of the legal situation as the objective interpretation of that very reality. As elaborated below, the explanation that was delivered in our classroom followed the State's narrative, even if not presented as such.

The professor explained that as for the unilaterally annexed territories of East Jerusalem and the Golan Heights, 'Israeli law sees no controversy, offences there are internal offences, even though the world does not recognise it'.[704] In other words, from the Israeli perspective, Israeli domestic law applies directly to East Jerusalem and the Syrian Golan Heights because both these areas were annexed by Israel.[705] While unilateral annexation is prohibited according to the international law of war,[706] and Israel's actions were widely condemned by the international community,[707] the professor remained silent as to the illegality of Israel's actions, which allowed the professor to present the situation from the Israeli perspective only,

[700] 'Criminal Law Lecture' (n 664).
[701] ibid.
[702] Fiona Cownie and Anthony Bradney, 'Socio-Legal Studies' in Dawn Watkins and Mandy Burton (eds), *Reearch Methods in Law* (2nd edn, Routledge 2018) 40–41.
[703] Bourdieu (n 417) 820.
[704] 'Criminal Law Lecture' (n 664).
[705] The Golan Heights Law; Matar (n 143).
[706] 'Annexation (Prohibition Of)' (*International Committee of the Red Cross*) <https://casebook.icrc.org/a_to_z/glossary/annexation-prohibition> accessed 11 October 2023.
[707] United Nations Security Council, 'Resolution 465 Territories Occupied by Israel' (1980) <http://unscr.com/en/resolutions/doc/465> accessed 11 October 2023; United Nations Security Council, 'Resolution 497 Israel-Syrian Arab Republic' (n 150).

as a dispute between two valid positions. This moment in which Israeli domestic law is utilised to perform an illegal action according to international law was, in other words, not mediated as such in the classroom. In this case, as Pierre Bourdieu stresses, '[t]he law, an intrinsically powerful discourse coupled with the physical means to impose compliance on others, can be seen as a quintessential instrument of normalization'.[708] Thus, Israel's political interpretation of its sovereignty, an interpretation that most of the world objects to, is inserted as if it is neutral, normal and objective, with the assistance of legal discourse.

Another slide in the professor's presentation included a list of 'the fundamental problems of application in Judea and Samaria', including '(1) no application of Israeli law; (2) but, umbilical connection; (3) 300-400 thousand Israeli residents'.[709] The list was accompanied by a map that showed the 1949 Armistice Line and the areas of the Palestinian Authority. 'The fact that "the Area" is held under belligerent occupation is a problem',[710] the professor explained. 'Hundreds of thousands of people live in an area that prima facie criminal law does not apply to'.[711] In other words, hundreds of thousands of Israeli citizens, live in an area where criminal offences are considered by Israeli criminal law to be external offences. While highlighting this point, the professor remained silent about the noncitizen Palestinians who live in the same area. This silence mirrors the prevalent settler colonial erasure of the indigenous population.[712]

'Applying [Israeli] law [to the West Bank] is an act of annexation, that has been avoided for fifty years', the professor continued, 'but if you don't apply it, the criminal law that would apply [to Jewish settlers] would be the Jordanian one that had been in force before the military takeover'.[713] At no point during class did the professor explain that there are aspects of illegality in the problem we are trying to solve. The search for a legal solution for the Jewish settlers muted any information regarding the illegality of the reality we were discussing.

[708] Bourdieu (n 417) 848.
[709] 'Criminal Law Presentation' (24 January 2017).
[710] ibid.
[711] ibid.
[712] Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 17) 389.
[713] 'Criminal Law Lecture' (n 664).

The professor explained that Israeli law does not apply to the occupied Palestinian territories, but that there is a very strong connection between Israel and this area, given that hundreds of thousands of Israeli citizens live there. Without using the words 'settlers' or 'settlement', with no mention of international law and the illegality of the settlement enterprise, as well as the prohibition against annexing an occupied territory, this entire situation was presented in class as simply a given state of affairs taking place within the juridical field, as if it had been imposed on Israel. Indeed, '[t]he settler colonial curricular project of replacement', as Tuck and Gaztambide-Fernández describe it, 'seems to happen organically, without intent'.[714]

The next slide was titled: 'Israeli application in Judea and Samaria – expected legal issues'.[715] While one might have expected to find a list of problems that involve international law provisions—like the obligation to administer an occupied territory for the benefit of the local population, or the restriction on the introduction of new legislation by the occupying power—the slide merely listed: 'choice-of-law; choice-of-jurisdiction'.[716] In this context, choice-of-law asks which law will apply to an offence committed by an Israeli citizen in the West Bank, whether it is Israeli law, military law, or local law. Choice-of-jurisdiction involves the court such an offence will be tried in, whether in an Israeli Civil Court or in a Military Court. Presenting these two aspects as the main legal issues for the application of Israeli law to the occupied Palestinian territories, frames it as if legally the major issue involves a formal question of jurisdiction. Yet again, it is the focus on issues relating to illegal Jewish settlers in the West Bank, that allows the silencing of Palestinians and their legal status, as if the question is merely according to which law, and in front of which court, an Israeli settler who committed a criminal offence in a settlement will be charged.

Silence in this instance serves as 'transfer by conceptual displacement' that Veracini describes as a strategy that 'allows for the possibility of discursively displacing indigenous people to the exterior of the settler locale'.[717] The professor thus glossed over and even legitimised all the illegalities of occupation that brought us to that point by narrowing the legal discussion to the choice of law and jurisdiction. This, combined with all the disclaimers

[714] Tuck and Gaztambide-Fernández (n 538) 79.
[715] 'Criminal Law Presentation' (n 709).
[716] ibid.
[717] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 35.

regarding 'not discussing the political aspects', makes it sound, or even implies, that there is no legal problem with Israel's occupation, only a political one.

Then, my professor turned to illustrate the problem presented to the class. 'Does it make sense for a resident of [the illegal settlement of] Ariel[718] who attacks another Ariel resident to be tried in front of a Military Court according to Jordanian law?' the professor asked and immediately answered, 'this is undesirable'.[719] This short question and answer, posed by our professor, both assume and entail a great deal. They assume that Ariel is in fact an illegal settlement located in occupied territories in the West Bank, and therefore, that the residents that take part in this scenario are living there in contravention of international law, and are Jewish Israeli citizens. Thus, the actual question is whether or not Israel should exercise its own criminal law in an Israeli civil court with respect to criminal law breaches by Israelis in the settlements or whether those settlers should be subject to West Bank local law in Military Courts, like their neighbours, the indigenous noncitizen Palestinians. But the professor's immediate answer worked to silence any discussion that could have followed the professor's question. Such classroom practices correlate with Freire's description of the pedagogy of the oppressor, in which 'the teacher is the Subject of the learning process, while the pupils are mere objects'.[720] According to international law, for instance, it does make sense that a citizen of the occupying state who commits a criminal offence in the occupied territory would be tried in a Military Court using the local law that applies in that territory. The professor presented the Israeli answer to that question as if this is the only possible response: namely, Israel decided to extraterritorially charge its citizens according to its own domestic law in its civil courts.

'To regularise the criminal affairs of Israelis who live there', the professor explained, 'the Knesset decides that instead of applying Israeli criminal law to the Area, it will apply it personally, to the Israeli residents of Judea and Samaria'.[721] Thus, throughout the entire lecture, illegal Jewish settlers were not described as settlers, but merely as 'residents', and they were not presented as living in an occupied territory, but in 'the Area' or 'Judea and Samaria'. Furthermore, this description of 'personal jurisdiction', suggests that yet again,

[718] Ariel is an illegal Israeli settlement in the West Bank.
[719] 'Criminal Law Lecture' (n 664).
[720] Freire (n 388) 73.
[721] 'Criminal Law Lecture' (n 664).

they are not settlers in an occupied territory, but citizens who simply live outside the territory governed by Israeli law. This choice of words works to conceptually displace the native in the classroom,[722] because as Mamdani's aforementioned quote suggests, if there are no settlers, there are no natives,[723] hence there is no occupation. 'The idea', the professor concluded, 'was to give jurisdiction to an Israeli civil court, to hear cases of Israelis who commit offences in Judea and Samaria, according to Israeli criminal law'.[724] That was, the professor said, 'to avoid a situation in which Israeli citizens and residents are tried in a Military Court – undesired situation'.[725]

The *David*[726] case was part of the module's syllabus, and the professor specifically advised the class to read it for the lecture as this was to be the central case discussed under the topic of personal jurisdiction. Moshe David, a Jewish Israeli citizen, appealed his conviction according to the Firearm Act of 1949.[727] According to the facts of the case, David gave a submachine gun to a person who did not have a licence to carry a firearm in Israel.[728] The main issue was that '[t]he act did not take place in Israel, but in Alon Shvut which is [an illegal Jewish settlement located] in Judea and Samaria'.[729] As our professor explained, the main question of the appeal in front of the Supreme Court was whether an Israeli civil court has jurisdiction in this case. In the amended indictment, the prosecution added Regulation 2(a),[730] that authorises a court in Israel to sentence a person who is listed on the Israeli Resident Registration, for an act or omission that took place in Judea and Samaria and would have constituted an offence if it would have been carried out in an area under Israeli courts' jurisdiction, according to Israeli domestic law. The professor explained that according to Justice Aharon Barak, the whole purpose of Regulation 2 is to avoid the abnormal situation where a Military Court tries citizens, which in his mind was considered an inappropriate situation.[731] Justice Barak claimed that the personal application of the law should be based on

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[722] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 35.
[723] Mamdani (n 502) 1.
[724] 'Criminal Law Lecture' (n 664).
[725] ibid.
[726] *Moshe David v State of Israel* [1983] Israeli Supreme Court CA 163/82, 37(1) PD 622.
[727] Firearm Act 1949 (IL).
[728] *David v. State of Israel* (n 726) s 2.
[729] ibid.
[730] Emergency Regulations (Judea and Samaria, Gaza area, Sinai and South Sinai – Adjudication and Legal Assistance) 1967 (IL) s 2(a).
[731] 'Criminal Law Lecture' (31 January 2017).

a conceptual approach, disregarding the location of the offence, and that 'we' should instead ask ourselves whether it would constitute an offence in Israel. If the act (or omission) would constitute an offence in Israel, the law should apply. Thus, in the David case the Supreme Court ruling is also silent about the illegality of the context in which the alleged criminal offence took place. Following Duncan Kennedy, the David case shows that '[l]egal thought can generate equally plausible rights justifications for almost any result'.[732] Thus, it is the Court's liberal legal reasoning in this case that facilitates disregard of illegality in its decision and in the classroom, working to make sense of the use of Israeli law to erase the illegalities of its settler colonial reality.

Towards the end of our lecture, the Professor did briefly mention the issue of noncitizen Palestinians. While throughout the lecture the professor referred to them only by insinuation, stating that 'we must not forget that there are other people who live there who also deserve the protection of criminal law',[733] or that 'soon we will talk about the non-Israelis',[734] in that part of the lecture the professor referred to them several times as 'Palestinians'.[735] The only thing the professor did say about the prosecution of noncitizen Palestinians is that up to the Oslo Accords, noncitizen Palestinians were tried in front of Military Courts and Jordanian courts on criminal offences. As part of the Cairo Agreements, Palestinian courts had been established, to prosecute noncitizen Palestinians in Areas A and B. This way, the professor explained, 'an entire criminal proceeding of assault between Palestinians will be conducted in a Palestinian court - in itself a desirable situation'.[736] It should be noted that this explanation is in fact not accurate, as cases of interest of the Israeli military regime, mainly involving security issues but not only, are still prosecuted in Military Courts, whether they involve noncitizen Palestinians from Area A, B or C.

The professor then briefly mentioned two court cases concerning noncitizen Palestinians, that were not part of our reading list. One is the case of Marwan Barghouti, who was the head of the Tanzim, the militant faction of the Fatah, and had been prosecuted for a series of offences including premediated murder, aiding and abetting murder, and solicitation to murder of

[732] Kennedy, 'Legal Education as Training for Hierarchy' (n 390) 62.
[733] 'Criminal Law Lecture' (n 664).
[734] ibid.
[735] ibid.
[736] ibid.

Israeli citizens during the Second Intifada.[737] Our professor referred only to a preliminary argument made by Barghouti, that Israeli domestic courts have no jurisdiction over his acts, and that he should be tried in front of a Palestinian court.[738] The professor just stated that the District Court accepted the State's argument, that Israel did not relinquish its security authority over the entire territory in the Interim Agreement, and therefore, it has jurisdiction over Barghouti's acts.[739] The Court's decision on this preliminary petition made by Barghouti is a lengthy and fascinating legal document,[740] detailing a variety of arguments claiming that Israel has no authority to prosecute Barghouti according to international law, Israeli law, and according to the Oslo Accords, but our professor did not discuss it any further.

The second court case briefly discussed in our classroom was HCJ Al-Harub,[741] that involved a Palestinian defendant who allegedly sent a suicide bomber to Jerusalem. The would be bomber failed to operate the device, and was sentenced to life by the Military Court.[742] Al-Harub claimed that according to the principle of uniformity in punishment, he should be sentenced to a maximum of twenty years, as set by Israeli domestic criminal law for the offence of attempted murder.[743] But the HCJ found that 'there is no reason to require the military commander to determine that [military] courts would not be able to issue a life sentence[744] for the offence of deliberate attempt to cause death'.[745] In other words, the Court decided that the difference between the Israeli and military punishment bar can be maintained.

While this is an example of a situation in which noncitizen Palestinians were mentioned in the classroom, and the military law was briefly discussed, even if only for a short period, several aspects should be noted. First, as mentioned above, the professor emphasised the establishment of Palestinian courts but overlooked the fact that full security authority remains

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[737] *State of Israel v Marwan Barghouti* [2004] Tel Aviv District Court SCC 1158/02, Nevo.
[738] 'Criminal Law Lecture' (n 664).
[739] ibid.
[740] *State of Israel v Marwan Barghouti* [2003] Tel Aviv District Court SCC 1158/02, Nevo.
[741] *Darar Al-Harub v Commander of the Military Forces in the Judea and Samaria Area et al* [2009] Israeli High Court of Justice HCJ 7932/08, Nevo.
[742] ibid 1.
[743] ibid 2.
[744] The meaning of Palestinian prisoners' life sentence in Israeli Military Courts is literally 'for life'. Palestinian prisoners' life sentence is rarely commuted by Israeli authorities, yet some of them get released in prisoners exchange deals.
[745] *HCJ 7932/08 Al-Harub v. Commander of the Military Forces et al.* (n 741) s 13.

in the hands of the military regime, to detain and prosecute noncitizen Palestinians. Thus, liberal aspects involving a better juridical system that accurately apply local law are presented in the classroom, while the settler colonial overseeing by the military legal system is almost totally muted. Second, when specific Palestinians are mentioned in class, and court cases regarding noncitizen Palestinians are presented, they tend, as in this example, to involve security issues with defendants accused of the perpetration of political violence, all of which works to feed the general Israeli perception of Palestinians as 'terrorists'. Third, the court cases alluded to are not fully presented or discussed in the classroom. They are only briefly mentioned to highlight a specific precedent and are not even included in the reading list.

The fact that people living within the same territory are subjected to different legal regimes according to their ethnicity and national belonging and how this might impact the liberal claim about equality before the law was also never discussed in the classroom. This is the necessary preparation that Israeli students require, to be able to seamlessly enter the settler colonial hegemonic worldview.[746] Thus, it is clear when one should refrain asking about the acrobatics carried out by the Courts, and just accept it as it is. This assists in sustaining the Israeli regime, as it makes sense of extraterritorial application and reproduces its logic that allows settlers to take the law with them and carry it around, expanding beyond state borders.

4.1.2.2 'Judea and Samaria and the Gaza Region'

Following the 1967 war, the military regime in the occupied territories issued an order that practically changed the West Bank's name to 'the Judea and Samaria Region'.[747] A leading Israeli legal scholar who later became a government minister, Amnon Rubinstein, claims that this action, which had no apparent legal implications, aimed to draw a connection between biblical Jewish history and this swath of land, while simultaneously rejecting a name that could suggest that Israel recognises Jordan's (referred to as the East Bank) sovereignty over the West Bank.[748] While changing the name from the 'West Bank' to 'Judea and Samaria' does not alter its legal status, it has significant political ramifications that bleed into the legal realm.

[746] Gramsci, *The Gramsci Reader: Selected Writings 1916-1935* (n 402) 261.
[747] Rubinstein (n 277) 61.
[748] ibid.

A short deliberation on a related topic took place during my Constitutional Law class, when the professor discussed the Citizenship and Entry to Israel Law (Temporary Order) – 2003, known as the 'Family Unification Law' (that I discuss in depth below, see section 4.1.3.2).[749] According to section 2 of the Temporary Order, '[…] the Minister of Interior shall not grant a resident of the Area […] citizenship under the Citizenship Law […]'.[750] The professor explained that the purpose of this temporary order is to 'prevent the implementation of section 7 to the Citizenship Law to non-Jewish spouses from "the Territories", the area of Judea, Samaria, and the Gaza Region'.[751] While section 7 aims to facilitate the ability of noncitizens who are married to Israeli citizens to receive citizenship, the Temporary Order explicitly aims to prevent the extension of this law to noncitizens who are Palestinians.[752]

During class, one of the students argued that the professor should call 'Judea and Samaria and the Gaza Region' simply 'Judea and Samaria and Gaza'. The student explained that the name 'Gaza Region' refers to the Jewish settlements in the region, which had been evicted in 2006, and so now, when there are no more Jewish settlements in the Gaza Strip, only Palestinian localities, it should be just called 'Gaza'. The professor said that as they recall, this is the official wording, but promised to check it and let us all know. Following class, we all received an email from the professor, citing section 1 to the Temporary Order: '"Area" – every one of these: Judea and Samaria and Gaza Region'.[753] It was already Friday afternoon, but it was evident that the professor had to take this off their mind, as the email was signed, 'that's it, I think we can go into the weekend'.[754]

This class discussion resembles Rubinstein's argument, as on the one hand, the territory's official name bears no legal significance, but on the other hand, its political implications are evident. While the difference between 'Gaza' and 'Gaza Region' seems quite insignificant, this discussion exposes how first, the law is used to mask illegality by changing the occupied territory's name to a biblical Jewish one, and then, in the classroom, the professor is

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[749] Citizenship and Entry to Israel Law (Temporary Order) 2003 (IL).
[750] ibid 2.
[751] 'Constitutional Law Lecture' (5 May 2017).
[752] Since 2007, it includes Iran, Lebanon, Syria and Iraq as well; Citizenship and Entry to Israel Law (Temporary Order) (Amendment 2) 2007 (IL) Addendum.
[753] Citizenship and Entry to Israel Law (Temporary Order) s 1.
[754] Constitutional Law Professor, 'And One More Debt - Following Comment: "Gaza"/"Gaza Region"' (5 May 2017).

enforcing the law, masking illegality once again on a different level, as the debate had reduced to a controversy regarding the Israeli official name, displacing the West Bank so that it will not enter the purview. The professor's clarification proved that they were using the exact wording of the Temporary Order, recommending all students to keep to the letter of the law. This name change can also be seen as an indigenising effort,[755] that works to erase the Palestinian West Bank and reconstitute it as a Jewish space, in which Jewish settlers are the real indigenous people. Thus, the repeated use of this specific term in class, constitutes an act of indigenisation, that both erases the Palestinian people from the area, or at least detaches them from the land, and reproduces it as a Jewish territory. This way, legal education works to reproduce the settler colonial logic.

4.1.3 Identity

The identity of the sides of court cases, as well as the social groups affected by rulings, were commonly presented and discussed throughout my law studies. Indeed, the vast majority of the cases we learned involved Israeli citizens, most of them Jews, with their names listed in the cases' titles, and a short description of them available in the opening paragraphs of court decisions. Some of my professors were keen to discuss the actual individuals behind cases, others referred us to read the circumstances of cases on our own. Yet, by and large, the central identifying characteristics and personal circumstances of the parties were known, even if their names concealed.

One of the outcomes of Israel's ongoing domination over noncitizen Palestinians is that such individuals are regularly tried by the Israeli judicial system, producing, at times, important precedents that exceed not only the specific matter discussed, but affect Israeli law in general. Such cases, although involving individuals and issues that are rarely discussed in law school, must be taught to future lawyers for the sake of the precedent they include. But how do law teachers manage to present a case involving noncitizen Palestinian defendants, without addressing questions as to Israeli law's jurisdiction on such persons and cases? Complete silence is one handy pedagogical tool in such situations, especially when discussing cases involving concealed names and circumstances, as discussed below.

[755] Veracini, 'What Can Settler Colonial Studies Offer to an Interpretation of the Conflict in Israel–Palestine?' (n 325) 270.

Another consequence of Israel's control over the West Bank and its inhabitants is that the Israeli High Court of Justice also hears underlying cases concerning Palestinian issues, presented mainly by human rights organisations. Not surprisingly, many such rulings are utterly discriminatory and evidently unjust, as 'security needs' can overpower almost any other argument. While most of these cases remain outside the Israeli law classroom, some decisions turn too crucial to simply disregard. Complete silence allows law professors to make sense of such court cases, by muting some of their essential aspects.

4.1.3.1 Security Offences

As part of the complete absence of military law from the curriculum, 'security offences detainees' and 'security prisoners' were almost never mentioned during my LLB studies. Only in my third year, in a Criminal Procedure module, we learned about two cases, *John Doe v. State of Israel*[756] and *The Public Committee against Torture in Israel v. Government of Israel*,[757] that directly discuss Palestinian detainees' petitions against violation of procedural rights, different interrogation methods and torture.

Criminal Procedure was a required module during the third year of my LLB program. The module took place over one term, and due to a lecturers' union strike, we had only 8 lectures of three and a quarter hour, and 5 tutorial sessions of an hour and a half. It involved both practical material regarding detentions, arrests, interrogations and criminal trials, and more substantive aspects that inform criminal procedure. We were a group of about 50 students, sitting in a regular classroom, and the professor was using a PowerPoint presentation, mainly to project discussed legislation. Assessment included only a final exam.

We studied the case of *John Doe v. State of Israel*[758] already in the first session of our Criminal Procedure module, under the topic of the influence of Basic-Laws on criminal procedure. The court decision itself appeared on our syllabus, and the professor instructed us to read it in advance. John Doe was arrested on suspicion of being a member of an illegal association.[759] He argued that Section 5 to the Criminal Procedure Act (Detainee Suspected

[756] *John Doe v State of Israel* [2010] Israeli Supreme Court CA 8823/07, 63(3) PD 500.
[757] *The Public Committee against Torture in Israel v Government of Israel* [1999] Israeli High Court of Justice HCJ 5100/94, 53(4) PD 817.
[758] *John Doe v. State of Israel* (n 756).
[759] ibid 2 J Rivlin.

of Security Offence),[760] that allowed the Magistrate's Court to hold his detention extension hearing in his absence, is unconstitutional.[761] John Doe was also denied meeting with a lawyer for three days. His first appeal, to the District Court, had been held without his presence, and was denied, based on a confidential report that the State presented to the Court, that John Doe's lawyer did not receive.[762] John Doe appealed to the Supreme Court, that accepted the appeal.[763] Later on, the Supreme Court held another discussion of the substantive arguments that John Doe had raised, and found that the combination of three infringements of the right to due process—withholding meeting with a lawyer, submitting confidential material to the court, and holding arrest extension hearings in the suspect's absence—sums up to an unproportionate violation of John Doe's rights to due process.[764] In its ruling, the Supreme Court repealed Section 5 to the Criminal Procedure Act (Detainee Suspected of Security Offence),[765] and set a new precedent, declaring that due process is protected under Basic-Law: Human Dignity and Liberty.[766]

In the classroom, the professor explained that 'the criminal procedure violates a series of basic rights, as Basic-Law: Human Dignity and Liberty defines them, the right to freedom, dignity and bodily integrity'.[767] The professor went on to stress that we discuss *John Doe*, because 'it is, in my opinion, an excellent court decision to demonstrate a series of points regarding the effect of the Basic-Law [on criminal procedure]'.[768] As for John Doe, the professor did not provide much information about him, besides stating that 'John Doe was arrested for security offences'.[769] One could infer from this statement, as well as from some clues in the court decision itself, that John Doe is in fact a noncitizen Palestinian. But the case was brought to our classroom for another reason, and so, any other aspect of the case had been immediately silenced.

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[760] Criminal Procedure Act (Detainee Suspected of Security Offence) (Temporary Provisions) 2006 (IL) s 5.
[761] *John Doe v. State of Israel* (n 756) para 1 J Rivlin.
[762] ibid 2 J Rivlin.
[763] ibid.
[764] ibid 34 J Rivlin.
[765] Criminal Procedure Act (Detainee Suspected of Security Offence) (Temporary Provisions) s 5; *John Doe v. State of Israel* (n 756) para 35 J Rivlin.
[766] *John Doe v. State of Israel* (n 756) para 16 J Rivlin.
[767] 'Criminal Procedure Lecture' (4 December 2018).
[768] ibid.
[769] ibid.

Attempts made by my fellow students to understand who John Doe is, were warded off by the professor. One of the students asked whether ‘a detainee suspected of security offence is under administrative arrest?’,[770] but the professor simply answered ‘no’, and moved on, not even taking the time to explain the difference. One reason for pushing aside this issue is that answering the student’s question, that sought to understand how a suspect of security offence is held in Israel and tried by an Israeli court, would require the professor to discuss John Doe’s identity, explain that he is in fact not a citizen, and then expose the whole class to the manner in which Israel has jurisdiction over his acts and so on.

Yet, as mentioned above, the professor had a different purpose behind the *John Doe* discussion, to teach us that in the bottom line, ‘the Court tells us unequivocally that due process is a right derived from the right to dignity and liberty, and is therefore protected by the Basic-Law’.[771] The fact that such an important precedent had been achieved in a case of a noncitizen Palestinian, was not part of our discussion. When another student tried to understand what is going on and asked whether ‘this John Doe is a resident of the Area?’, referring to the Occupied Palestinian Territories, the professor answered strictly that ‘it is not important, it is not relevant. He is a suspect in a criminal, security case, we are discussing criminal procedures’.[772] I found it quite odd back then, if there is such a confusion, let’s just pause for a moment, explain who this John Doe is, what is he doing in an Israeli court, and move on. But when I revisited my class materials again and again, I understood the problem.

Henry Giroux and Anthony Penna maintain that one should ‘focus on the tacit teaching that goes on in schools and help to uncover the ideological messages embedded in both the content of the formal curriculum and the social relations of the classroom encounter’.[773] In our classroom, it was evident that the professor completely disregarded John Doe’s identity, dismissing any attempt to mention it. John Doe’s obvious identity characteristics were not mentioned even once. The words ‘Palestinian’ or ‘noncitizen’ were totally absent from the discussion, and every question that raised them had been instantly rejected. On the surface, the professor repeatedly demanded that we focus on the precedent set, and not on the case itself. The significance of John Doe’s identity lies in the striking inequality before the law

[770] ibid.
[771] ibid.
[772] ibid.
[773] Giroux and Penna (n 388) 21.

that this case exposes. As our professor explained, there are different laws that inform the arrests of 'normal detainees' and 'security detainees'.[774] The professor stressed that 'there are slightly different rules for arrests in security offences, there are fewer rights, and more possibility to restrict one's freedom'.[775] The professor explained that when we usually discuss detainees, then Section 34 to the Arrests Act sets that 'a detainee has the right to meet and consult with a lawyer',[776] and when the detainee asks for a lawyer, then section 34(b) sets that 'the person in charge of the investigation will allow it without delay'.[777] Yet, if we discuss a security detainee, the professor explained that 'without delay' is replaced by 'as soon as possible'.[778] The professor stressed that 'as soon as possible' is less generous than 'without delay'.[779] Furthermore, the professor emphasised, when discussing security offences, the law stipulates three different grounds that allow interrogators to withhold the meeting, '(1) if it would interfere with the arrest of other suspects; (2) if it would interfere with the discovery or seizure of evidence, or any other interference with the investigation; or (3) to thwart a crime or save human life, like the "ticking bomb" issue'.[780]

Maintaining silence as to John Doe's identity allowed the professor to present the difference between the laws as pertaining to 'normal detainees' and 'security detainees', when, in fact, the more evident distinction that could have been made here is between Israeli citizens, that are subject to the Criminal Procedure Act (Powers of Enforcement - Arrests),[781] known as the Arrests Act, and noncitizen Palestinians, that are subject to security legislation and military law. Revealing the fact that the different treatment of Israeli law does not have much to do with the nature of the offence, but is mainly founded on the identity of the suspect, would have exposed the Israeli settler colonial apartheid regime in the most clear way. From its domination over noncitizens, the different laws and unequal treatment of citizens and noncitizens that are subject to the same regime, and the landmarks precedents set for Israeli citizens to enjoy, in a case that discusses a triple human rights violation that Israeli citizens are rarely exposed to. Thus, following Giroux and Penna's suggestion, 'the ideological

[774] 'Criminal Procedure Lecture' (n 767).
[775] ibid.
[776] Criminal Procedure Act (Powers of Enforcement - Arrests) 1996 (IL) s 34.
[777] ibid 34(b).
[778] 'Criminal Procedure Lecture' (n 767).
[779] ibid.
[780] ibid.
[781] Criminal Procedure Act (Powers of Enforcement - Arrests).

messages embedded' in this lecture, and particularly in the dynamics of the class discussion, are that the Israeli juridical field is a liberal field, capable of progressing and protecting human rights, and therefore, the identity of John Doe is not only irrelevant to the precedent set, but is in fact counterproductive to convey those ideological messages.

This silence, in turn, maintain the image of Israel and the Israeli juridical field as liberal and democratic, in the sense that even John Doe, a suspect in a security offence, was granted the protection of the Court. Thus, the Basic-Law had been extended to include due process under the list of constitutional rights it protects, in a case of a noncitizen Palestinian who was denied due process. Therefore, muting John Doe's identity facilitated the overlook of the settler colonial context in which this case took place.

The Public Committee against Torture in Israel v. Government of Israel[782] is a case famous for its democratic spirit, that had been mentioned in many of my law school modules. The most deliberate discussion of the case took place in my Criminal Procedure module, when we studied about unlawful interrogation techniques. The petition had been submitted by human rights organisations and individuals who claimed that they were unlawfully interrogated and tortured by the Israeli Security Agency (Shin Bet), against its interrogation techniques.

As we were not instructed to read the decision itself, the professor briefly described the case in class, and explained the court's conclusion. The professor stipulated the list of interrogation techniques that were described in length in the decision, and explained that Justice Barak found that even though Israel is contending with different security threats, a categorical prohibition on torture must be set.[783] The reason, as Justice Barak described it in his ruling is that 'a democratic, freedom-loving society does not accept that investigators use all means to uncover the truth. [...] At times, the price of truth is so high, that a democratic society is not prepared to pay [...]'.[784] Thus, in a landmark decision, the Court ruled that torturing suspects during interrogations is prohibited.

Justice Barak left some room for unlawful interrogation techniques and torture by suggesting that while the Court imposes a categorical prohibition so from now on, such acts will

[782] *The Public Committee against Torture in Israel v. Government of Israel* (n 757).
[783] 'Criminal Procedure Lecture' (18 December 2018).
[784] *The Public Committee against Torture in Israel v. Government of Israel* (n 757) para 22 J Barak.

constitute a criminal offence, interrogators that would be indicted for such acts in situation of a 'ticking bomb' will be able to argue for necessity defence.[785]

While the description of the petitioners in the court decision indicates that they are noncitizen Palestinians, even if not directly stated, and the first sentence of the court decision states that it discusses the interrogations of 'individuals suspected of committing offences against state security',[786] in our classroom, no such statement had been made. It is true that generally, Israelis understand that unlawful interrogation techniques and torture are mainly used against Palestinians. Yet, at no point it had been made clear in our classroom that the High Court of Justice is discussing the torture of noncitizen Palestinians, who are subject to Israeli domination. This groundbreaking decision, that had already been restricted since,[787] is indeed a landmark human right defending precedent. The silence as to the identity of the petitioners, that is, complete silence as to the identity of the vast majority of people that suffer torture from Israeli authorities, allowed the professor to highlight the democratic essence of the ruling, while avoiding the settler colonial context in which the decision was made.

4.1.3.2 Noncitizen Palestinians

We studied about the Family Unification Law as part of the topic of citizenship in Constitutional Law. Constitutional Law was a required module during the first year of my LLB program. It was a yearlong module, that included 25 sessions of a two and a half hours lecture, that took place in a large lecture hall. We were a group of about 80 students, the vast majority of us were Jewish citizens, only a few were Palestinian citizens. Assessment included two written assignments and a final exam. The syllabus included a very short description: '[t]he Constitutional Law module deals with the foundations of the regime of the State of Israel, on the one hand, and the issue of individual rights, on the other'.[788] The reading list detailed the variety of topics the module covered, including a historical introduction to the establishment of the State and the adoption of mandatory law; basic principles, including separation of powers, the rule of law, Israel as a Jewish and democratic state; Constitution, Basic-Laws and judicial review; Human rights, including their

[785] ibid 40 J Barak.
[786] ibid J Barak.
[787] *Firas Tbeish et al v The Attorney General* [2018] Israeli High Court of Justice HCJ 9018/17.
[788] Constitutional Law, 'Module Syllabus'.

applicability in private law, citizenship and other specific rights; Institutional Constitutional Law, including the Knesset elections, the status of its members, its work procedures and judicial review, the President of the State and the Government's emergency powers and limited authorities.[789]

During the lectures, the professor was talking in dictation speed, to allow students to write down every word that was said. When students indicated that they did not manage to record everything, the professor would repeat to make sure that everyone penned everything down, making an evident effort to repeat what had just been said, word by word. Occasionally, the professor made short breaks for questions, allowing students to ask about the presented material. By and large, no significant discussions took place in class that would have allowed students to engage in the session. This combination of continuous narration and lack of students engagement is a precise example of what Paulo Freire describes as 'the banking concept of education'.[790] Utilising most of the session's time to dictate the material to students epitomises the premise that 'the teacher knows everything and the students know nothing'.[791] This type of learning process, in which 'the teacher teaches and the students are taught',[792] facilitates the instruction of questionable subjects, in an indisputable manner.

As mentioned above, the Citizenship and Entry to Israel Law (Temporary Order) – 2003, that is known in Israel as the Family Unification Law, prevents noncitizen Palestinians from the West Bank and Gaza Strip,[793] who marry an Israeli citizen, from receiving an Israeli citizenship according to Section 7 to the Citizenship Law.[794] In class, our professor presented two petitions that were submitted against the Family Unification Law, *Adala v. the Minister of Interior*[795] and *MK Galon v. the Attorney General*.[796] As we were not required to read the full decisions, the professor described them briefly and referred us to an article that offered a brief summary of the two.

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[789] ibid.
[790] Freire (n 388) 72.
[791] ibid 73.
[792] ibid.
[793] Since 2007, it includes Iran, Lebanon, Syria and Iraq as well; Citizenship and Entry to Israel Law (Temporary Order) (Amendment 2) Addendum.
[794] Citizenship Law 1952 s 7.
[795] *Adalah - The Legal Center for Arab Minority Rights in Israel v The Minister of Interior* [2006] Israeli High Court of Justice HCJ 7052/03, 61(2) PD 202.
[796] *MK Zahava Galon - Meretz-Yahad v Attorney General* [2012] Israeli High Court of Justice HCJ 466/07, 65(1) PD 1.

The professor explained that the main justification behind the Family Unification Law is security, while mentioning briefly that in the case of *Adalah*, Justice Procaccia doubted the security justification, claiming that there is also a demographic interest, and therefore, that there is a discrepancy between the declared purpose of the law and the concealed one.[797] The professor went on to explain that in both cases, the dissenting opinion argued that the Family Unification Law violates the right to family of Israeli citizens.[798] 'Justice Barak', the professor elaborated, 'found it to violate the principle of equality because most of the Israeli citizens who marry residents of Judea, Samaria and the Gaza Strip are usually Arab citizens of Israel'.[799] 'This is the reason that Justice Barak says that there is an infringement of the right to equality', the professor continued, 'because if we look at the data, the transgression is only against Arab citizens'.[800] The professor explained that the majority opinion in both cases solved the problem by stating that 'the right to family life is not violated as whomever wants to start a family, can do it elsewhere, just not in Israel'.[801] This statement caused a minor outrage in the classroom, as some of the students could not believe that the Court, and especially the majority opinion, not once but twice, posed such an argument.[802] Answering students who claimed that place is an integral part of the right to family, the professor brought up an article that argues for 'a state's right to define itself as a nation state, and on the legal aspect, to enact laws that give precedence to the specific nation'.[803]

Interestingly, the word 'Palestinians' was not mentioned even once during the session. As mentioned above, the professor referred to noncitizen Palestinians as 'residents of Judea, Samaria and the Gaza Strip' and to Palestinian citizens as 'Arab citizens'. Even though noncitizen Palestinians are subject to Israeli domination, the professor referred only to the violation of rights of Palestinian citizens who wish to marry noncitizen Palestinians, and totally ignored the noncitizen partner. On the surface, it seems that the court acknowledges, even if only in a dissenting opinion, the violation of the right to family of Palestinian citizens. Yet, the silence as to the identity of the person who is not allowed to receive citizenship like

[797] 'Constitutional Law Lecture' (n 751).
[798] ibid.
[799] ibid.
[800] ibid.
[801] ibid.
[802] ibid.
[803] ibid.

everybody else who would be marrying an Israeli citizen, that both the Court and the professor maintained, managed to mask the real Jewish privilege in the entrance to the country, that is, the Law of Return that is discussed in depth below. An in-depth discussion of the victims of this policy would expose Brenna Bhandar and Rafeef Ziadah's argument, that Israeli settler colonialism 'is rooted in dispossession, and maintained through a sophisticated matrix of apartheid policies against Palestinians everywhere, not just in the territories occupied in 1967'.[804]

Israel has been preventing the right of return of noncitizen Palestinians since 1948. The Family Unification Law is one of many other mechanisms that have been deployed over the years in order to maintain a Jewish majority in the country (see sections 1.1.3-1.1.4). The silence as to the person that is supposed to receive citizenship allowed the professor to present this problematic court decision as one that violates the rights of Palestinian citizens, but to totally disregard the settler colonial reality that facilitated such a decision. As Karl Marx stresses, 'the individuals who rule [...] have to give their will [...] a universal expression as the will of the State, as law – an expression whose content is always determined by the relations of this class'.[805] Maintaining silence as to the identity of those who are denied citizenship allowed the professor to avoid any mention of Israel's occupation, the connection between Palestinian citizens and noncitizens, and as Marx suggests, to disregard the Jewish privilege that is inherent to this discussion by constituting the Jewish will as a universal provision of the law.

4.2 Silence Attained by an Utterance

In some situations, silence is achieved through the utterance of something else, that is, focusing on one aspect of an issue while disregarding another aspect. In many situations, as shown below, the disregarded aspect is not marginal or esoteric, but one actually central and therefore something one would expect to be discussed. That is exactly the strength of silence in settler colonial pedagogy, as it manages to make sense of muting significant issues while deliberately discussing others.

4.2.1 The subject(s) of the Israeli regime

[804] Bhandar and Ziadah (n 523).
[805] Marx (n 386) 200.

Liberal law sees its subject as free of any identifying markers. This is fundamental to 'its rule of law principle', suggesting as it were that law applies equally to all subjects. Scholars have, however, shown that the population living in the territories controlled by Israel can be divided into four groups—Jewish citizens, Palestinian citizens, Palestinian residents, and noncitizen Palestinians.[806] The distinctions among these groups are hardly discussed in Law School and this reinforces the idea that the law is blind as to the identity of its subjects. And even when the students are exposed to the fact that the law treats specific people and groups differently—the impact of these identities on the distribution of rights across the population is not really discussed nor is the fact that laws that apply to one group do not apply to another based on the resident's legal status.

As of 2022, over fifteen million Jews live around the world,[807] with over seven million of them residing in Israel.[808] These seven million people amount to about 74 percent of Israel's 9.5 million residents,[809] while 21 percent are Palestinian citizens and residents and another 5 percent are defined as 'others', people deemed non-Jewish by religious law. The relevance of the Jewish community outside Israel stems from the fact that every Jew is a potential Israeli citizen, as set by the Law of Return of 1950[810] which states that every Jew has the right to immigrate to Israel.[811] This was later reinforced by the Citizenship Law of 1952,[812] which establishes that immigration according to the Law of Return is one of several ways to acquire Israeli citizenship.[813] Consequently, Israel is indeed the state of the Jewish people, as it opens its gates to Jewish immigrants, while almost completely barring the possibility of any other immigration. This principle was reinstated in Basic-Law: Israel – the Nation-State of the

[806] Said (n 42) 38; Baruch Kimmerling, 'Boundaries and Frontiers of the Israeli Control System: Analytical Conclusions' in Baruch Kimmerling (ed), *The Israeli state and society: Boundaries and frontiers* (1989) 269–272; Falk and Tilley (n 146) 30–48.
[807] The Jewish Agency for Israel, 'Data on the Number of Jews in the World on New Year's Eve 5781 (2020)' <https://www.jewishagency.org/il/rh-2021/> accessed 9 September 2023.
[808] Israeli Central Bureau of Statistics, 'Press Release: Population of Israel on the Eve of 2022' <https://www.cbs.gov.il/he/mediarelease/DocLib/2021/447/11_21_447b.pdf> accessed 9 September 2023.
[809] ibid.
[810] Law of Return.
[811] ibid 1.
[812] Citizenship Law.
[813] ibid 2.

Jewish People in 2018, providing that '[t]he State shall be open to Jewish immigration, and the ingathering of the exiles'.[814]

Jewish privilege is not limited to unfettered immigration and the receipt of immediate citizen status. From the freedom of movement that Jewish citizens enjoyed from 1948 to 1966, when Palestinian citizens of Israel were subject to the military administration,[815] to the involvement of global Jewish organisations like the Jewish National Fund and the Jewish Agency in the administration and allocation of lands in the country, the privileges bestowed upon Jews are evident.[816] A variety of laws and court decisions that facilitate spatial segregation as, for instance, Amendment 8 to the Cooperative Associations Ordinance,[817] known as the 'Admission Committees Law', allowing small-scale Jewish localities in the Negev and the Galilee[818] to instate a committee to decide who can purchase lands and assets in the locality, and become a resident also serve as confirmation of Jewish privilege, since such committees mainly serve to prevent Palestinian citizens from moving into such places.[819] At the same time, zoning and planning authorities work to circumscribe Palestinian localities in Israel, to block their development options,[820] and have caused a dramatic housing crisis by refusing to approve formal planning proposals and building permits. This has led to wide-scale illegal building and a high volume of house demolitions in Palestinian localities within the Green Line.[821]

The Israeli Knesset voted in favour of Basic Law: Israel – the Nation-State of the Jewish People in July 2018.[822] This Basic Law determines at the outset that '[t]he land of Israel is the historical homeland of the Jewish people',[823] that '[t]he State of Israel is the nation state of

[814] Basic Law: Israel - the Nation State of the Jewish People s 5.
[815] Shira Robinson, 'Supremacy Unleashed: The Ongoing Erosion of Palestinian Citizenship in Israel' in Roel Meijer, James N Sater and Zahra R Babar (eds), *Routledge Handbook OF Citizenship in the Middle East and North Africa* (Routledge 2020).
[816] Forman and Kedar (n 114).
[817] Cooperative Associations Ordinance 1933.
[818] A small locality is defined by Section 1 to the Ordinance as encompassing up to 400 families; ibid 2.
[819] Michal Rotem, 'Segregated Spaces: The Spatial Discrimination Policies among Jewish and Arab Citizens in the Negev-Naqab' (Negev Coexistene Forum for Civil Equality 2016) 10–11 <https://www.dukium.org/wp-content/uploads/2016/03/IDARD_ENG_WEB-1.pdf> accessed 6 November 2022.
[820] Falah, 'Dynamics and Patterns of the Shrinking of Arab Lands in Palestine' (n 105).
[821] Yiftachel, 'Bedouin Arabs and the Israeli Settler State: Land Policies and Indigenous Resistance' (n 18) 37; Rassem Khamaisi, 'From Supervision to Development: A New Concept in Planning Arab Localities' (2017) 20 Strategic Assessment 99.
[822] Basic Law: Israel - the Nation State of the Jewish People.
[823] ibid 1(a).

the Jewish People in which it realises its natural, cultural, religious and historical right to self-determination',[824] and then makes clear that '[t]he realisation of the right to national self-determination in the State of Israel is exclusive to the Jewish People'.[825] The Basic Law turns then to stipulate the State's symbols, all Jewish-oriented, from the name of the State, through its flag and symbol, to the wording of the national anthem;[826] The State's capital is '[t]he complete and united Jerusalem'[827] and the State's language is Hebrew.[828] The Basic Law also mentions the importance of the State's connection with the Jewish people abroad,[829] and declares that '[t]he State views the development of Jewish settlement as a national value, and shall act to encourage and promote its establishment and consolidation'.[830]

Both the Law of Return and the Citizenship Law are taught in Constitutional Law modules. In our class, the Law of Return and the Citizenship Law were discussed as part of the 'Jewish and Democratic State' topic, and specifically, under the 'Jewish Character' subject.[831] The professor explained that 'the State of Israel is a Jewish and democratic state', and that 'the State's identity as Jewish and democratic […] cause tension at times, and sometimes there exist contradictions between them that need to be settled'.[832] One example for such a contradiction the professor elaborated is the Law of Return: '[t]he law on its face is a discriminatory law, granting Jews an advantage in entering the country. Over the years, quite a few questions have been raised—about the Law of Return as a discriminatory practice in a democratic country, inquiries as to who is a Jew and who is recognised as such by this law, and a variety of other questions'.[833]

While it seemed straightforward that the Law of Return discriminates against non-Jews and particularly the 1948 Palestinian refugees, this discrimination which is embedded in the Law was not discussed, and we focused instead on who according to the law is a Jew. We briefly examined a case of a Jewish child who was converted to Christianity in an orphanage during

[824] ibid 1(b).
[825] ibid 1(c).
[826] ibid 2.
[827] ibid 3.
[828] ibid 4.
[829] ibid 6.
[830] ibid 7.
[831] 'Constitutional Law Lecture' (25 November 2016).
[832] ibid.
[833] ibid.

the Holocaust in order to save his life, and was denied the possibility of immigration according to the Law of Return;[834] the case of a family including a Jewish father and non-Jewish mother who asked to register their children as Jewish;[835] and even cases discussing the type of conversion to Judaism allowed if one is to apply for citizenship on the basis of the Law of Return.[836] Discrimination was discussed in class, but focused on individuals whose Judaism is questioned by different authorities.

The unequivocal discrimination embodied in the Law of Return against Palestinian citizens as well as Palestinian refugees was not mentioned at all. The Law of Return had been presented as an all-Jewish issue, and the focus on its discrimination between Jews allowed the professor to totally overlook the evident discrimination against Palestinians. The silence as to Jewish privilege and the discrimination of Palestinians had been maintained by both the professor and the students. This ability to mute any mention of such an evident discrimination, in Antonio Gramsci's words, is based on the production of common sense. He writes:

> The fundamental characteristic of common sense consists in its being a disjointed, incoherent, and inconsequential conception of the world that matches the character of the multitudes whose philosophy it is.[837]

The hegemonic worldview, that sees no contradiction between Jewish privilege and democracy, and erases the discriminatory aspects of Israeli law towards Palestinians, dominates the classroom and it does so through consent. The capacity to impose this worldview in the classroom is the product of the professor's power to set the curriculum and lead the discussion, but it is also instructed by the Israeli juridical field itself. The hegemonic acceptance of this settler colonial logic, based on settler privilege and the erasure of the native,[838] exists in every part of the juridical field, and it is up to the law school to inculcate students into this perception.

Later that year, we learned about Israel's Citizenship Law. The central way to receive Israeli citizenship, the Constitutional Law professor explained, is by birth. Section 4(a)(1) sets that a

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[834] *Oswald Rufeisen v Minister of Interior* [1962] Israeli High Court of Justice HCJ 72/62, 16 PD 2428.
[835] *Benjamin Shalit et al v Minister of Interior et al* [1970] Israeli High Court of Justice HCJ 58/68, 23(2) PD 477.
[836] *Thais-Rodriguez Tushbaim v Minister of Interior* [2004] Israeli High Court of Justice HCJ 2597/99, 59(6) PD 721.
[837] Gramsci, *Prison Notebooks* (n 386) 333.
[838] Elkins and Pedersen (n 332) 4.

person who was born in Israel, and one of his/her parents was an Israeli citizen, will be an Israeli citizen from birth.[839] Until 1980, our professor explained, children of Israeli citizens who were born abroad, also received Israeli citizenship, and kept passing it to their next of kin regardless of their connection to the State of Israel. In 1980, Section 4 had been amended, to restrict the inheritance of Israeli citizenship by birth abroad, to one generation only.[840] The rationale, the professor stressed, is that a person who does not maintain any connection to Israel, will not inherit citizenship.

The professor did not mention the identity of the legal subject within the perimeter of this discussion. But the identity, when discussing Section 4 to the Citizenship Law and especially its amendment is crucial. Its importance goes back to the Law of Return. As long as the right to 'return' to Israel is safeguarded for all Jewish people, regardless of their connection to Israel, they can always be granted Israeli citizenship according to Section 2 to the Citizenship Law.[841] In other words, even if a Jewish person is not entitled to inherit citizenship, he/she can immigrate to Israel and receive citizenship through the Law of Return. The impact of the 1980 Amendment is, however, crucial for Palestinian citizens of Israel. As the right of return is granted only to Jews, Palestinian citizens of Israel who live abroad, and lose their citizenship due to the 1980 Amendment, will not be able to regain it and it therefore seems obvious that this amendment was introduced to circumvent the rights of Palestinian citizens.

Yet, the obvious was never uttered. On the surface, the professor did not describe the legal subject at all, sharing no identifying characteristics. But within the class discussion, it was implicit that the subject the Law dealt with is Jewish, even while the actual subject of this Amendment was Palestinian since it had little tangible effect on Jews. From this perspective, the silence as to the subject's identity works similarly to the laws discussed in class, as it promotes the supremacy of the Jewish subject while ignores the Palestinian who is also subject to the very same law. In other words, the alleged blindness as to the subject of liberal law, works both in class and in the laws themselves, to promote Jewish privilege under the disguise of liberal rule of law. Overlooking the subject's identity allows for the concealment of the inequality inherent in the law, while the liberal universal subject is deployed to make

[839] Citizenship Law s 4(a)(1).
[840] ibid 4(a)(2).
[841] ibid 2.

sense of the constant disregard of the subject's identity. '[T]he reproduction of labour power requires not only a reproduction of its skills', according to Althusser, 'but also, at the same time, a reproduction of its submission to the rules of the established order, i.e. […] a reproduction of the ability to manipulate the ruling ideology correctly for the agents of exploitation and repression, so that they, too, will provide for the domination of the ruling class "in words"'.[842] Thus, the lecture not only provides the students with particular knowledge of the law, but it also works to make sense of settler colonial ideology of Jewish privilege, and grants students the means to pursue and reproduce it.

Interestingly, at one point the professor discussed a series of sections of the citizenship law that are mainly applicable for non-Jews. 'Sections 3 and 3A', the professor explained, 'are sections that involve the acquisition of citizenship by the so-called virtue of living in Israel'.[843] These sections 'were intended to provide some kind of solution for non-Jews who on the eve of the establishment of the State were subjects of the British mandate, what was called "Palestinian citizens"[844] and at the end of the War of Independence were still present in the territory of the State of Israel. According to these sections, they are granted Israeli citizenship'.[845] The professor then briefly gave an example of birth-right citizenship, simply stating that 'we have a situation in which those who were in Israel on the eve of the establishment of the State, those who were in Israel at the end of the War of Independence and remained stateless, there are Arabs, Druze, Bedouin, all kinds of people who received citizenship this way'.[846]

The context in which Sections 3 and 3A were required is that of the 1948 war and the Palestinian Nakba. During the war, the majority of the Palestinian population within the Green Line fled or had been expelled.[847] An estimated 750,000 Palestinians became refugees

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[842] Althusser (n 11) 6–7.
[843] 'Constitutional Law Lecture' (28 April 2017).
[844] It should be noted that the Hebrew term that the professor used, as does the Citizenship Law itself, 'natin Eretzisraeli', means 'a citizen of the land of Israel', and does not include the word 'Palestinian' as its English translation.
[845] 'Constitutional Law Lecture' (n 843).
[846] ibid.
[847] Khalidi, 'Plan Dalet: Master Plan for the Conquest of Palestine' (n 83) 4–9; Khalidi, 'Why Did the Palestinians Leave, Revisited' (n 86) 49–50.

and approximately 160,000 Palestinians remained in the area that became Israel.[848] Not surprisingly, with no context at all, some of the students in class did not understand the professor's explanation of Sections 3 and 3A. Students repeatedly asked about these sections, but the professor simply adhered to the Sections' wording, instead of explaining what exactly happened, and who the affected people were. Thus, even when deliberately discussing the citizenship of non-Jews, mere mention of 'Arabs, Druze, Bedouin' without any explanatory context, acted to enhance the silence. The professor continuously used the Hebrew term for 'subjects of Mandatory Palestine', repeating the fact that they were present in Israel's territory after the 1948 war, and had no citizenship, but avoided straightforwardly explaining what happened in that war, who the non-Jewish residents of Palestine were, and how it was that they were left stateless.

This evident difficulty to discuss the consequences of the 1948 war in the classroom resonates with Veracini's assertion that '[s]ettler projects are inevitably premised on the traumatic, that is, violent, replacement and/or displacement of indigenous Others'.[849] The 1948 war is one violent event of displacement in the history of the State of Israel that my professor declined to even mention, even though students did not understand what the professor was talking about. Veracini further stresses that 'settler colonialism also needs to disavow any foundational violence'.[850] The professor's reluctance to discuss the context through which Palestinians became and then remained uprooted and stateless, can be understood exactly as such disavowal of the reality of violent dispossession during war, as well as its dire consequences that the Citizenship Law asks to address.

4.3 Silence as to the Circumstances

While silence is a central tool of settler colonial legal pedagogy, it is combined at times with utterances that emphasise aspects of specific court case. By uttering a partial description, the most problematic or significant facts can be overlooked or hidden. Silence as to the circumstances surrounding a legal case serve settler colonial pedagogy by conveying the basic assumptions of the Israeli juridical field. For instance, as elaborated below, presenting a

[848] Lustick (n 87) 28, 48–49; Khalidi, 'The Palestine Problem: An Overview' (n 24) 9; Morris (n 79) 397; Khalidi, *The Iron Cage: The Story of the Palestinian Struggle for Statehood* (n 52) 46.
[849] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 75.
[850] ibid.

case that prohibits discrimination against Palestinians, while ignoring the fact that it took place in the occupied territories, highlights the liberal while concealing the settler colonial context in which the events were carried out. By presenting the juridical field as distinct, neutral, universal and legitimate, helps conceal the non-liberal and non-democratic aspects of Israeli law.

4.3.1 Ibrahim Naamneh v. Kibbutz Kalya

'The question is, who is obligated to protect human rights – only the State? Or maybe also us as individuals?' my Constitutional Law professor asked at the outset of our class.[851] A large portion of my Constitutional Law module had focused on human rights. One of its subtopics was 'the applicability of human rights in private law', questioning whether constitutional human rights apply to interactions between individuals. For instance, while it is clear that State authorities are obliged to treat different citizens equally, this matter asks whether individuals are also required to treat each other equally in the interactions and encounters between them. The model that had been adopted in Israel is the one of 'indirect application', which sets that constitutional human rights are applicable to individual relations, but only through legal doctrines which absorb public law principles into private law.[852] In other words, constitutional human rights do not apply directly to any individual interaction in Israel, they apply only to specific situations that the law defines. In such situations, the legislator, or the court, establish that even though constitutional human rights apply directly only to interactions between the citizen and the State, a particular right will be absorbed by private law, demanding individuals to also guarantee and respect it under specific circumstances.

The professor explained that we will be discussing three court decisions, to demonstrate the 'indirect application model': *Chevra Kadisha v. Kastenbaum*,[853] *Nivi Atias v. Isrotel Hotel Management*[854] and *Ibrahim Naamneh v. Kibbutz Kalya*.[855] Each of these cases serves to display a different doctrine allowing the incorporation of public law obligations to private encounters. Lionel Kastenbaum was a Jewish man whose wife passed away and had been

[851] 'Constitutional Law Lecture' (6 January 2017).
[852] Barak, *Interpretation in Law Volume III: Constitutional Interpretation* (n 416) 654.
[853] *Chevra Kadisha [Burial Society] of the Jerusalem Community v Lionel Aryeh Kastenbaum* [1992] Israeli Supreme Court CA 294/91, 46(2) PD 464.
[854] *Nivi Atias v Isrotel Hotel Management (1981) LTD* [2002] Haifa Magistrate Court CL 2896/98, Nevo.
[855] *Ibrahim Naamneh v Kibbutz Kalya* [1996] Tel Aviv Magistrate Court CL 11258/93, Nevo.

buried in Jerusalem. Kastenbaum's request to engrave his wife's name in Latin letters as well as her Gregorian date of death on her gravestone had been denied by the non-profit organisation which operates the cemetery. The case went all the way to the Supreme Court which ruled that the right to dignity of the deceased remains after death, as well as the family's right to honour their loved ones, and both rights should be realised, even though this is a private law case.[856] In another case, Nivi Atias was a 12-year-old girl who asked to have dinner with her mother in a hotel restaurant which had an entry limit of 16 and above. Her access was denied, and she went to court and claimed discrimination due to her age. The court found that while discrimination due to age exists in Israeli law in some circumstances, in this case no prohibited discrimination took place, and the lawsuit was rejected.[857]

The professor brought up the *Naamneh* case as yet another example of the applicability of constitutional human rights in Israeli private law. It was presented in class after the discussion about the *Kastenbaum* ruling and before the *Nivi Atias* case. The professor opened by describing the facts of the case, shortly recounting the events that took place in July 1993: '[a] family of Israeli Arabs, arrived at a water park a day after a terror attack, [the cashier] sells tickets to part of the family, and when they hear them speak to each other in Arabic, they ask them to return the tickets, as they do not let Arabs in the park'.[858]

The professor had included specific excerpts of the court decision for the students to read, which presents some relevant information that was not mentioned in class. According to the court decision:

> Plaintiff 1, an Arab, resident of Beit Hanina […], arrived at the place on the mentioned date with his wife and children, together with two other families. He asked May Najar, who was standing in line to purchase tickets, to buy tickets for him too, in his mother tongue (Arabic). When the cashier heard they are Arabic speakers, she asked May to present her identity card, and after looking at her ID, she announced that they will not be able to enter.[859]

Thus, the professor remained silent as to the precise circumstances of the case; namely, the Naamneh family were in fact Palestinian residents from East Jerusalem, and the entire

[856] *CA 294/91 Chevra Kadisha v. Kastenbaum* (n 853).
[857] *CL 2896/98 Nivi Atias v. Isrotel* (n 854).
[858] 'Constitutional Law Lecture' (n 851).
[859] *CL 11258/93 Naamneh v. Kalya* (n 855) para 3.

incident took place in the occupied territories. The professor did not mention both of these significant details.

Reading the court decision itself reveals that the Naamneh family lives in Beit Hanina, a Palestinian neighbourhood in East Jerusalem (see Figure 4.1). Thus, the plaintiffs are not 'Israeli Arabs',[860] as suggested by the professor, they are residents of occupied East Jerusalem. The term 'Israeli Arabs' refers to Palestinian citizens of Israel who live within the Green Line. Even though the term 'Israeli Arabs' is mentioned in the court decision itself by one of the witnesses, and although residents of East Jerusalem can apply for an Israeli citizenship, the plaintiffs in this case reside in an occupied territory that had been unilaterally annexed by Israel in 1967 and they are not Israeli citizens.

Figure 4.1: Beit Hanina and Kalya Beach

Another interesting aspect of this case is that the water park was located in Kalya beach, situated in the northern part of the Dead Sea, which is in fact part of the occupied Palestinian territories. The water park itself was built and operated by a nearby illegal Israeli settlement.

[860] There exists some wide criticism as to the general use of the term 'Israeli Arabs', as Azmi Bishara stresses: 'it is impossible to point at a nationality or a national group called "Israeli Arabs" or "Arabs in Israel"'. In other words, Bishara argues that using the term 'Israeli Arabs' works to disconnect them from Palestinian history, as well as from the Palestinian question. See: Bishara (n 98) 7.

Under the Oslo Accords, the area had been designated as Area C, subject to full Israeli control.[861]

So, the events happened in Kibbutz Kalya in the occupied territories, and Naamneh is a resident of Beit Hanina rather than a citizen of Israel. In our class, the *Naamneh* case served to demonstrate how section 63 of the Tort Ordinance, 'Breach of Statutory Duty', can be used to incorporate the violation of Basic Law: Human Dignity and Liberty, into private law cases. Section 63(a) stipulates that:

> A violator of a statutory duty is a person who does not fulfil an obligation imposed on him by any legislation […] intended for the benefit or protection of another person, and the violation caused that person damage of the type or nature of the damage the legislation is referring to […].[862]

My professor turned to explain the argument made by the Naamneh family's attorneys who asked that the right to equality and the prohibition of discrimination be incorporated into the Tort Ordinance.[863] The professor showed us how every demand of Section 63 had been met:

> [The plaintiffs] claim that Basic Law: Human Dignity and Liberty is a statute that is designated for the benefit and protection of the human, it is the clearest law which sets that. They claim that the right to equality is part of the right to dignity. They claim that there has been a violation of Basic Law: Human Dignity and Liberty, and that this is exactly what the statute is meant to do, this is the heart of the law. All three elements [of Section 63] are present – there is a statute, there has been a violation, the harm it is supposed to prevent has been caused.[864]

[861] Aseil Abu-Baker and Marya Farah, 'Established Practice: Palestinian Exclusion at the Dead Sea' (2020) 49 Journal of Palestine Studies 48, 52; Over the years, there has been some attempts to prevent access of Palestinians to the Dead Sea shores, in 2007, a military check point had been set up for this end, ibid 54; The Association for Civil Rights in Israel (ACRI) filed a petition to the High Court of Justice against this policy. In the petition, ACRI stressed that '[i]n its actions, the IDF deprives the occupied territory residents of the only coastal strip in the area, and designates it for the exclusive use of Israelis, and for the benefit of the financial well-being of the settlements in the area' *Association for Civil Rights in Israel v Chief of the General Staff Lieutenant General Ashkenazi* [2009] Israeli High Court of Justice HCJ 5148/08, Nevo (Petition) 2; The High Court of Justice dismissed the petition, as '[t]he activity of Beit HaArava checkpoint was stopped in its previous format, according to which the entry of Palestinian residents into the Dead Sea area was blocked at different times' ibid 1.

[862] Tort Ordinance 1968 (IL) s 63.

[863] 'Constitutional Law Lecture' (n 851).

[864] ibid.

Therefore, the Court found that the statutory duty to treat others as equals had been violated and ordered the respondents to compensate the Naamneh family and pay their expenses.[865]

Naamneh is undoubtedly a valuable example of the implementation of section 63 to the Tort Ordinance. Yet, there are many other suitable rulings that demonstrate how breach of statutory duty is claimed and proved in court. Its added value can be found in the combination of the statutory duty it discusses, the identity of the plaintiffs, and the result. Thus, the fact that the plaintiffs claimed for a breach of the duty to treat others as equals, and that it was a family of 'Israeli Arabs', as well as the Court's ruling that recognised the breach and compensated plaintiffs, contributes altogether to the production of Israel as a liberal democracy. While the cashier and the manager did not allow a group of 'Israeli Arabs' to enter the park, the Israeli court intervened to repair the situation. The main moral that can be learned from *Naamneh* is that Israeli courts protect the right to equality of Palestinian citizens of Israel, not only in front of State authorities, but also within the private sector. Hence *Naamneh* serves to constitute the Israeli juridical field as a liberal field that actively safeguards the right to equality of every citizen.

To ensure the sedimentation of this broader ideological deceit the case should be understood upon the facts and circumstances as presented in court and by the professor and not according to the situation on the ground. In accordance with the settler colonial mode of operation,[866] both the court and the professor omitted some key facts of the *Naamneh* affair. The fact that Kalya is an illegal settlement that not only profits from a natural resource in an occupied territory and takes advantage of it, but also prevents members of the occupied population, Palestinians from the West Bank, from enjoying that resource, was not mentioned in class nor in the court decision. In the same manner, the identity of the plaintiffs was not fully disclosed, avoiding a discussion of the (lack of) civil status of Palestinian residents of East Jerusalem, and therefore referring to them as 'Israeli Arabs'.

This can be therefore categorised as a selective utterance, one that presents a story that fits the general narrative, yet omits aspects that actually undermine the effort to constitute Israel as a liberal democracy that guarantees human rights to all its citizens. The discussion of this

[865] *CL 11258/93 Naamneh v. Kalya* (n 855) paras 5–7.
[866] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 15.

case signals to students that the juridical field they will be joining in the future is a liberal universe, as Bourdieu asserts, a 'social universe […], which is in practice relatively independent of external determinations and pressures',[867] one that works to repair the injustices caused by members of society and even punish them for their misbehaviour.

While the *Naamneh* case discusses the right to equality, it should be noted that it refers to a quite superficial concept of equality. Not allowing an individual to enter a public place due to his/her identity constitutes an infringement, but it mainly serves to create a false impression of the State and its authorities as liberal and equal. Emphasising the liberal decisions of Israeli courts in fact promotes settler colonial logic, hiding the context in which the event takes place imposes a very narrow concept of equality and therefore enables a solution to the said breach, that is, that the park will not prevent 'Arabs' from entering. This legal decision in turn bolsters settler colonialism as the illegal settlement remains unchallenged and will continue taking advantage of the beach, only now it will have to allow 'Arabs' in.

This puts a large question mark over the professor's decision to utilise the *Naamneh* case to discuss the right to equality in Israeli private domestic law. The silenced context of the case raises significant questions regarding settlers taking over occupied natural resources, and further restricting the freedom of movement of the occupied population. Teaching this case out of its context might seem as a direct utterance regarding inequality towards 'Israeli Arabs', but the silence as to the real circumstances of the *Naamneh* case raises more questions than answers as it de facto erases the Green Line, disregards the inferior status of East Jerusalem residents, and legitimises the settlement enterprise.

4.4 Emphasising the Liberal while Silencing the Settler Colonial

Cases involving Palestinian citizens of Israel, that directly engage with land law and land rights, were quite uncommon during my LLB studies. Yet, two cases that were discussed in my Constitutional Law class are worth mentioning—the case of *Qa'adan*,[868] and the case of *Avitan*.[869] In *Qa'adan*, a Palestinian citizen of Israel, who asked to purchase land in a newly established Jewish town, was rejected because he was not Jewish. He submitted a petition to

[867] Bourdieu (n 417) 816.
[868] *Qaadan v Israeli Land Administration et al* [2000] Israeli High Court of Justice HCJ 6698/95, 54(1) PD 258.
[869] *Eliezer Avitan v Israel Land Administration et al* [1989] Israeli High Court of Justice HCJ 528/88, 43(4) PD 297.

the High Court of Justice, claiming that land allocation by State authorities should be done on an equal basis, and in a democratic manner. Qa'adan's petition was accepted, as the High Court of Justice rejected the State's 'separate but equal' argument, and ruled that such a policy, of allocating lands to Jewish and Palestinian citizens separately, is in fact not equal.[870] In *Avitan*, a Jewish citizen asked to purchase a plot in a Bedouin township in the Naqab desert, but was declined in the claim that the town is for Bedouin only.[871] Avitan's petition was rejected by the High Court of Justice, which accepted the State's argument, that it is a justifiable 'separate but equal' policy.[872]

My constitutional Law professor used these two cases, *HCJ Qa'adan* and *HCJ Avitan*, as examples of the tension between the Jewish and democratic characters of the State of Israel. This 'tension' is based on the premise that Israel is simultaneously a Jewish and democratic state, and that a constant conflict endures between these elements (I discuss this in depth in Chapter 5). It is therefore up to the High Court of Justice to balance the two.

As for *HCJ Qa'adan*, the professor explained that indeed, the case 'provoked a wide public discussion, but overall, Qa'adan was a nurse in the hospital who said—I want to give my children a better life—with infrastructure and education and good conditions for raising children, like every parent'.[873] This suggests that although directly discussing land rights, Adel and Iman Qa'adan's petition did not threaten the Israeli regime, seeking to promote individual rights of a specific family, and not bringing a wider claim as to land resource allocations between Palestinian and Jewish citizens. In other words, Adel and Iman Qa'adan did not ask to improve Palestinian localities in Israel, they just asked to move to a Jewish locality because the quality of life there is much higher. The professor went on to clarify the meaning, saying that 'the lawyers did not come with a fiery petition, they did not deny the Jewish character of the state, they said explicitly that they do not go against the Jewish character, they only wanted to say that when allocating land, it should be allocated equally

[870] *HCJ 6698/95 Qaadan v. ILA et al* (n 868).
[871] *HCJ 528/88 Avitan v. ILA et al* (n 869).
[872] ibid.
[873] 'Constitutional Law Lecture' (2 December 2016).

and democratically'.[874] Hence, *Qa'adan* did not undermine Israel's definition as a Jewish democracy, and even worked to reconstitute this concept by suggesting that equality exists.

The operation of *Qa'adan* in the classroom not only suggests that the Jewish and the democratic characters of the State can be balanced, it masks Jewish privilege and Jewish supremacy by focusing on an individual case and by so doing serves to cover up the ongoing discrimination against Palestinian localities in Israel, including the lack of infrastructure, resources and land for development and expansion. In this context, the teaching of *Qa'adan* resonates with Tuck and Gaztambide-Fernández's observation of 'the settler colonial curricular project of replacement, which aims to vanish Indigenous peoples and replace them with settlers, who see themselves as the rightful claimants to land, and indeed, as indigenous'.[875] It is common sensical for the professor and students mostly from the middle class, that a Palestinian citizen would prefer to reside in a Jewish locality due to the better living conditions that are available. The solution becomes acceptable precisely because it does not entail massive allocation of resources to Palestinian localities, but simply allowing Adel and Iman Qa'adan to purchase land in a Jewish locality. This is exactly how liberalism works and what it asks to promote, preferring individual rights as well as individual petitions, instead of collective rights and wider legal action. That is the reason that *Qa'adan* was presented in class to begin with, because it does not challenge the Jewish character of the State and allows the professor to emphasise Israel's liberal aspects and maintain silence as to the settler colonial ones.

The professor explained that the State had two central arguments. One, that the State also allocates land for 'Arab' localities, so the equality principle prevails. Two, that land allocation for Jewish settlement is legal anyway, as it reflects the Jewish character of the State. Our professor did not comment on these two arguments, given that an analysis of their logic might have exposed the settler colonial character of the State. Openly favouring segregation and Jewish privilege is straightforward settler supremacy.[876] But the court rejected both arguments, in a decision that my professor described as 'a ruling that the State

[874] ibid.
[875] Tuck and Gaztambide-Fernández (n 538) 73.
[876] Elkins and Pedersen (n 332) 4.

does not know how to deal with'.[877] The reason that the State did not know how to handle this ruling is that allowing a Palestinian citizen to reside in a Jewish locality sabotaged, even if only temporarily, the Israeli policy of residential segregation. It undermined the transfer of settlers, which as Veracini notes takes place 'when settlers move into secluded enclaves in an attempt to establish a population economy that is characterised by no indigenous presence'.[878]

Another interesting aspect of *Qa'adan* that had been absent from our class as well as from the Court decision itself is the clear settler colonial logic that informed the establishment of Katzir, the locality in which the Qa'adan family asked to purchase land. Katzir is located within Israel, but adjacent to the Green Line, and is situated in Wadi 'Ara, an area in Northern Israel that is mainly inhabited by Palestinian citizens. It was established in 1982, according to the 'Axis of the Hills' plan, that aimed to develop Israel to the east by establishing new Jewish settlements along the Green Line, and 'create a sequence of Jewish settlements in this area in order to strengthen the Jewish presence there'.[879] As Israeli Geographer Elisha Efrat stresses:

> The undeclared goal of the State of Israel in carrying out this plan is, in fact, to interrupt the Arab settlement sequence on the western side of the "Green Line" […] by increasing Jewish settlement along it. Another apparent goal is the de facto erasure of the "Green Line" […] in order to practically maintain a Jewish territorial continuity between the State of Israel and the territories of Judea and Samaria.[880]

With its underlying purposes to settle Jews in between Israeli Palestinian localities and thus use their land reserves and block their development possibilities, as well as feed Israel's settler colonial pressure to expand,[881] Katzir is an evident manifestation of Israel's settler colonial project.

In this context, *Qa'adan*, a case that allegedly challenges residential segregation by allowing native Palestinians to move into settlers-only localities (within the Green Line), sanctions the ongoing transfer of Palestinians in Israel and the erasure of their indigeneity. It both legitimises Jewish localities that had been established to interrupt Palestinian ones and allows

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[877] 'Constitutional Law Lecture' (n 873).
[878] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 49.
[879] Elisha Efrat, 'The Planning and Development of the Axis of the Hills' (1992) 35 Karka 24, 24.
[880] ibid 28.
[881] Sayegh (n 339); Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (n 19) 167.

the resettlement of uprooted Palestinian citizens on State lands, that are considered Jewish lands, thus erasing the fact the many of those lands were not long ago owned by native Palestinians, removing their indigenous connection to the land.[882]

In class, my professor did present the State's Judaising efforts, stating that in the case of *Qa'adan*, 'the state sought to designate land in areas where there are not many Jews, for Jews only, but the court did not accept the state's position'.[883] This statement suggests that the Court ruled out Israel's Judaising policy as a whole, thus rejecting the concept of land allocation based on ethnicity, as well as localities designated for Jews only. But such statements work to strengthen settler colonial logic, as they simply do not represent Israeli reality. They present Israel as a liberal state, with an independent High Court that protects the State's citizens. This is the reason the case was brought to class, but when critically examined it actually showcases how the fiction of liberal Israel is constructed.

The High Court of Justice has ruled that every law has a specific purpose and a general one. In this case, Basic-Law: Israel Lands, has a specific end that is to administer the State's lands, and a general purpose, a normative umbrella of principles, among them the principle of equality.[884] My Constitutional Law professor explained that the State brought a claim of 'separate but equal', claiming that it allocates lands to everyone, but separately. The professor reiterated that in the case of *Qa'adan*, the court rejected that argument, referring to the case of *Brown v. Board of Education*, and ruling that separate but equal is unequal. 'The *Qa'adan* Affair', the professor explained, is an example of a situation where the court preferred the democratic character of the state over its Jewish character'.[885] The professor further explained that 'the court ruled that separate but equal is not equal, that the separated group always gets hurt'.[886] Such a policy, the professor explained, can be accepted only in exceptional situations – one of them being affirmative action.

The professor's example of affirmative action was the case of *Avitan*, which the professor described as 'a unique case in which the court allowed a separate but equal policy'.[887]

[882] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 35.
[883] 'Constitutional Law Lecture' (9 December 2016).
[884] *HCJ 6698/95 Qaadan v. ILA et al* (n 868) paras 20–25.
[885] 'Constitutional Law Lecture' (n 883).
[886] ibid.
[887] 'Constitutional Law Lecture' (n 873).

Affirmative action is a liberal policy that can be defined as a 'preferential treatment given to minorities […] for the purpose of counteracting the effect of past discrimination or unjust treatment, combating present or prospective prejudice, or creating a more diverse environment or more just society'.[888] Thus, affirmative action is an unequal treatment by definition.[889] But the *Avitan* case, I maintain, is neither an example of affirmative action nor an example of 'separate but equal' policy.

Eliezer Avitan, a Jewish resident of the Naqab area, challenged an ongoing State policy that allocates plots of land in reduced prices to Bedouin citizens only. Avitan asked to buy a plot in the Bedouin township of Shaqib al-Salam, one of seven localities that the State of Israel established in order to displace the indigenous Bedouin community, take over Bedouin lands and concentrate them in dense urban areas.[890] He argued that the Israeli Land Administration's refusal to sell him land constitutes a 'violation of the principles of equality and the prohibition of discrimination on national grounds'.[891]

At the outset, our professor described the case briefly, and explained that they 'did not want to get into the political aspects of the story'.[892] When I claimed that we should ask ourselves why the State established the Bedouin townships to begin with, the professor answered that 'maybe it was aimed at getting the Bedouin to leave their lands',[893] and proceeded with the lecture. The professor turned to describe *Avitan* as a case of affirmative action, a preferential action that privileges members of one social group over others, in this case preferring Bedouins over Jews, that is justifiable as it aims to right past wrongs. But as the Court decision reveals immediately, the justification for the unequal allocation of plots in the *Avitan* case is not directed at righting anything.

The *Avitan* ruling clearly states its genuine goals. In his majority opinion, Justice Theodor Or decided to bring in detail parts of the affidavit filed by the Israeli Land Administration and

[888] John Hasnas, 'Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination' (2002) 71 Fordham Law Review 423, 436.
[889] ibid.
[890] Yiftachel, 'Bedouin Arabs and the Israeli Settler State: Land Policies and Indigenous Resistance' (n 18) 34–38.
[891] *HCJ 528/88 Avitan v. ILA et al* (n 869) para 2.
[892] 'Constitutional Law Lecture' (n 873).
[893] ibid.

the Israeli Government. An excerpt from that affidavit, reveals the State's real interests in allocating lands for Bedouins only:

> Aside from a solution to the phenomenon of nomadism, which is not consistent with proper administrative procedures in modern society, and does not allow for the provision of regular and adequate social and municipal services, the policy of settling the Bedouin in permanent localities is also intended to solve, as mentioned, the problems of illegal construction in unplanned Bedouin concentrations and the seizure of state lands while claiming for ownership over these lands […].[894]

Justice Or then stated that 'from the above it appears that the State has a clear interest to encourage Bedouin settlement, due to the aforementioned public interests'—namely, transferring them into towns so the State can take over their land.[895] Although he revealed the real interests informing the State's decision to provide Bedouins with plots at a reduced rate, Justice Or presented *Avitan* as a matter of affirmative action. Citing Justice Shoshana Netanyahu from a previous case:

> […] an equal treatment does not always lead to a just result, and sometimes inequality must be practiced in order to achieve justice, all depending on the goal we strive to reach. When the initial starting point of one is inferior to that of the other, it is necessary to give him more, in order to bring the two to equality… the justice in the result is the determining factor and not the sanctity of the principle of equality, which only comes to serve the purpose of justice.[896]

Following this citation, Justice Or stressed:

> This is our case. There is a public interest in assisting the Bedouins to settle permanently in urban settlements, both from considerations related to providing them with improved public services […]; and from other planning and public considerations, related to the need to vacate state lands seized by Bedouins and to demolish buildings that were built without a permit.[897]

This rationale, stated by the court, exposes that *Avitan* is not really a case about ensuring that the Bedouin population, which is among the poorest in Israel, enjoy some kind of affirmative action. Instead, it is a case in which the concept of affirmative action had been exploited to

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[894] *HCJ 528/88 Avitan v. ILA et al* (n 869) s 5.
[895] ibid 6.
[896] ibid 6 citing; *Religious Sport Union Elitzur Nahariya v Nahariya Municipality* [1983] Israeli High Court of Justice HCJ 720/82, 37(3) PD 17 [4].
[897] *HCJ 528/88 Avitan v. ILA et al* (n 869) para 6.

cover up indigenous dispossession. But these aspects were not presented in the classroom, as my professor described *Avitan* as a unique 'separate but equal' case. According to Bourdieu, this is exactly the naming force of the law, as '[l]aw is the quintessential form of the symbolic power of naming that creates the things named'.[898] Thus, a court decision that supposedly prefers the rights of Palestinian citizens of Israel over those of Jewish citizens, and in reality, promotes settler colonialism is presented, utilising the symbolic power of naming, as an example of Israeli liberalism. Emphasising its 'liberal' nature contributes to the concealment of its settler colonial essence.

According to our professor, in the case of *Avitan*, 'the State sought to maintain an affirmative action, but its main goal was to address the disputed lands issue, as from the State's point of view, the Bedouin seized lands and the State wanted to evacuate them'.[899] Our professor explained that 'the State offered the Bedouin alternative lands to move to, in order to clear off the lands and by the way perhaps improve their quality of life'.[900] This, yet again, constituted both an ethnic transfer that detached the indigenous people from the land, and a coerced lifestyle change[901] yet named in the law classroom as not only affirmative action, but one that justifies a separate but equal policy.

Finally, Justice Or exposed the real reason behind his decision, even though it has nothing to do with positive discrimination or affirmative action, stating that '[t]he [special] treatment is for Bedouins, who for many years lived nomadic lives, and their attempts to settle in a permanent location did not go well, and involved violations of the law, to the point where the state had an interest in helping them, and thus also achieving important public goals'.[902] The 'violations of the law' that Justice Or refers to are in fact Bedouin homes and agricultural structures that were built without permit, either in Government planned townships or in Bedouin historical villages that are not recognised by the State. The State's 'interest in helping them' is therefore part of an ongoing struggle between the Bedouin community and

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[898] Bourdieu (n 417) 838.
[899] 'Constitutional Law Lecture' (n 883).
[900] ibid.
[901] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 35, 44.
[902] *HCJ 528/88 Avitan v. ILA et al* (n 869) para 6.

the State of Israel, and the 'important public goals' involved are the concentration of the Bedouin community, against its members' will, in urban townships.[903]

4.5 Conclusion

This chapter distinguishes between four types of silence that exist in the law classroom—complete silence, silence attained by an utterance, silence as to the circumstances, and an emphasis of the liberal to conceal the settler colonial. These silences grant law teachers with some flexibility, especially when presenting cases that are difficult to convey. Obviously, silences and utterances are always deployed in classrooms, reflecting, as it were, the hegemonic political ideology and the social relations within society. In Israel, they help constitute a strong settler colonial pedagogy, allowing law teachers to selectively present information in a manner that highlights the liberal aspects of the State, while concealing the settler colonial project and its manifestations. This settler colonial pedagogy also allows law teachers to completely mute aspects of the law or simply disregard the circumstances of a specific case. While these methods surely assist teachers in other political settings as well as in other disciplines, the distinctive combination of tools described in this chapter is specific to the settler colonial case.

The settler colonial law school operates by continuously concealing the actual operation of the legal system, while emphasising its liberal aspects. Furthermore, the legal universe embedded in settler colonial reality inculcates law students into the judicial field by rationalising the complex entanglement of liberal law and settler colonial reality. As Patrick Wolfe stresses, the settler colonial structure, that develops and expands over time,[904] requires constant maintenance in order to endure.

[903] Michal Rotem and Neve Gordon, 'Bedouin Sumud and the Struggle for Education' (2017) 46 Journal of Palestine Studies 7.

[904] Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (n 19) 163–167.

Chapter 5: Judaising Democracy

'The State's identity as Jewish and democratic is not always contradictory, but these two characteristics generate tension at times, and every so often there are contradictions between them that must be resolved'.[905] This quote, that I wrote down in my Constitutional Law class notes, negates what many scholars, theoreticians and political figures and activists have been claiming for a long time: that Israel cannot be a Jewish and democratic state at the same time.[906] Some inconsistencies might erupt between the Jewish and democratic characters of the State according to my professor, but these can be sorted out. The conflicting yet corelating Jewish and democratic character of the State was mentioned repeatedly throughout my LLB program, in almost every module.

One can find specific areas in which the Jewishness of the State and its democratic character can be compatible. *Handyman Do-it-Yourself LTD v. the State of Israel*,[907] a Supreme Court decision that appeared in my Constitutional Law module reading list is a good example of how the two can coincide. Handyman, a shop that employed Jewish workers on Saturday, had been convicted of employing workers during their weekly rest day. In its appeal to the Supreme Court, Handyman argued that the instruction that Jewish employees are not allowed to work on Saturdays is unconstitutional, as it violates Basic-Law: Freedom of Occupation. In the process of assessing if the instruction contravenes the Basic-Law, Justice Dalia Dorner examined whether the law's directive is consistent with the definition of the State of Israel as a Jewish and democratic state. 'Setting Jews' day of rest on Shabbat [Saturday] fulfils the values of the State as a Jewish and democratic State',[908] Justice Dorner determined in her decision. 'These two values correspond in full harmony in the law in question',[909] Justice Dorner continued, '[a] day of rest for workers has a social and societal purpose, while Judaism, which introduced the concept of the weekly day of rest to humanity, sanctified Shabbat as the day of rest for the Jewish people. The Shabbat is a national value no less than

[905] 'Constitutional Law, Class Notes'.
[906] Falk and Tilley (n 146).
[907] *Handyman Do-it-Yourself LTD v the State of Israel* [2003] Israeli Supreme Court CA 10687/02, Nevo.
[908] ibid 5.
[909] ibid.

a religious value'.[910] Thus, in some cases, the Jewish and the democratic aspects of the state can get along.

But how do law professors make sense of core issues in which the Jewish and the democratic characters of the State contradict one another? More precisely, how do they introduce the different laws that explicitly prefer the Jewish character of the State over its democratic character? This chapter discusses the experience of studying two basic laws that explicitly favour Israel's Jewishness over democracy, Section 7A to Basic-Law: The Knesset and Section 1 to Basic-Law: Israel as the Nation-State of the Jewish People. Section 7A prohibits the participation in the general elections of candidates and lists that negate the existence of the State as Jewish and democratic.[911] Section 1 to the Nation-State Law sets that Israel is the homeland of the Jewish people, and self-determination in the State is available to the Jewish people only.[912] These basic laws raise Jewish supremacy and Jewish privilege to a constitutional level, and do not appear to coincide with liberal values.

This structure of privilege, rooted in the law itself, characterises settler colonial regimes, but as opposed to other instances where privilege is affirmed through the law,[913] in our case the law bestows privilege on the settler.[914] Such clear-cut legislation that favours the group of settlers over the indigenous community is written into the structure of the settler colonial state,[915] including mechanisms that deprive the indigenous community of the right to self-determination as well as the right to vote and stand for election. Law schools, as central sites for training of future members of the Israeli juridical field, ought to inculcate its students into this complex legal reality, in a juridical field that constitutes and enforces inequality through basic laws, but at the same time, perceives itself as a liberal democratic field and interprets the law with liberal and democratic means.[916]

This chapter examines how the spatial settler colonial practice of Judaisation is translated into the law classroom, to bridge the inherent gap between the Jewish and the democratic

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[910] ibid.
[911] Basic-Law: the Knesset 1958 (IL).
[912] Basic-Law: Israel as the Nation-State of the Jewish People 2018 (IL) s 1.
[913] Catharine MacKinnon, 'Difference and Dominance: On Sex Discrimination' in Anne Phillips (ed), *Feminism and politics* (Oxford University Press 1998); Marx (n 386) 300.
[914] Elkins and Pedersen (n 332) 4.
[915] Zreik (n 325) 357.
[916] Bourdieu (n 639) 74.

character of the State. It introduces the concept of 'Judaising democracy' as a settler colonial pedagogy, serving to make sense of Israel's settler colonial logic in the law school. Spatial Judaisation stipulates that to dominate a territory it is not enough to own it but it needs to be both physically settled by Jews and conceptually turned into a Jewish space, by, for instance, changing place's names and transforming the landscape to erase Palestinian traces.[917] In a similar manner, liberal and democratic areas are settled with Jewish concepts that gradually bind them together, and blur the meaning of basic concepts by presenting them as corresponding with democratic ideas and concepts. Importing the concept of Judaisation into a study of Israeli legal education, enables us to look at this specific field of higher education as an imagined space that similar to the territory in which it takes place is undergoing a continuous process of Judaisation.

5.1 Section 7A to Basic-Law: the Knesset

Section 7A to Basic-Law: the Knesset stipulates causes for restricting participation in the general elections to the Israeli Parliament. As elaborated below, such a provision had not been part of Israeli law from the State's inception. From 1948 to 1965, no restriction had been imposed on candidates' lists that wished to participate in the general elections. In 1965, the Supreme Court allowed the disqualification of one candidates' list, ruling that even in the absence of a restricting provision, a list that negates the integrity and the very existence of the State of Israel can be disqualified.[918] In 1984, a Supreme Court ruling that allowed the participation of two candidates' lists that were disqualified by the General Elections Committee, urged the Knesset to change the law.[919] Therefore, in 1985, Amendment 9 to Basic Law: The Knesset introduced Section 7A, a constitutional provision that restricted the participation of candidates' lists in the general elections.[920] The Section had already been amended twice since then, in 2002,[921] and again in 2017.[922]

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[917] Cohen and Gordon (n 123) 200; Oren Yiftachel, *Ethnocracy: Land and Identity Politics in Israel/Palestine* (University of Pennsylvania Press 2006) 105–108.
[918] *Yardor v the Chairman of the Central Elections Committee to the Sixth Knesset* [1965] Israeli Supreme Court EA 65/1, 19(3) PD 365.
[919] *Neiman v the Chairman of the Central Elections Committee to the Eleventh Knesset* [1985] Israeli Supreme Court EA 84/2, 39(2) PD 225.
[920] Basic-Law: The Knesset (Amendment 9) 1985 (IL).
[921] Basic-Law: The Knesset (Amendment 35) 2002 (IL).
[922] Basic-Law: The Knesset (Amendment 46) 2017 (IL).

Institutional constitutional law was one of the main subjects in my Constitutional Law module. ‘Under the topic of the Knesset elections’, my professor said at the beginning of the session, ‘we are certainly dealing with one of the prominent expressions of the democratic essence of the State’.[923] ‘One of the interesting discussions’, the professor continued, ‘is the restrictions that have to do with the goals, acts, or characteristics of a political candidates’ list that wishes to run in the [general] elections’.[924] At that point, the professor turned to describe the ongoing legal process constricting the right to vote and the right to stand for election in Israel, from almost unrestricted rights to limited privileges.

‘The democratic paradox is the situation in which a democracy ponders whether or not to impose content restrictions on candidate lists running for parliament’,[925] my professor stated, framing the discussion within the scope of defensive democracy. The professor explained that it is a paradox, ‘because, on the one hand, if we impose such restrictions, then it’s not democratic, right? If we say that a list whose ideas are A, B, or C, cannot compete in the elections, we are actually doing something that is anti-democratic’.[926] The professor described the liberal equation, suggesting that, on the one hand, following John Stewart Mill’s liberal theory, we should let any idea compete in the marketplace of ideas, no restrictions imposed. Yet, on the other hand, the professor continued, ‘democracy has the right to defend itself, right? It is the democracy’s right to come and say I am ready to offer complete freedom until it reaches the point where one seeks to change the regime and destroy me’.[927] While describing the democratic paradox, the professor did not explain that in fact, some of the restrictions we are going to learn about serve not so much to defend Israeli democracy, but to defend the Jewish character of the state.

The blurred treatment of the democratic and Jewish characters of the State of Israel in the law classroom is not accidental. ‘Hegemony’, as Michael Apple explains Gramsci’s concept, ‘acts to “saturate” our very consciousness, so that the educational, economic and social world we see and interact with, and the commonsense interpretations we put on it, becomes the world

[923] ‘Constitutional Law Lecture’ (n 751).
[924] ibid.
[925] ibid.
[926] ibid.
[927] ibid.

tout court, the only world'.[928] As I show in this section, tying up the democratic and Jewish characters works to Judaise liberal concepts like 'democratic paradox', 'defensive democracy' and even 'the marketplace of ideas', as if those are meant to safeguard Israel's non-democratic regime of Jewish privilege, and turn it into common sense.

Yardor v. the Chairman of the Central Elections Committee to the Sixth Knesset

'We are about to drift down a fascinating slope together, that will lead us to the enactment of Section 7A of Basic-Law: the Knesset, the Section that exists in the Basic-Law today and allows lists to be disqualified',[929] my professor said and turned to describe the development of the Section. In 1948, the professor explained, 'Israel decides to be established as a state that does not impose such a provision, it is founded as a state that has no law that restricts lists from running to the Knesset'.[930] The reason, according to the professor, 'is a fear of a slippery slope, that if we breach this dam the grounds for disqualification will expand and expand over time'.[931] This pure democratic point of departure, as the professor described it, must be taken into account within the rather fast restriction process it went through. 'The law is the quintessential form of "active" discourse', as Pierre Bourdieu asserts, 'able by its own operation to produce its effects. It would not be excessive to say that it *creates* the social world, but only if we remember that it is this world which first creates the law'.[932] Thus, even this favourable beginning should be understood within the political context in which the law had been legislated and amended, until it reached its current wording, which can be understood within this study's context, as a settler colonial ideology.

In this context, we discussed four court decisions under the topic of candidate lists restrictions—*Yardor*,[933] *Neiman 1*,[934] *Neiman 2*,[935] and *Tibi*[936]—and students were asked to read either the full decision or a specific excerpt in advance. The professor discussed the cases chronologically, starting with *Yardor v. the Chairman of the Central Elections*

[928] Michael W Apple, *Ideology and Curriculum* (Third Edition, Routledge 2004) 4.
[929] 'Constitutional Law Lecture' (n 751).
[930] ibid.
[931] 'Constitutional Law Lecture' (12 May 2017).
[932] Bourdieu (n 417) 839.
[933] *Yardor v. the Chairman of the Central Elections Committee to the Sixth Knesset* (n 918).
[934] *Neiman v. the Chairman of the Central Elections Committee to the Eleventh Knesset* (n 919).
[935] *Neiman v the Chairman of the Central Elections Committee to the Twelfth Knesset* [1988] Israeli Supreme Court EA 88/1, 42(4) PD 177.
[936] *Central Elections Committee to the Sixteenth Knesset v MK Tibi* [2003] Israeli Supreme Court EA 11280/02, 57(4) PD 1.

Committee to the Sixth Knesset.[937] Back in 1965, as elaborated above, there was no law which allowed the disqualification of a list from running to the Knesset. The Central Elections Committee, a political body comprised of representatives of the different nominated lists, with a Supreme Court Justice acting as chair, refused to authorise the Socialists' List to the Sixth Knesset, claiming that 'the candidates' list is an illegal association, given that its initiators deny the integrity of the State of Israel and its very existence'.[938] The Socialists' List submitted an appeal against the Committee's decision to the Supreme Court, demanding to be qualified to participate in the general elections.

The Supreme Court focused its discussion on a formalistic question, pondering whether the Central Elections Committee can disqualify a list in the absence of any positive legal authorisation for such an act.[939] The professor also focused on that formalistic argument, explaining that:

> Agranat, Zussman and Cohn are sitting [as Justices] and they need to decide, what do we do with this list? Do we accept the decision of the Central Elections Committee, that says "we are sorry, but we will not allow a list that seeks to negate the very existence of the State of Israel to run in the elections", or do we say that [the Court and the Committee have] no authority here, and because there is no authority, we do not disqualify the List.[940]

Limiting the discussion to the question of authority, the professor did not take the time to clarify how the Socialists' List threatened Israeli democracy or what exactly appeared on its platform. The professor simply accepted the Committee's assertion, stating, as a fact, that 'the List seeks to negate the integrity and the very existence of the State of Israel'.[941] The professor also did not explain that the Socialists' List was made up solely of Palestinian citizens, nor that it was affiliated with the *al-Ard* movement, which was outlawed in 1964. This information was also partly absent from the Supreme Court decision that the students were instructed to read. Chief Justice Agranat did stress that the majority of the Socialists' List's candidates were members of the *al-Ard* movement. He then cited the description of *al-Ard's* goals as it was offered by the Court in the *Jiryis* case, as 'complete and absolute denial

[937] *Yardor v. the Chairman of the Central Elections Committee to the Sixth Knesset* (n 918).
[938] ibid 2 J Cohn.
[939] ibid 7 J Cohn.
[940] 'Constitutional Law Lecture' (n 751).
[941] ibid.

of the existence of the State of Israel in general, and the existence of the State within its borders in particular'.[942]

The actual goals of *al-Ard* were stipulated in *Jiryis v. Haifa District Commissioner*:

> To impose full equality and social justice among all strata of the people in Israel;
>
> To find a just solution to the Palestinian problem […];
>
> To support the movement of liberation, unification and socialism in the Arab world […];
>
> To achieve peace in the Middle East in particular, and in the world in general;
>
> To support every progressive or opposition to imperialism movement all around the world, and support all nations striving to be freed from it.[943]

Reading the goals themselves (in a court decision that did not appear on our reading list), rather than merely listening to the professor and reading the materials the professor provided, suggests that *al-Ard* and the Socialists' List did not threaten the democratic character of the State of Israel, but sought to impose a democratic regime for all the State's citizens. By so doing they did threaten the Jewish character of the State, underscoring the tension between its Jewish character and full equality. Yet, both the court discussion as well as our class discussion did not deal with this tension and instead cast the debate within the framework of defensive democracy. Apple stresses that 'hegemony is created and recreated by the formal corpus of school knowledge, as well as by the covert teaching that has and does go on'.[944] Certain meanings conveyed, along with ones neglected, constitute overt knowledge that contributes to the creation and maintenance of hegemony.[945]

Our professor explained that in their decision, the two majority Justices, Agranat and Zussman, created a very narrow exception, allowing the Committee to intervene and disqualify a list in a case that threatens the very existence of the State, based on the idea of defensive democracy.[946] 'Zussman says, I don't need authorisation by law, the authority is

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[942] *Yardor v. the Chairman of the Central Elections Committee to the Sixth Knesset* (n 918) 385 J Agranat citing; *Jiryis v Haifa District Commissioner* [1964] Israeli High Court of Justice HCJ 253/64, 18(4) PD 673, 677 J Witkon.
[943] *Jiryis v. Haifa District Commissioner* (n 942) 674.
[944] Apple, *Ideology and Curriculum* (n 928) 77.
[945] ibid.
[946] 'Constitutional Law Lecture' (n 751).

given to me by natural law, by the supra-constitutional rules that prevail in a democratic state, they are the source to protect the existence of the state'.[947] The professor went on to explain that according to Zussman, 'democracy has a right to defend itself against those who rise to eliminate and erase it, and this right is an external right, it is external to positive law, it is derived from the fundamental principles of the system, from the law above all laws, from our very definition as a democracy'.[948] 'Agranat is a little more moderate', the professor continued, 'he goes to the Declaration of Independence and says, in the Declaration of Independence, we are defined as a Jewish State, as a sovereign State, as an independent State, and therefore, it is our right to protect ourselves'.[949]

In the court decision itself, Agranat's statement about the Declaration of Independence puts an emphasis on the Jewishness of the State:

> Not only is Israel a sovereign, independent, freedom-loving state characterised by a regime ruled by the people, but also, it was established 'as a Jewish state in the Land of Israel', as the act of its founding was made, first and foremost, by virtue of 'the natural and historical right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign State', and this act also constituted 'the realisation of the age-old dream – the redemption of Israel'.[950]

Thus, the Chief Justice's central justification for allowing the Committee to disqualify a list with no authorisation by law, was that Israel is indeed a democracy, but, as cited from the Declaration of Independence, it is primarily the State of the Jewish people. In other words, it was not the democratic character that needed to be defended from the Socialists' List, but defensive democracy was recruited to defend the Jewishness of the State.

As the professor stated, Justice Zussman was firmer in arguing for defensive democracy, emphasising that: 'just as a person does not have to agree to be killed, neither does a state have to agree to be eliminated and wiped off the map'.[951] He went on to present an example:

> So-and-so wants to throw a bomb in the Knesset in order to assassinate its members, but this cannot be carried out from the guest stand, so he submits a list of candidates for the Knesset elections, and his stated goal is that as a member of Knesset, who

[947] ibid.
[948] ibid.
[949] ibid.
[950] *Yardor v. the Chairman of the Central Elections Committee to the Sixth Knesset* (n 918) 385.
[951] ibid 4 J Zussman.

> enjoys immunity, he will be able to enter the meeting hall and carry out his plot there. This so-and-so submits a list of candidates that is flawless. Is the Election Committee obliged to approve the list? […] Or is the Committee entitled to determine that this is not the purpose of the House of Representatives in a democratic regime? […] If the Committee have the right to refuse to approve a list of candidates submitted to it for the promotion of a murder offence, is the Committee not allowed to refuse to approve a list submitted for the promotion of treason?[952]

Thus, according to the example, the Socialists' List are presented as traitors, paving the way for the Court to *create* the law, as underscored by Bourdieu, and for that decision, to impact the social world in turn.[953]

Justice Haim Cohn, in a dissenting opinion, adhered to the formalities and found that as Section 6 to Basic-Law: the Knesset sets only one restriction to the right to be elected to the Israeli Parliament, allowing the Court to revoke the right according to an existing law, in the absence of any such law, the appeal should be accepted, and the Socialists' List should be qualified.[954]

Overlooking the particular circumstances as well as the cases' wider context, allowed my professor to present *Yardor* as a matter of imminent threat to Israeli democracy.

Chief Justice Agranat continued with an excerpt from Justice Alfred Witkon in the former *Jiryis* case, stating that:

> It has happened more than once in the history of states with a proper democratic regime, that fascist and totalitarian movements of various kinds rose up against them, and used all these rights, of freedom of speech, press and association, which the state grants them, to carry out their destructive activities under their auspices. Those who saw this during the days of the Weimar Republic will not forget the lesson.[955]

It is an interesting quote to share – as it discusses how democracies did not protect themselves properly, allowing their own principals to be used against them, but this case discusses a situation in which citizens ask to use democratic rights and the democratic game in order to struggle against non-democratic features of the state, and the court does not allow

[952] ibid 5 J Zussman.
[953] Bourdieu (n 417) 839.
[954] *Yardor v. the Chairman of the Central Elections Committee to the Sixth Knesset* (n 918) para 17 J Cohn.
[955] ibid 388 J Agranat citing; *Jiryis v. Haifa District Commissioner* (n 942) 679 J Witkon.

that. In fact, the court is outspoken, and in an ongoing sensemaking process using democratic arguments in order to protect the Jewishness of the State.

Indeed, in our classroom, *Yardor* served to describe the first step in the formation of the Israeli democracy's defence strategy. Avoiding a discussion about the content of the Socialists' movement platform including its ideas of equality and democracy, the court defended the State's Jewish character from Palestinian citizens who asked for the opportunity to transform it into a real democracy. Posing *Yardor* as a case that defends democracy, produces a perception that binds any attempt to challenge Israel as a Jewish state as if it is an assault against democracy. In this manner, liberal concepts are coloured by the Court and the professor in shades of Jewish privilege which actively Judaise the legal realm by highlighting the defence of democracy while disregarding the fact that the decision actually restricted democracy to protect the Jewishness of the State and enact Jewish supremacy.

The utilisation of liberal law to constitute a regime of supremacy is a core feature of settler colonialism. As Caroline Elkins and Susan Pedersen assert, 'settler colonialism is defined […] also by a particular structure of privilege. For settler colonies, like settler societies, are marked by pervasive inequalities, usually codified in law, between settler and indigenous populations'.[956] Reading the *Yardor* affair through this prism suggests that disqualifying the Socialists' List served to protect Israel's settler colonial project and make sure that indigenous citizens will not be able to struggle for equality from within parliament. Elkins and Pedersen contend that in settler colonies, political privileges, like the right to vote, are guaranteed to the settler community only.[957] The *Yardor* decision to disqualify a list of Palestinian citizens because its struggle for equality ostensibly 'threatens the very existence of the state' severely restricts not only the right to stand for election, but also the right of citizens to vote for a list that represents them.[958] Presenting this affair in class as a matter of defensive democracy in action, while abstaining from disclosing its details, works concurrently to conceal the operation of settler colonialism, making sure that the indigenous community does not gain any political power, and to construct the defence of the Jewish

[956] Elkins and Pedersen (n 332) 4.
[957] ibid.
[958] Falk and Tilley (n 146) 33.

character of the State as defending democracy. In this manner, democratic concepts are blurred to include Jewish interests also, thus becoming common sense.

Neiman v. the Chairman of the Central Elections Committee to the Eleventh Knesset

In 1984, my professor proceeded, 'the first Neiman case was a catalyst for the enactment of the very famous Section 7A of Basic-Law: the Knesset'.[959] *Neiman v. the Chairman of the Central Elections Committee to the Eleventh Knesset*, known as *Neiman 1*, involved the Central Elections Committee's decision to disqualify both Kach, an orthodox Jewish racist list led by Meir Kahane, and the Progressive List for Peace, a left-wing joint list of Palestinian and Jewish citizens, led by Mohammed Miari.[960] Justice Gabriel Bach, the Central Elections Committee Chair, informed the lists of the reasons for their disqualification. As to Kach, the Committee found that:

> the list advocates racist and anti-democratic principles that contradict the declaration of independence of the State of Israel, openly supports acts of terrorism, tries to foment hatred and enmity between different parts of the population in Israel, intends to harm the feelings and religious values of some of the citizens of the country, and in its goals negates the fundamental essences of the democratic regime in Israel.[961]

The committee went on to argue that 'the implementation of the principles of this list would pose a danger to the existence of the democratic regime in Israel and could lead to the collapse of public order'.[962] As to the Progressive List for Peace, the Committee stated that:

> this list does contain subversive elements and trends, and key people on the list act in a way of identifying with the State's enemies. […] Most of the Committee members were convinced that this list advocates principles that endanger the integrity and the existence of the State of Israel, and the maintenance of its uniqueness as a Jewish State in accordance with the basic essences of the State as expressed in the Declaration of Independence and the Law of Return.[963]

The question of *Neiman 1*, my professor explained, is 'whether the *Yardor* decision can be extended [to other grounds for disqualification]'.[964] Kach, the professor emphasised, 'is not threatening the existence of the State of Israel, it holds racist ideas and therefore threatens the

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959 'Constitutional Law Lecture' (n 931).
960 *Neiman v. the Chairman of the Central Elections Committee to the Eleventh Knesset* (n 919).
961 ibid 2 J Shamgar.
962 ibid.
963 ibid.
964 'Constitutional Law Lecture' (n 931).

democratic foundation of the state, because it is racist'.[965] As for the Progressive List for Peace, the professor stressed, the problem was 'its idea of a bi-national state'.[966] In *Neiman 1*, the Supreme Court decided that the *Yardor* precedent, that allows the disqualification of candidates' lists, cannot be extended to other grounds besides threatening the existence of the State, with no explicit authorisation by law, and approved both Kach and the Progressive List for Peace to run in the eleventh general elections.

Once again, my professor did not take the time to explain what the problem with the Progressive List for Peace's idea of a bi-national state was. The concept of a bi-national state does not pose a threat to democracy, it only endangers the Jewish character of the State and the regime of Jewish privilege. This contradiction between the Jewish and democratic characters of the State of Israel might seem straightforward, to the point where it is hard to understand how students unquestionably accept it. But one should bear in mind Robert Cover's assertion, that 'the function of ideology is much more significant in justifying an order to those who principally benefit from it and who must defend it than it is in hiding the nature of the order from those who are its victims'.[967] Thus, in a law classroom with a clear majority of Jewish students, the justification of defending Israel's Jewish character from citizens who ask to promote democracy, while using means that are meant to protect democracy, did not encounter much defiance, but even further support.

The professor instructed us to read only an excerpt of the *Neiman 1* court decision, an excerpt that included Justice Aharon Barak's single opinion. While the majority opinion ruled that both lists do not threaten the existence of the State and therefore do not meet the *Yardor* strict criteria, so the Committee is not authorised to disqualify them in the absence of an authorising law, Justice Barak agreed that the lists should not be disqualified, yet for a different reason. Justice Barak found that Kach's platform includes racist and anti-democratic ideas. Regarding the Progressive List for Peace, he stated, 'we did not find anything in [its platform] that would indicate, explicitly or implicitly, an aspiration to bring about the destruction of the State or to impair its democratic character'.[968] Not limiting himself to the *Yardor* precedent, Justice Barak found that the Central Elections Committee is authorised to

[965] ibid.
[966] ibid.
[967] Cover (n 12) 1608.
[968] *Neiman v. the Chairman of the Central Elections Committee to the Eleventh Knesset* (n 919) para 15 J Barak.

disqualify candidates' lists that negate the State's existence or its democratic nature.[969] Yet, Justice Barak suggested that the Committee would be authorised to act only if there is evidence that 'the participation of the lists in the elections raises a reasonable possibility of impairment to the existence of the State or to its democratic character'.[970] In this case, Barak found that the Progressive List for Peace does not threaten the existence or the democratic character of the State, and as for Kach, that the list threatens the democratic character of the State, but that there is no evidence that the list actually endangers Israeli democracy.[971] Thus, while the majority opinion, restricted itself to the precedent set in *Yardor*, and Justice Barak, in his single opinion, extended the grounds for disqualification, they got to the same result.

'Isn't this single opinion dangerous?', one of the students asked our professor. 'Justice Barak is taking a big risk here in the context of opening it up only to the democratic aspect, but what about the Jewish character? He says this is a basic principle, he emphasises it and sanctifies it, but where does he put the Jewish aspect here?'.[972] 'The aspect that is required to discuss in this judgment is the aspect that Kach brought with it and the aspect that the Progressive List for Peace brought with it',[973] my professor answered. 'Kach brought racism, so here we are talking about the democratic aspect; the Progressive List for Peace brought the idea of bi-national state in the sense of equality. Therefore, there was no discussion of the Jewish essence of the state, because there was no threat to it in the fundamental sense, preventing its existence as a Jewish state in its categorical sense'.[974]

The student's question assumes that the Jewish and the democratic character of the state are tied up to a point where one cannot discuss one without the other. While the professor's answer seems quite dismissive of this point of view, suggesting that the Court discusses what needs to be discussed, as shown below, the idea of binding the Jewish and the democratic characters together had been reflected in the 2002 amendment of Section 7A. The student's expectation, that if a Jewish list's threat to democracy is discussed, then a Palestinian's list threat to the Jewish character of the state will be also mentioned, regardless of the facts of the

[969] ibid 16 J Barak.
[970] ibid.
[971] ibid 15 J Barak.
[972] 'Constitutional Law Lecture' (n 931).
[973] ibid.
[974] ibid.

case, reflects on one level, an achievement of the Judaisation of liberal law, as students do not even speculate as to the possible contradiction between the Jewish and the democratic character, it turns into a common sense that one cannot speak of one without the other. On another level, it shows how liberal law is not only flexible enough to contain the Israeli regime, on its variety of illiberal and non-democratic features, but its practices serve to bolster concepts of supremacy and Jewish privilege. Such practices include, for instance, 'free' and 'democratic' elections, allowing different ideas and ideologies to compete, which in fact work to promote Jewish supremacy by disqualifying any list that poses a direct demand for full equality from participation in the general elections.

It should be noted that while my professor presented the Progressive List for Peace as 'the list of the Arabs, Israeli-Arabs',[975] back then, the list was in fact a joint list of Palestinian and Jewish citizens. The List won two seats in the 1984 elections, and had one Palestinian and one Jewish members of Knesset in its faction.[976] Portraying the list as an Arab-only list works to present the Court and thus Israeli law in general as utterly liberal, this time allowing an allegedly Arab-only list to participate in the elections despite their radical ideas of equality.

The Progressive List for Peace advocated for the two states solution, maintained that Israel should talk to the Palestine Liberation Organization (PLO), and demanded full equality for the Palestinian citizens of Israel.[977] Even though the Central Elections Committee claimed that there are 'subversive elements and tendencies' in the List, that 'key figures in the list act in a way of identifying with the enemies of the state', and that the List 'advocates principles that endanger the integrity and existence of the State of Israel',[978] the Court found that there are no grounds to even discuss the Progressive List for Peace. Besides the Court's conclusion, this information was not available to us in class or in the reading material. Overlooking the circumstances and the context of the case allows the professor to significantly limit the discussion. Following Apple, such 'selective tradition and incorporation function at the level of overt knowledge so that certain meanings and practices are chosen for emphasis […], and

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[975] ibid.
[976] 'The Progressive List for Peace' (*The Israeli Democracy Institute*) <https://www.idi.org.il/policy/parties-and-elections/parties/hareshima-hamitkademet-leshalom/> accessed 8 October 2023.
[977] ibid.
[978] *Neiman v. the Chairman of the Central Elections Committee to the Eleventh Knesset* (n 919) para 2 J Shamgar.

others are neglected, excluded, diluted, or reinterpreted.[979] These, in turn, work to deepen hegemonic control and consensus in the classroom.

Neiman v. the Chairman of the Central Elections Committee to the Twelfth Knesset

The Court's decision in *Neiman 1* was rather formalistic, concluding that *Yardor* cannot be extended to any platform that does not threaten the existence of the State, without an explicit authorising primary legislation, thus both Kach and the Progressive List for Peace could compete in the general elections and join the Knesset. That decision led to the enactment of Amendment 9 to Basic-Law: the Knesset in 1985, adding Section 7A to the law. Section 7A introduced a constitutional provision that allowed the disqualification of candidates' lists in the general elections, if their actions or goals include a denial of the existence of the State, a denial of the State's democratic nature, or incitement to racism.[980]

In the 1988 general elections, the Central Elections Committee disqualified Kach again. When the case of *Neiman v. the Chairman of the Central Elections Committee to the Twelfth Knesset*,[981] arrived at the Supreme Court, Section 7A allowed the Court to approve the Committee's decision and dismiss Kach's appeal of its disqualification due to the List's incitement to racism, according to Section 7A(a)(3) Incitement to racism.[982] At the same time, the Central Elections Committee authorised the participation of the Progressive List for Peace in the elections, by a narrow majority of 20 against 19.[983] An appeal submitted by right-wing activists against the Committee's decision was also dismissed, by a majority of 3 Supreme Court Justices against 2.[984] Thus, the Progressive List for Peace was authorised to participate in the general elections.

The professor explained that in *Neiman 2* there were two central arguments made by Kach. One formal argument, suggesting that preventing some citizens with particular ideas from being elected to the Knesset according to Section 7A to Basic-Law the Knesset, violates Section 4 to the same law, which sets the principle of equality in the elections. Therefore,

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[979] Apple, *Ideology and Curriculum* (n 928) 77.
[980] Basic-Law: The Knesset (Amendment 9).
[981] *Neiman v. the Chairman of the Central Elections Committee to the Twelfth Knesset* (n 935).
[982] Basic-Law: The Knesset (Amendment 9) s 7A(a)(3).
[983] *Ben Shalom v Central Elections Committee to the Twelfth Knesset* [1989] Israeli Supreme Court EA 88/2, 43(4) PD 221 [1 J S Levin].
[984] *Ben Shalom v. Central Elections Committee to the Twelfth Knesset* (n 983).

Kach argued, Section 7A is invalid.[985] The Court dismissed this formal argument, stressing that Section 4 to the Basic-Law explicitly sets the mechanism for its amendment, allowing for a Knesset majority vote to change it. As Section 7A was accepted in a majority vote, the Court dismissed this argument.[986] The other argument, our professor explained, was a substantive argument, claiming that Section 7A constitutes 'an extreme deviation from the values of democracy',[987] as they violate both the right to vote and the right to be elected. Yet, the professor asserted, this argument was presented ahead of its time, before the Israeli constitutional revolution, in an era when the Court followed the principle of parliamentary sovereignty, and refrained from reviewing Knesset legislation.[988]

The professor explained that the Progressive List for Peace was authorised to participate because the right-wing failed to prove any of the grounds for their disqualification. The reason, the professor stressed, was that back then, Section 7A did not include the denial of the existence of Israel as a Jewish state as ground for disqualification, it was added only in 2002.[989]

Section 7A (Amendment 35)

In 2002, the Knesset amended section 7A.[990] Amendment 35 to Basic-Law: The Knesset, introduced several changes to section 7A:

> (a) A list of candidates will not participate in the Knesset elections […] if the goals or actions of the list […] contain any of the following:
>
> (1) Denial of the existence of the State of Israel as a Jewish and democratic state;
>
> (2) Incitement to racism;
>
> (3) Support in an armed struggle, of an enemy state or of a terror organisation, against the State of Israel.[991]

First, sections 7A(a)(1) and 7A(a)(2) were slightly altered and consolidated, so the denial of the existence of the State of Israel as *the State of the Jewish people* turned into the denial of the existence of the State of Israel as *a Jewish state*. In addition, the denial of the existence of

[985] *Neiman v. the Chairman of the Central Elections Committee to the Twelfth Knesset* (n 935) para 4 J Shamgar.
[986] ibid 4.
[987] ibid 5.
[988] 'Constitutional Law Lecture' (n 931).
[989] ibid.
[990] Basic-Law: The Knesset (Amendment 35).
[991] ibid.

the State of Israel as a Jewish and as a democratic state now share one section. This is a major step in the Judaising process of democratic and liberal concepts, binding the two together to a point where they are almost inseparable, and also utilising democratic ideas to promote the Jewishness of the State at the expense of its democratic nature. Second, an additional ground had been added for the disqualification of lists in Israel. Section 7A(a)(3) sets that a list will be disqualified if its actions and goals support an armed struggle of an enemy state or a terror organisation against the State of Israel. Third, from now on, a single candidate, and not an entire list, could be also disqualified. Fourth, from this point, according to section 7A(c), every candidate will have to submit a signed statement as stipulated in section 57(i1) to the Knesset Elections Act (1969): ‘I undertake to maintain loyalty to the State of Israel and refrain from acting contrary to the principles of Section 7A of Basic-Law: the Knesset’.[992]

Shortly after the amendment of Section 7A, in the beginning of 2003, elections to the Sixteenth Knesset were carried out. As Section 7A now allowed it, the Central Elections Committee decided not to authorise three individual candidates: Ahmad Tibi, a Palestinian citizen of Israel, Member of Knesset since 1999 until today from Ta’al party, the ‘Arab Movement for Renewal’; Azmi Bishara, a Palestinian citizen of Israel who founded Balad party, the ‘National Democratic Alliance’, Bishara was a Member of Knesset from 1996 to 2007, when he fled Israel following allegations regarding his connections with members of Hezbollah; and Baruch Marzel, a Jewish Israeli settler who replaced Meir Kahane as the chair of Kach following his assassination, he participated in the general elections several times as part of different radical right-wing lists, but was never elected. In 2019, the Supreme Court accepted an appeal to disqualify Marzel from running in the 22nd general elections, due to incitement to racism.[993]

The Central Elections Committee v. MK Ahmad Tibi

In *The Central Elections Committee v. MK Ahmad Tibi*,[994] the Supreme Court heard three appeals against decisions of the Central Elections Committee. Following request submitted by right-wing candidates and lists of candidates, the Committee decided to disqualify Azmi

[992] Knesset Elections Act 1969 (IL) s 57(i1).
[993] *Gil Segal v Itamar Ben Gvir* [2019] Israeli Supreme Court EA 5487/19, Nevo.
[994] *Central Elections Committee to the Sixteenth Knesset v. MK Tibi* (n 936).

Bishara,[995] based on section 7A(a)(1), for denying the existence of the State of Israel as a Jewish state, and section 7A(a)(3), for support in an armed struggle against Israel.[996] Following a discussion of the various evidence brought, mostly op-eds and speeches in which Bishara expressed his political opinions, demanding, for instance, full equality and a the establishment of a state of all its citizens, the Court decided that Bishara, as well as his list, Balad, can participate in the elections.[997] Ahmad Tibi was second in the Hadash–Ta'al joint list to the sixteenth Knesset. A member of the Likud party requested Tibi's disqualification, and the Committee approved it.[998] The Committee disqualified Tibi according to section 7A(a)(3), for supporting an armed struggle of an enemy state or a terror organisation against the State of Israel, due to his relations with the former chairperson of the PLO, Yasser Arafat.[999] Before becoming a Member of Knesset, Tibi served as Arafat's consultant, he maintained connections with him, and expressed his support in the Palestinian struggle against Israel's occupation regularly.[1000] Yet, the Supreme Court decided that the Committee's decision should not be approved, and qualified Tibi to participate in the general elections.[1001] The third appeal heard by the Supreme Court was submitted by a member of the Labour party, against the Committee's decision to allow Baruch Marzel's participation in the elections.[1002] The appeal argued that Marzel should be disqualified following section 7A(a)(1), denying the existence of Israel as Jewish and democratic, and section 7A(a)(3), incitement to racism. 'The basis for the two disqualification grounds was one', Justice Barak explained, 'the claim that Mr Marzel is a racist, supports racist actions and incites racism himself'.[1003] Yet, the Court did not find a reason to intervene in the Committee's decision, and allowed Marzel's participation in the elections.[1004]

The interpretation of the Court in these three appeals, my professor asserted, was very narrow, as basic rights that are at the heart of democracy were on the line. Justice Barak, the professor emphasised, was very cautious in every aspect of his decision, 'only a list that

[995] ibid 27 J Barak.
[996] ibid 28 J Barak.
[997] ibid 50 J Barak.
[998] ibid 51 J Barak.
[999] ibid 52 J Barak.
[1000] ibid.
[1001] ibid 61 J Barak.
[1002] ibid 62 J Barak.
[1003] ibid 63 J Barak.
[1004] ibid 83 J Barak.

undermine the fundamental characteristics of the State can be disqualified',[1005] the professor stressed. 'This is a perception that is consistent with the idea of the democratic paradox', the professor reiterated, 'we have a section that limits lists, but Justice Barak says—you extended Section 7A, it allows disqualification on several grounds, it allows disqualification of both a single candidate and a list—so it must be interpreted narrowly'.[1006] According to the professor, the fact that Justice Barak also added the 'reasonable possibility test' he suggested in *Neiman 1*, which estimates the probability that the list under discussion would manage to implement its platform, adds even more flexibility and allows the court to further assess, even in cases in which Section 7A apply, and thus abstain from disqualification. 'The message of *Tibi*', my professor concluded, 'is that a list will be invalidated in the State of Israel only in very exceptional cases. The court significantly narrows these margins'.[1007] The professor stressed that this amendment exposed the democratic paradox, but overlooked the primary paradox at stake, that is, the use of democratic means to describe and promote Jewish interests and privilege, at the expense of non-Jewish citizens and of democracy itself.

A careful reading of the excerpt of the *Tibi* case allocated in our syllabus, suggest a more complicated reality than the one described in class. The professor directed us to read Justice Barak's opinion, minus the sections that directly discuss every candidate's specific case. At the outset, after a short description of the democratic paradox, Justice Barak set that 'whoever does not accept the basic principles of democracy and wants to change them, cannot ask to participate in democracy in the name of those rules'.[1008] For Justice Barak, a balance can be found between the Jewish and the democratic characters of the State of Israel:

> Indeed, the existence of Israel as a democratic state should not be defended in a way that would negate its existence as a Jewish state, as a state that defends itself against the racist incitement and the armed struggle imposed on it. In the same way, the existence of the State of Israel as a Jewish state, as a state that defends itself against racist incitement and fights against those who rise against it, should not be defended in a way that would negate its existence as a democratic state.[1009]

[1005] 'Constitutional Law Lecture' (19 May 2017).
[1006] ibid.
[1007] ibid.
[1008] *Central Elections Committee to the Sixteenth Knesset v. MK Tibi* (n 936) s 2 J Barak.
[1009] ibid 5 J Barak.

Our reading material suggests that any conflict can be settled when utilising liberal legal practices successfully. If one will balance the Jewish and the democratic characters accurately, no controversy will occur. Justice Barak also cited his fellow Justices in previous cases, stating, for instance, that there is no contradiction whatsoever between the fact that Israel is both the state of the Jewish people and a democratic state.[1010]

Our class discussion of the *Tibi* affair focused on the issue of purposive interpretation. The professor read a short excerpt from an article that criticised the fact that Justice Barak managed to 'manipulate' Section 7A in a manner that allowed him not to disqualify any of the candidates. One of the students, agreeing with the presented critique, argued that '[Barak] is acting in the complete opposite way, if he was really following the purpose [the legislator] sought to achieve in these laws, it's that lists that act against the Jewish character of the state or support terrorism one way or another, will be disqualified'.[1011] When the student further argued that Justice Barak took purposive interpretation to the point where it is 'the interpretation that happens between his ears',[1012] suggesting that Justice Barak decides whatever he wishes to, regardless of the legislator's intention, the professor took over the discussion to defend the concept of purposive interpretation and the Court itself.

The professor explained, that as for the 'negation of the existence of the State of Israel as a Jewish state',[1013] Justice Barak provides the 'very narrow list' of characteristics that every list or candidate must not annul or negate, if they wish to participate in the Knesset elections:

> At their centre is the right of every Jew to immigrate to the State of Israel, where the Jews will form the majority; Hebrew is the main official language of the country and most of its holidays and symbols reflect the national revival of the Jewish people; Israel's heritage is a central component of its religious and cultural heritage.[1014]

Our professor presented this list as 'narrow and limited', and not for one second doubted or questioned its components' meaning in class, just like the dozens of students who did not even pay attention to this assertion. This short list can be described in many ways, but it is not narrow.

[1010] ibid 7 J Barak.
[1011] 'Constitutional Law Lecture' (n 1005).
[1012] ibid.
[1013] *Central Elections Committee to the Sixteenth Knesset v. MK Tibi* (n 936) para 11 J Barak.
[1014] ibid 12 J Barak.

While the student argued that by allowing candidates that act against the State's Jewish character to run in the elections, the Court failed to follow the legislator's intention, the professor's attempt to protect the court and present it as defending both the Jewish and democratic characters of the state, exposed the illiberal essence of the Court's and the professor's argument. Thus, according to the professor, the Court allowed the candidates' participation to protect democracy, and presented a list of 'red lines', that would constitute an act against the State's Jewish character, if crossed. But the list is, in fact, an illiberal manifestation of rights and privileges that are safeguarded for Jewish citizens only, that cannot be contested in the general elections. The professor's answer thus prove that the Jewish and democratic characters of the state are in constant conflict, that cannot be settled, as in its core, Israel is a settler colonial state, and therefore Israeli law prefers the Jewishness of the State over democracy.

Declaring that maintaining a Jewish majority is a non-negotiable characteristic of the state, that no list or candidate can struggle against or denounce, not only empties Palestinian citizens' civil right to be elected of any content but imposes a real barrier to any opportunity for Palestinian citizens to struggle for full equality from within the State's parliament. But this is exactly the point where the law, as well as the reading material, turn into a repressive apparatus in its full sense, one that explicitly stipulates the components of Jewish supremacy. This is also the point in which the Judaisation of liberal and democratic notions that are related to the restriction of candidates is fully achieved, as defensive democracy is presented as means to not only protect the Jewish character of the State but to actively prevent Palestinian citizens from democratically challenging these issues.

As for the concept of 'a state of all its citizens', while our professor did not discuss it in class, Justice Barak argued in the reading material we were asked to learn that 'if all that is required according to this goal is equality between the citizens of Israel, then this goal poses no harm to the State of Israel as a Jewish state'.[1015] But the real meaning of a state of all its citizens, allowing real equality between Jewish and Palestinian citizens, would require Jewish citizens to give up most of their privileges—starting with unrestricted Jewish immigration and no Palestinian return, in order to guarantee a Jewish majority by all means. Portraying the

[1015] ibid 13 J Barak.

concept of ‘a state of all its citizens’ as compatible with the Jewishness of the State and therefore with Jewish privilege, establishes inequality as sheer equality by stressing that one can systematically prefer Jewish citizens while treating all citizens as equals.

It is interesting to see how the Judaisation process of this specific area of the law, that seeks to restrict the participation of specific candidates and lists in an allegedly democratic game has evolved over the years. From no restriction in 1948, to a very limited one in 1965. Then to the first version of Section 7A, and to the second one, whereby the ‘denial of the existence of the State of Israel as a Jewish and democratic state’[1016] renders a candidate and party illegitimate. Richard Falk and Virginia Tilley define Section 7A as one among various racist policies that Israel is deploying to maintain Israel as the state of the Jewish people. Falk and Tilley make clear that the Section contravenes democracy, as ‘[v]oting rights lose their significance in terms of equal rights when a racial group is legally banned from challenging laws that perpetuate inequality’.[1017] They even suggest an analogy to ‘a system in which slaves have the right to vote, but not against slavery’.[1018] How then a law professor makes sense of an allegedly non-liberal and non-democratic legal clause in the classroom? The axiom that Israel can be both Jewish and democratic is so deeply rooted in the legal discourse, that even a discussion of invalidation of candidates and lists that seek to establish a real democracy in this country, is accepted with not even slight doubt.

5.2 Basic-Law: Israel as the Nation-State of the Jewish People

Basic-Law: Israel as the Nation-State of the Jewish People (herein: the Nation-State Law) had been legislated during my LLB studies and was finally enacted on July 19, 2018. The controversial law, which already in its headline defines Israel as ‘the Nation-State of the Jewish People’, led to widespread protests across Israel, carried out mainly by Palestinian citizens of the State, who felt that the Basic-Law brings the ongoing discrimination against them to a constitutional level.[1019]

[1016] Basic-Law: the Knesset s 7A(a)(1).
[1017] Falk and Tilley (n 146) 33.
[1018] ibid.
[1019] ‘Tens of Thousands Protest in Tel Aviv against “Nation-State Law”’ *Al Jazeera* (12 August 2018) <https://www.aljazeera.com/news/2018/8/12/tens-of-thousands-protest-in-tel-aviv-against-nation-state-law> accessed 8 October 2023.

Even though the Nation-State Law was enacted when I was in Law School, we hardly discussed it in class. On the one hand, it seemed quite odd, given that the constitution of a new Basic-Law is both a rare and important juridical event. But, on the other hand, at that point I had already completed studying Constitutional Law, and so the new Basic-Law was mentioned only in specific modules where it was particularly relevant. The most significant discussion took place during my Public International Law module.

Public International Law was a mandatory annual module in the fourth year of my LLB program, formed of a weekly one hour and a half lecture. We had 12 in-person sessions, in a large lecture hall during the first term, and one online lecture. Our second term started with one in-person meeting, and then quickly moved online for the remaining 11 sessions due to the COVID-19 pandemic. The assessment of the module included one short proficiency test, a choice between a written assignment and class simulation exercise, and a final online exam. The first term mainly included lectures delivered by the professor, during the second term, a decent amount of time had been allocated for our simulation exercises. Student attendance in the module had been quite low, with no more than a couple of dozens joining the sessions, out of more than 50 registered students. The vast majority of the students in the module were Jewish Israeli citizens, and only a few Palestinian citizens of Israel.

In terms of content, as the module syllabus explicates: '[t]his course is designed to provide students with understanding of basic concepts in public international law, knowledge in its main areas and familiarity with its methods of operation and the main approaches regarding its nature, advantages and disadvantages'.[1020] Thus, the first term offered a general introduction to international public law, including the history, sources, and the status of international law, as well as an overview of the main actors in the international arena. The second term focused on specific international norms, primarily the prohibition of the use of force in international law, international humanitarian law, the law of occupation, international human rights law, the right to self-determination, war against terrorism, international trade law and the enforcement of international law.[1021]

[1020] Public International Law, 'Module Syllabus'.
[1021] ibid.

We just finished studying the general principles of the right to self-determination a week earlier, and my Public International Law professor said that in this class we will be looking at these principles within the Israeli context.[1022] 'I warn you in advance that I know these are very charged issues', the professor alerted us at the outset; 'I do not want us to discuss them in the thousand and one legal and non-legal aspects that do not concern the right of self-determination. I do want to illustrate the issue of the right to self-determination, as well as its complexity and its problematic aspects through this issue'.[1023] While this disclaimer makes sense from the lecturer's point of view, considering the time limit and the massive amount of material that must be taught in each module, it has some direct pedagogical implications. Paulo Freire maintains that it is a feature of the pedagogy of the oppressor, that 'the teacher chooses the program content, and the students (who were not consulted) adapt to it'.[1024] While this aspect characterises many higher education modules in general, not allowing any question or comment that do not fit the professor's specific plan is a very strict approach that silences students. Within a context of a new Basic-Law that limits the scope of self-determination of one group, accepting this newly legislated, widely disputed Basic-Law as is, without emphasising its questionable impact on fundamental democratic concepts or even the ongoing protests against it, constitutes the Basic-Law as non-controversial from a legal point of view, or at least, as not important enough for us to spare a moment and discuss it. The Basic-Law is therefore portrayed as yet another law that had been enacted. Delving directly into a discussion of a specific aspect of the Nation-State Law, not only accepts Israel's large step towards overtly preferring its Jewish character over its liberal-democratic aspects with no further discussion, but also works to covertly Judaise the class discussion, by smoothly accepting this striking piece of legislation.

Following the disclaimer, the professor proceeded to project Section 1 of the Nation-State Law on the screen:

> 'Basic Principles
> 1(a) The land of Israel is the historical homeland of the Jewish people, in which the State of Israel was established.

[1022] 'Public International Law Lecture' (26 May 2020).
[1023] ibid.
[1024] Freire (n 388) 73.

(b) The State of Israel is the national home of the Jewish people, in which it fulfils its natural, cultural, religious, and historical right to self-determination.

(c) The right to exercise national self-determination in the State of Israel is unique to the Jewish people'.[1025]

With the Basic-Law in front of us, the professor simply asked what section 1(c) means, emphasising again that the question is 'not whether it is good or bad, or whether the Law as a whole is good or bad, "[t]he right to exercise national self-determination in the State of Israel is unique to the Jewish people", what does it mean?'.[1026]

The professor's insistence on not making any normative judgement of the law itself and even the specific section we focused on cannot, I believe, be understood simply as a time management or subject matter choice decision. Even if directly focusing on one section, restricting the discussion to the point where no normative assertions are welcome not only confines the class discussion, but it also assumes that the 'meaning' of the section is and/or can be isolated from any normative assumption or view. Gramsci's description of the function of the law can shed light on the Nation-State Law, as it is so straightforward in nature. For Gramsci, 'through "law" the State renders the ruling group "homogeneous", and tends to create a social conformism which is useful to the ruling group's line of development'.[1027] Even though the Nation-State Law takes a wide step into constituting Jewish supremacy, and it indeed 'renders the ruling group "homogeneous"', the professor's silent treatment implies that it does not contradict, or that it is compatible, at least to some extent, with a liberal legal system.

The students all agreed to the limited scope of the discussion, answering the specific question we were just asked while ignoring the many other aspects of the Nation-State Law. I answered first, shortly: 'it means that no one else can exercise self-determination here'.[1028] Who else wishes to exercise self-determination here? And where is 'here' exactly? It seemed that everyone in class understood what I meant, even though I am not sure what I was actually referring to. In a similar manner, the Nation-State Law itself does not provide any map or description of Israel's borders, and while it mentions the Jewish people many times, it

[1025] Basic-Law: Israel as the Nation-State of the Jewish People s 1.
[1026] 'Public International Law Lecture' (n 1022).
[1027] Antonio Gramsci, *Selection from Prison Notebooks* (Lawrence and Wishart 1971) 195.
[1028] 'Public International Law Lecture' (n 1022).

does not refer to anyone else directly. It is mainly through the implied denial of rights in the Basic-Law, where one can learn between the lines about those whose rights it refutes.

Following my brief answer, the professor tried to clarify the question, ‘why use the words “national self-determination”? What does it mean? What is “national self-determination?”’.[1029] ‘I think that it is different’, another student answered, ‘that it is not for a people, it is for a sovereign in a territory’.[1030] The student meant that national self-determination refers to ruling the territory in which a people already exercise its self-determination. The student then provided an example, ‘for instance, you have Palestine, […] even though they are defined as a people, they are not defined as the sovereign, and this is a national identity’.[1031] The student provided a correct answer, implying that the Basic-Law constitutes an Israeli unilateral declaration of its ‘unique’ right to self-determination.

‘I think that unlike the self-determination of a people’, a second student added, ‘it is the self-determination of the State of Israel, namely that the State of Israel announces to the world that this state will be the state of the Jewish people exclusively; it therefore cannot be, for that matter, a state of all its citizens’.[1032] It is reasonable to draw the assumption that Israel cannot be a state of all its citizens, from the State’s declaration that only the Jewish people exercise the right to national self-determination in the State of Israel. But this logical step reveals how Israeli legal education takes part in the Judaisation of the legal field. As discussed above, a state of all its citizens, in which all citizens enjoy equal rights regardless of their religion or ethnicity, is a democracy. Uncritically discussing the Nation-State Law, poses that it is a valid law for a liberal legal system to enact, even though it negates basic democratic values, and then, it is only obvious that if only the Jewish people exercise their right here, then Palestinians simply do not. This resonates with Paulo Freire’s concept of banking education, as he stresses that this ‘approach to adult education […] will never propose to students that they critically consider reality’.[1033] It is in the brief and focused discussion, that Jewish supremacy is disseminated, and Palestinian citizens are constituted as inferior, as well as their citizenship, which according to Freire, constitutes the pedagogy of the oppressor.

[1029] ibid.
[1030] ibid.
[1031] ibid.
[1032] ibid.
[1033] Freire (n 388) 74.

The professor concluded that the multiplicity of interpretations suggested by the class, and the other one that the professor is just about to share too, show that the Section is not very successfully worded. 'It seems to me that the intention was to say that the right to what is called "external self-determination" as we have defined it, that is, the right of the Jewish people to self-determination through the establishment of a state, the State of Israel, is the unique right. That is, that as much as there are groups in the State of Israel that are entitled to the description "people", then their right to define themselves by establishing a state does not exist within the State of Israel'.[1034]

The professor then gave an example, trying to explain who are those people who cannot exercise their external right to self-determination in Israel:

> Until not many years ago, an [Israeli] identity card had a nationality section. Under the nationality section, non-Jews had something else written, it didn't say "Jews". It means that the State of Israel recognises that there are also members of at least one other nation living in Israel, okay? So, is this section intended to deny them the right to self-determination? I think not. The section is intended to deny them the right to external self-determination. In other words, they still have the right within the State of Israel to self-determination in a way that respects their language, their culture, and all that is acceptable in countries where several peoples live.[1035]

While the professor insinuated that Palestinian citizens enjoy some sort of multiculturalism in Israel, with their language, culture, and other aspects of their community respected, in fact, the Nation-State Law relegated Arabic to a lower status, and elevated Hebrew, along with other Jewish symbols, to a superior level.[1036] The professor's example suggests that Israel is a democracy that is maintaining some space for its Palestinian citizens to equally practice their culture and celebrate their language, and disregards the fact that the same law discussed in class, explicitly prefers the Jewishness of the State over its democratic character, while restricting non-Jewish citizens' rights and freedoms. This, in turn, conceals, to the extent possible, the settler colonial nature of the Nation-State Law, by focusing on one problematic article, and presenting it as a democratic provision. One should bear in mind Raef Zreik's

[1034] 'Public International Law Lecture' (n 1022).
[1035] ibid.
[1036] Basic-Law: Israel as the Nation-State of the Jewish People ss 2, 4.

assertion, that even though it is a unique case of settler colonialism, Zionism is 'a settler project and a national project at the same time'.[1037]

5.3 Conclusion

In order to maintain the image of the Israeli legal system as a liberal one, the pedagogy in Law Schools must continuously and repetitively work to rationalise the supremacy of the Jewish population and its interests, aiming to settle the inconsistency of allocating privileges to Jews with a liberal egalitarian democratic framework, and constitute them as compatible. Departing from the Israeli legal field's self-perception as a liberal legal field that operates within a liberal legal system under liberal law, this chapter questioned how, pedagogically speaking, this purportedly neutral universe Judaises the liberal field.

The chapter focused on specific moments of discrepancy in the law classroom, moments in which the liberal and the Jewish are clearly on course to collision. The class lectures and discussions I highlighted shed light on the manner in which the Jewish supremacist legal field is introduced to law students as a liberal one as well as some of the mechanisms that are deployed to this end. Conceptualising Judaisation of liberal law as a settler colonial pedagogy enabled me to outline how law teachers reconcile the system's preference of Jewish interests over democratic principles, and actively bolster Israel's settler-colonial logic and apartheid regime.

[1037] Zreik (n 325) 359.

Chapter 6: de facto and de jure distinction

Law is a tool of the state that secures and regulates social relations. Yet, law never captures reality precisely. There is always a gap between the *de facto* reality on the ground, and the *de jure* situation, as set by the law. Such a gap pertains to every area of the law but varies in scale and significance. Law regulates and modifies social relations but also changes over time when social forces render it inadequate or irrelevant. At times, law is amended to better fit the existing social relations. But most of the time, developments on the ground are much faster than the state's efforts to regulate them, resulting in a gap between the *de jure* and *de facto* reality. In other times, outdated laws become irrelevant, as they describe acts and behaviours that no longer exist, to the point where even the legislator does not bother to change or revoke them, so the laws remain in force, even though they have no merit. But there are also specific situations in which the *de facto* and *de jure* gap serves a particular political interest, and therefore, the regime prefers to maintain that gap.

The nature, operation and legality of Israel's fifty-five-year-old occupation is not considered central to the Israeli law degree and is discussed (as my research revealed), often only in passing, in a limited number of modules. When it does come up, professors tend to ignore the reality of the occupation on the ground and focus on the *de jure* aspects of Israel's control of Palestinians. This allows them to discuss the law as an abstraction divorced from reality. This chapter focuses on the disjunction between the *de facto* and *de jure,* claiming that it serves in effect as a pedagogical practice that helps make sense of a settler colonial reality by providing it with a quasi-liberal-legal framework. The *de facto* situation refers to the reality on the ground, including, for instance, the actual path of the 'Separation Barrier', the number of Palestinians that have been killed by the Israeli military, or the amount of private Palestinian land that had been expropriated by Israel over the years. It also refers to the fact that Israel maintains effective control over Palestinian lives on the ground, that it is in practice the supreme authority over the territory, and that for the settlers the Green Line marking the 1949 armistice agreements, does not comprise a border. The *de jure* situation refers to the legal situation in the West Bank, according to Israeli domestic law, including Israeli legislation, Israeli caselaw, and Israeli interpretation of relevant international law. The *de jure* situation includes, for instance, the legal status of the West Bank as an occupied

territory, the applicability of the Fourth Geneva Convention in the West Bank, and the different legal systems that apply to Israeli settlers and noncitizen Palestinians in the West Bank.

This chapter focuses on three examples that illustrate how the disjunction between the *de facto* and *de jure* is deployed as a settler colonial pedagogy within Israeli Law Schools: Israel's 'Separation Barrier'; 'population transfer'; and 'belligerent occupation'. Each example is first approached through a description of a lecture in which it was discussed. Analysis then turns to assess the difference between the Israeli position as presented by the professors, the *de facto* situation in the West Bank, and the *international position*. Each subsection includes an analysis of the contribution of that specific example to sensemaking processes that reproduce and even bolster settler colonialism, inculcating the students into a world where settler colonialism can unproblematically coincide with liberal law. The chapter's concluding section turns to provide a description of this particular pedagogy and analyses its implications.

6.1 Administrative Law and the 'Separation Barrier'

Administrative law was a required module during the second year of my LLB program. According to its description on the syllabus, the 'module encompasses the law applicable to the actions of the different administrative authorities, and the judicial supervision of this activity. The objective of the module is to provide students with knowledge and analytical skills in relation to the basic concerns of administrative law'.[1038] The module spread over two terms, with 24 lectures of an hour and a half. We were a group of about 75 students, spread around a large lecture hall, the professor standing on a stage in front of us. The vast majority of our cohort were Israeli Jews, and only a few were Palestinian citizens of Israel, with about an equal number of male and female students. The class format was one of extended lecturing intervals, with brief pauses for short questions. In other words, the professor was talking most of the time, and we, the students, were taking notes. This kind of teaching is what Paulo Freire referred to as 'narration sickness',[1039] in which the teacher 'fills' the students with the

[1038] Administrative Law, 'Module Syllabus'.
[1039] Freire (n 388) 71.

contents of his narration like containers.[1040] For Freire, this is a central characteristic of the pedagogy of the oppressor, as '[t]he more students work at storing the deposits entrusted to them, the less they develop the critical consciousness which would result from their intervention in the world as transformers of that world'.[1041]

Our assessment in the module included two written assignments and a final exam at the end of the year. The assignment asked students to write short essays of a page and a half, answering questions that demonstrated some level of understanding but mainly demanding the memorising of large quantities of data. These assignments can be interpreted according to Freire's 'banking concept of education', in which students are expected to 'store the deposit' received from the professor, with emphasis put on recording and repeating, and less on perceiving and realising.[1042]

Our Administrative Law module touched upon a variety of topics, from the different types of administrative authorities through the rules of the administrative process, to causes for intervention in the administrative decision and the judicial review of administrative decisions and actions, as well as the possible consequences of such inquiries. In terms of content, the module focused mainly on court decisions regarding Israeli citizens and their encounters with administrative bodies, mostly within the 1949 armistice lines. Therefore, Israel's control of the West Bank and its actions in this area were almost completely absent from our reading list. While the administrative authorities that operate in the West Bank (including the Israeli military) are in fact subject to the High Court of Justice's judicial review, they did not appear in the syllabus. As the example below shows, the same administrative law applies not only to the military but to any other administrative body, and court decisions in administrative petitions filed by noncitizen Palestinians, hold the same status as any other petition. Therefore, overlooking this area of administrative law, that relates to millions of people living under military rule, appears to serve a specific function related less to law than politics.

One might argue that the module's syllabus does not define the parameters of Israeli administrative law, and indeed, different professors' reading lists included varied materials and focus on various subjects. But for the student who studies an LLB level Administrative

[1040] ibid 71–72.
[1041] ibid 73.
[1042] ibid 72.

Law module once in a lifetime, administrative law is that which is discussed in class lectures, appears in reading list items, and in the module's assessment materials. In other words, professors define what 'Israeli Administrative Law' actually means through the materials they use and their interpretation of the material. In the class I took, the Israeli military, its Israeli Civil Administration, and many administrative actions that took place in the West Bank (an area where over 3 million people are governed), as well as scores of court decisions and precedents relating to these areas, were never mentioned. This, obviously, helps shape how Israeli administrative law is imagined by the students in the classroom, and is part of the settler colonial pedagogy of erasing the native.

To be sure, in every module there is much more material that needs to be delivered, than actual time to properly teach the students all the elements of a particular legal field. But a decision to overlook such a crucial aspect of Israeli administrative law, whether deliberately or not, cannot be dismissed as simple editing. This artificial dichotomy between Israeli administrative law and Israeli administrative law in the West Bank contributes to the production of, in Paulo Freire's words, a 'fragmented view of reality deposited in [the students]'.[1043] Freire maintains that the oppressor's pedagogy is directed at sustaining the political and social reality, and as quoted above, aims to prevent students from developing a critical consciousness.[1044] Thus, the focus of our module on Israel within the borders of the 1949 armistice agreement (the pre-1967 borders) and its civil administrative bodies can also be seen as providing a fragmented description of reality, that obscures the direct application of Israeli administrative law to its military, and specifically regarding military actions towards noncitizen Palestinians in the West Bank.

Among the four very brief mentions of issues related to Israel's control over the West Bank during my Administrative Law module, was a short discussion of the 'Separation Barrier'. Altogether, the construction of the 'Separation Barrier' was mentioned only twice throughout my LLB studies. In my Administrative Law class, a case regarding the path of the 'Separation Barrier' was brought by the professor as an example of the concept of proportionality in administrative law. Specifically, we were discussing proportionality as a

[1043] ibid 73.
[1044] ibid.

ground for judicial review of administrative bodies and actions. During class, the professor explained that:

> Proportionality has been immensely developed in the security field, especially, for example, in rulings regarding the separation fence. You know, the Israeli Supreme Court, which is highly respected in the world, ruled in principle that according to international law, the separation fence is legal. When you know, there are claims abroad that it is illegal, but the High Court of Justice here ruled that it is legal, this is important. But petitions were occasionally filed regarding the route of the fence, because the IDF, the security system, planned several times a route that, for example, crosses a Palestinian village in the middle, some of the villages have existed for hundreds of years, and suddenly one comes and divides it, divides families. Or separate the village and the farmers' fields, and now the farmers have to drive two hours to reach their field that previously was a five minutes' walk away.
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> So, there were cases that the High Court of Justice accepted, for example, in which the Court said that there is an alternative route that would cause less damage. The Court then suggests to plan a different route, maybe it will be a little more expensive, maybe at times it will even be more than a little expensive, but the damage to the Palestinian farmers is greater. Sometimes the Court says that the damage to the Palestinians is much greater than the benefit of a particular route, and therefore the route should be changed. So, this is an example of how the proportionality principle was developed and became rooted in security rulings.[1045]

At this point, with no comments or questions from students, the professor moved on to summarise the issue of proportionality, and then continued to the next subject.

My professor, it should be noted, did not bring up the 'Separation Barrier' as an example to discuss Israel's control over the West Bank, nor did the professor aim to discuss the judicial review of administrative actions of the Israeli military. This can be inferred from the fact that, as mentioned above, we almost never directly discussed issues relating to the West Bank throughout the year, and also from the professor's clear utterance at the beginning of this short example, that the professor brought up the 'Separation Barrier' to demonstrate how the proportionality of an administrative decision is considered in the judicial review process. Even though the 'Barrier' had been mentioned briefly to demonstrate a legal concept, it is important to draw attention to the example itself, the way it was presented, and what it can tell us about settler colonial pedagogy in Israeli Law Schools.

[1045] 'Administrative Law Lecture' (15 May 2018).

The construction of the 'Separation Barrier' in the West Bank began in 2002, during the second intifada.[1046] Israeli official documents refer to the 'Barrier' as the 'Security Fence', following Israel's argument that the purpose of the 'Barrier' is to protect the State's citizens.[1047] While the 'Barrier' was allegedly following the path of the 1949 armistice line, in order to separate Israel and the West Bank, about 85% of its route is located within the occupied territory.[1048] Thus, while Israel argues that the 'Barrier' is needed for security reasons, to block the entrance of non-citizen Palestinians into the State's territory, it significantly deviates from the Green Line, and is a land grabbing tool used to expropriate Palestinian lands.[1049]

My professor presented the 'Separation Barrier' as a matter of security, stating at the outset that '[p]roportionality had been developed significantly in the security field, especially, for example, in rulings regarding the separation fence'. As stated above, this is the Israeli official claim, that the rationale behind the 'Barrier' and its route is state security, and that its construction is an act of self-defence.[1050] The indirect, yet clear connection that the professor made between 'the security field' and the 'separation fence' presents the Israeli official position regarding the 'Separation Barrier' as a matter of fact. The professor called the 'Barrier' 'separation fence', and not 'security fence', which is different to the 'Barrier's' official name, but accepted the connection Israel has been promoting between the 'Barrier' and security, and presented it as if it is undebatable truth. Notwithstanding the professor's description, the International Court of Justice Advisory Opinion, for instance, considered the Israeli claim for self-defence, and concluded that: '[…] Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall […]. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law'.[1051] Reaffirming the longstanding connection that Israel draws between security and the 'Separation Barrier', and more generally, between

[1046] Michael Sfard, *The Wall and the Gate* (Keter Books 2018) 340–345.
[1047] Richard Rogers and Anat Ben-David, 'Coming to Terms: A Conflict Analysis of the Usage, in Official and Unofficial Sources, of "Security Fence", "Apartheid Wall", and Other Terms for the Structure between Israel and the Palestinian Territories' (2010) 3 Media, War & Conflict 202, 203.
[1048] 'The Separation Barrier' (*B'Tselem*) <https://www.btselem.org/separation_barrier> accessed 4 October 2022.
[1049] Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (n 194).
[1050] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (International Court of Justice) 138–139.
[1051] ibid 142.

security and the occupation itself, the professor constructed Israel's actions as justifiable and to some extant uncriticisable, as they are allegedly meant to defend its citizens.

With regards to the international arena, the professor mentioned that 'there are claims abroad that [the 'Separation Barrier'] is illegal, but the High Court of Justice here ruled that it is legal'. [1052] While the professor did not explain who considers the 'Barrier' illegal, or why is it considered illegal, the professor did stress that the HCJ ruled that the 'Barrier' is legal, emphasising that the ruling of the HCJ 'is important'. Those claims regarding the illegality of the 'Barrier', include a resolution of the UN Security Council that had been vetoed by the United States, a resolution of the UN General Assembly with a large majority of 144 in favour and only 4 against,[1053] and the aforementioned International Court of Justice Advisory Opinion, which concluded that: '[t]he construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law'.[1054] As mentioned above, Paulo Freire maintains that the deposition of a 'fragmented view of reality', is a central method deployed by the pedagogy of the oppressor.[1055] Not elaborating on the international position regarding the 'Barrier', while stating that the HCJ position is important, contributes to the fragmented view of reality of Israeli students, and works to construct the HCJ interpretation of international law as more significant than that of international legal institutions.

Pierre Bourdieu asserts that the *universalisation effect* of the juridical field is 'created by a group of convergent procedures', among them, 'reference to transsubjective values presupposing the existence of an ethical consensus'.[1056] The professor's utterance regarding the HCJ is one such statement. Such rhetoric, according to Bourdieu, 'is the expression of the whole operation of the juridical field and, in particular, of the work of rationalisation to which the system of juridical norms is continually subordinated'.[1057] In other words, when the professor asserts, while mentioning a disagreement between Israel and the international

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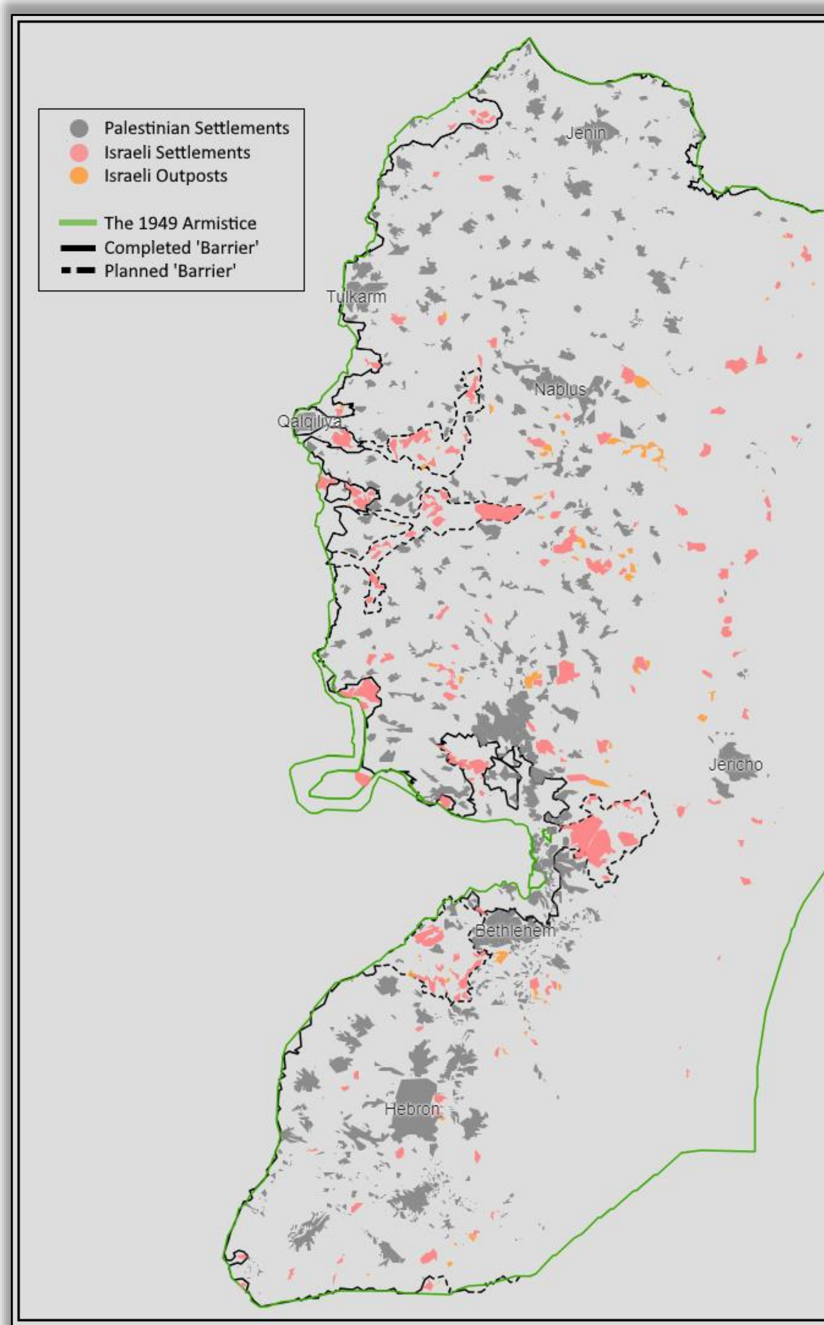
[1052] 'Administrative Law Lecture' (n 1045).
[1053] Sfard, *The Wall and the Gate* (n 1046) 357–358.
[1054] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 1050) s 163.
[1055] Freire (n 388) 73.
[1056] Bourdieu (n 417) 820.
[1057] ibid.

arena, that the position of the HCJ is 'important', the professor practically voices a specific standpoint as a fact, assuming a consensus around it, conveying that this is the consensus within the Israeli juridical field.

Figure 6.1: The 'Separation Barrier' Route and the Israeli Illegal Settlements



Source: Peace Now[1058]

The professor then moved to discuss the actual example, of cases that were brought to the High Court of Justice by Palestinian plaintiffs that were harmed by the route of the 'Separation Barrier'. During class, the professor's description of reality seemed fair, admitting, for instance, that in some cases, the 'Barrier' divides Palestinian villages and separates farmers from their lands. However, the professor's description of the 'Separation Barrier' works on two levels that should be addressed.

On the level of the difference between the law and reality, the professor described the law itself, while providing a blinkered portrayal of the reality on the ground. Presenting the law, the professor introduced the concept of weighing the proportionality between the benefits of administrative decisions and the harm they cause as presented in the petitions filed against the 'Barrier's' route. The court, the professor explained, evaluates the potential damage caused by the administrative decision, reviews alternative options, and rules whether the decision is proportionate, or there is a realistic alternative that would cause less harm. But the reality on the ground is missing. Large parts of the 'Separation Barrier' are situated within the West Bank. Based on the professor's description of the 'Barrier' one is likely to assume that dividing a Palestinian village and separating farmers from their agricultural lands is exceptional, but this is not the case. If the professor had presented a map of the 'Separation Barrier' route, the professor would have begun exposing students to the lived reality of the 'Barrier' for those Palestinians directly affected by it. As the 'Barrier's' map instantly reveals (see Figure 6.1), the Green Line is merely a suggestion in terms of the 'Barrier's' actual route. The map also exposes the variety of interests which determined the 'Barrier's' route, security might be one of them, but surely not the only one. Adhering to the legal while overlooking the actual reality, facilitates the presentation of the Israeli official position as the only position available.

The professor provided one specific case in which the HCJ ruled that the 'Barrier's' route should be changed but presented it as the general legal reality. The professor described the Court's decision as a general tendency, while in fact they were the exceptions. Most often, the Court dismisses allegations of disproportionality presented by Palestinian plaintiffs. One

[1058] 'Settlements Map' (*Peace Now*) <https://peacenow.org.il/maps/peacenow-desktop/index.html> accessed 12 October 2023.

might assume, based on the professor's explanation, that in general petitions that were filed against the 'Separation Barrier's' route were accepted by the Israeli High Court of Justice. But as human rights lawyer Michael Sfard describes the litigation that took place back then, the vast majority of Palestinian petitions against the 'Barrier' were rejected.[1059] In fact, it was in those rejected petitions, that the Court ruled that the 'Separation Barrier' is legal according to international law. Focusing on those few successful petitions, while not mentioning the many others that had failed, works to constitute the HCJ as both moral and just. It presents the Court as willing to intervene on security matters and to instruct the military to amend the 'Barrier's' route, in order to minimise the damage caused to noncitizen Palestinians. Thus, the law becomes a tool that is used to conceal the settler colonial reality on the ground.

This example exposes how the settler colonial logic works in the classroom itself, to produce a common sense among the students. Antonio Gramsci's notion of common sense suggests that it is a shared conception of the world that reflects the hegemonic worldview.[1060] In this class, one can locate the work of production of common sense in the reiteration of Israeli shared truths, for example, that the 'Barrier' is built to protect Israeli citizens, and that its route is planned according to security considerations. But when this sense-making process is taking place in the classroom, the professor voices the same shared truths, but in this setting, presenting them as a matter of legal fact.

6.2 Public International Law and Population Transfer

While most of my LLB modules rarely mentioned Israel's control over the West Bank and Gaza Strip, the syllabus of Public International Law explicitly stated that '[in] the module, special emphasis will be placed on aspects relevant to the State of Israel'.[1061] Indeed, the module touched upon Israel's occupation many times, especially as part of a lengthy discussion of the Law of War and particularly the Law of Occupation.

As part of a series of lectures on the international law of occupation, Israel's occupation of the West Bank and particularly 'population transfer and the legality of the settlements' were

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[1059] Sfard, *The Wall and the Gate* (n 1046) 345–354.
[1060] Gramsci, *Prison Notebooks* (n 386) 333.
[1061] Public International Law (n 1020).

discussed at length.[1062] In one class, our Public International Law professor explained that they wanted us, the students, to be familiar with the different arguments on the issue of the legality of Israeli settlements in the West Bank. The presentation slide included article 49(6) of the Forth Geneva Convention: '[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies'.[1063] As well as article 8 of the Rome Statute, which provides a list of war crimes, citing section 2(b)(viii): '[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies […]'. The professor explained that article 49(6) is the foundation of the argument that the transfer of Israeli population to the West Bank, and the establishment of Israeli settlements there, are illegal. The professor then added that article 8 of the Rome Statute not only defined such transfer as a war crime, but also elaborated that the transfer can be either direct or indirect.[1064]

At this point, the professor announced: 'and here is the answer to the riddle why Israel declared that it would accept the humanitarian provisions [of the Fourth Geneva Convention]'.[1065] The riddle had to do with the question of the applicability of the Fourth Geneva Convention to the West Bank, and particularly Israel's position on this issue. As part of a lecture about the law of occupation, our professor specified and described the central international conventions in this area and brought up the issue of the applicability of the Fourth Geneva Convention to Israel's occupation of the West Bank. The professor explained that Israel endorsed a dualist approach to the relation between domestic and international law, treating them as independent and separate systems, requiring the Israeli legislator to positively adopt international conventions into local law. The Israeli legislator never absorbed the Fourth Geneva Convention into Israeli domestic law. Therefore, the High Court of Justice—which regards the Fourth Geneva Convention as treaty law and not customary law—ruled that its provisions do not apply to Israel's occupation. In addition, the professor explained that Israel argues that both Gaza Strip and the West Bank were not part of a sovereign country prior to their occupation in 1967, hence Israel's control of these areas cannot be defined as an occupation, and so the Fourth Geneva Convention does not apply

[1062] Public International Law, 'Presentation: The Law of Occupation'.
[1063] ibid citing; International Committee of the Red Cross (ICRC) (n 668) art 49(6).
[1064] 'Public International Law Lecture' (12 May 2020).
[1065] ibid.

there. Nonetheless, following petitions filed to the High Court of Justice, the Israeli government announced that even though the Fourth Geneva Convention does not apply, Israel will fulfil its humanitarian provisions. Our professor did note that Israel's arguments had been rejected by the International Court of Justice, stating that the purpose of the Fourth Geneva Convention is to protect the occupied community, rendering questions of prior sovereignty irrelevant.

Back in our class about population transfer and the settlements, the professor went on to explain that 'according to the Israeli perception, the provision of article 49(6) is not a humanitarian one, as it is not meant to protect the residents of the occupied territory'.[1066] The professor elaborated on the State's position, that 'as long as the settlement of population from the occupying state in the occupied territory does not cause harm to the property or the quality of life of the population in the occupied territory, then there is no humanitarian issue here'.[1067] None of the students in class questioned that assertion, and the professor continued to the next matter at hand.

It is, however, important to dwell on the professor's explanation since it reveals two key gaps: a reality gap and an interpretive gap. The professor's statement implies that the Israeli settlement enterprise in the West Bank causes no harm to the property or quality of life of the Palestinian population. This account, as scores of studies and reports has shown, is simply false.[1068] Over the years, Israel embarked on a massive settlement enterprise in the West Bank, moving close to 10 percent of its Jewish citizenry from the pre-1967 area to the Palestinian territories that were occupied. At first, Israeli settlements were established on lands that were expropriated according to the Hague regulations for military use, based on the claim that the settlements are contributing to the military's security efforts.[1069] Since 1977, when the Likud party came into power, the settlement enterprise was expanded even further[1070] by making use of a variety of legal mechanisms including appropriation for military use, declaration as absentees' property, expropriation for public use, and assistance

[1066] ibid.
[1067] ibid.
[1068] See, for instance: 'Settlement Expansion Fuelling Violence in Occupied Palestinian Territory, Middle East Peace Process Special Coordinator Warns Security Council' (*United Nations Meetings Coverage and Press Releases*, 22 March 2022) <https://press.un.org/en/2022/sc14836.doc.htm> accessed 11 October 2023.
[1069] Benvenisti, *The International Law of Occupation* (n 691) 233; Shehadeh (n 670) 17.
[1070] Benvenisti, *The International Law of Occupation* (n 691) 233.

to Israeli citizens' land purchases in the free market.[1071] Over the years, the State either appropriated Palestinian land and then established a settlement on it, or vice versa.[1072] Scattered throughout the West Bank, the Israeli settlements turned the Palestinian areas into an archipelago of isolated, disconnected islands.[1073] These actions did cause egregious harm to the property and the quality of life of the occupied Palestinian population.

Furthermore, as reported by Palestinian, Israeli, and international human rights organisations, the establishment, existence, and maintenance of the Israeli settlements in the West Bank, not only impair the quality of life of noncitizen Palestinians, but also expose the occupied population to severe violence and even death on a daily basis. B'Tselem documented that 'from the beginning of 2020 to the end of September 2021, there were 451 settler attacks on Palestinians and on their property - 245 were directed at Palestinian farmers. This figure excludes the Jordan Valley, where violence takes place on a daily basis. Of the 451 attacks recorded, in 27 cases settlers fired live ammunition, 180 included physical assault, 145 included damage to private property, 77 included attacks on homes, and 35 attacks on passing vehicles'.[1074] Thus, the professor's affirmation of the Court position, that 'as long as the settlement of population from the occupying state in the occupied territory does not cause harm to the property or the quality of life of the population in the occupied territory, then there is no humanitarian issue here'—glaringly fails to take into account the reality of the West Bank.

Indeed, the professor's claims expose more of what happens in the settler colonial law classroom than in the West Bank. It helps reveal how a legal reality that for an outsider appears non-sensical becomes part of common sense. The fact that the movement of hundreds of thousands of Jewish settlers to the West Bank and the expropriation of large swaths of Palestinian land is *not* considered a humanitarian violation is fascinating and points to the gap

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[1071] For a detailed account of the different legal mechanisms of land appropriation see: Yehezkel Lein and Eyal Weizman, 'Land Grab: Israel's Settlement Policy in the West Bank' (B'Tselem 2002) 47–63 <https://www.btselem.org/sites/default/files/sites/default/files2/publication/200205_land_grab_eng.pdf> accessed 28 September 2022; Gordon (n 159) 119–122; Shehadeh (n 670) 17–41.
[1072] Gordon (n 159) 119.
[1073] Noura Erakat, 'Taking the Land without the People: The 1967 Story as Told by the Law' (2017) 47 Journal of Palestine Studies 18, 31.
[1074] Eyal Hareuveni, 'State Business: Israel's Misappropriation of Land in the West Bank through Settler Violence' (B'Tselem 2021) 10 <https://www.btselem.org/sites/default/files/publications/202111_state_business_eng.pdf> accessed 2 October 2022.

between the *de jure* and *de facto*. Disavowing the situation on the ground produces the conditions of possibility that enable the State, HCJ, and professor, to make such outlandish claims.

This particular module, Public International Law, exposes another gap as well; namely, the wide gap between the international law of occupation and the Israeli interpretation of this body of law. Israel's settler colonial reality dictates an interpretation of the international law of occupation that at times seems bizarre to the point of a satire. Classifying articles of the Fourth Geneva Convention as 'humanitarian provisions' and 'nonhumanitarian' ones, to identify the provisions that Israel is willing to follow—even as the State claims that the Convention does not apply to the West Bank—is bizarre. But then claiming that an article that explicitly prohibits an occupying power from transferring its own citizens into the occupied territory is not a 'humanitarian provision'—a provision that seeks to protect the local population—seems farfetched and not very convincing. But it also makes sense. As Karl Marx made clear in his trial, '[…] the law must be founded upon society, it must express the common interests and needs of society […] which arise from the material mode of production prevailing at the given time'.[1075] In a settler colonial society, the interpretation of international law, even if ludicrous, is the one that promotes the settler colonial project and renders it legal.

For the Israeli juridical field to be able to maintain itself and continue facilitating the settler colonial project that Israel is advancing, it must produce jurists that accept the field's logic and are fully inculcated to the ruling ideology. In other words, it needs new members to both accept settler colonialism and the rationalisation processes of this ideology. As Louis Althusser emphasises, '[I]n order to exist, every social formation must reproduce the conditions of its production at the same time as it produces, and in order to be able to produce'.[1076] Processes of production here include the formation of law students who are familiar with Israel's legal justifications, to the point where they accept them as their own and serve as vehicles of their dissemination. In this way the law students (and later lawyers) become vehicles of reproduction, making sure the settler colonial formation will be able to continue production in the future.

[1075] Marx (n 386) 300.
[1076] Althusser (n 11) 2.

The professor later turned to present other Israeli arguments. One argument suggested that even if the Fourth Geneva Convention had applied to the West Bank, the meaning of transferring people to the occupied territories denoted forcibly moving populations to the area and did not include voluntary movement.[1077] In other words, if Israel does not forcibly transfer its citizens to the settlements in the West Bank, then it does not constitute a prohibited transfer according to the Convention. The professor commented that 'objectively this is a difficult argument', as in its previous paragraphs, article 49 discusses 'forcible transfers', which suggests that when discussing 'transfer' without a predicate the Convention deliberately adopts a wider notion of transfer, prohibiting all sorts of transfers, not only forcible ones.[1078]

The 'voluntary transfer' argument put forth by Israel had already been rejected by a variety of international institutions.[1079] The International Court of Justice (ICJ), for instance, stated in its Advisory Opinion regarding the construction of the separation barrier that 'since 1977, Israel has conducted a policy and developed practices involving the establishment of Settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6'.[1080] Thus, the ICJ clearly affirms that Israel has been illegally transferring its citizens into the West Bank for decades. Indeed, the ICJ concluded that 'the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law'.[1081]

Furthermore, the situation on the ground suggests that the transfer of Israeli citizens to the West Bank has not been 'voluntary'. While Israel often claims that the State has nothing to do with the growing settlement enterprise, it has allocated enormous resources to the settlers to expand the settlements.[1082] In order to actually put to use lands that had been expropriated, the State established military bases, settlements and outposts in the occupied territories; it paved bypass roads, connected settlements to the electricity grid and to water reservoirs, built schools, clinics and other social services, and constructed the 'Separation Barrier' which

[1077] 'Public International Law Lecture' (n 1064).
[1078] ibid.
[1079] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 1050) para 120.
[1080] ibid.
[1081] ibid.
[1082] Gordon (n 159) 117.

diverged from the Green Line route and expropriated large swathes of Palestinian land.[1083] To encourage its Jewish citizens to move to the settlements, Israel provided them with a variety of benefits and incentives, mainly through the declaration of the settlements as 'national priority areas', thus granting the settlements and their residents with generous financial support through tax holidays and special mortgage benefits.[1084] Hence, the State's actions reveal that the professor's explanation is disconnected from the situation on the ground.

The professor's ambiguous comment, that 'objectively this is a difficult argument', implies that while legally, the argument that only forcible transfers are prohibited is a weak argument, it has some sort of value. To expose the contents of the *hidden curriculum*, which is not part of the official syllabus, Giroux and Penna suggest we ask ourselves 'what is learned in school?'[1085] or what kind of work the professor's explanations do in the classroom. If on the surface, claiming that the settlers moved to the West Bank voluntarily is a poor argument, on the *hidden curriculum* level, it is quite a strong one. First, even if not legal according to international law, it does suggest Israeli citizens were not forced to move to the occupied territories, they chose to live there and they want to live there. Therefore, when concentrating on the voluntary/forcible distinction, the professor's explanation appears factually sound. Second, even if not recognised by international law, the land of Israel—including the West Bank—had been promised to the Jewish People in the bible, and therefore some students in the classroom believe that Israel holds a divine right over this land, and even if it is prohibited by the Convention, as long as the transfer is not forcible, the justifications for the settlement project are tenable.

The professor also mentioned Israel's claim that all the land leasing contracts for the settlements are temporary and conditional, 'if the situation will change and the occupation will end, the contracts will be terminated'.[1086] A quick glance at the situation on the ground reveals that Israel's illegal settlements in the West Bank are not temporary. With almost half a million Israeli citizens residing in 146 settlements and 144 outposts that are spread across

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[1083] ibid 123–125.
[1084] Lein and Weizman (n 1071) 73–84.
[1085] Giroux and Penna (n 388) 23.
[1086] 'Public International Law Lecture' (n 1064).

the West Bank (see Figure 6.1 above),[1087] and another approximately 230,000 Israeli citizens residing in East Jerusalem,[1088] the Israeli settlement enterprise is here to stay.

It is important to note that some Israelis are not familiar with these numbers, and therefore, might accept the argument that at least in theory, the settlements are temporary, and can be withdrawn. The level of improbability of this argument renders it almost empty, but that should not mask the significant work it does when raised in the classroom. The fact that a claim like this can be made in the classroom without a single student questioning it is testimony to the level of ideological entrenchment. Even though it is, as Veracini maintains, 'the *intention* to stay' that distinguishes the settler from other colonists,[1089] the temporariness argument works to veil the very essence of the settler colonial regime, in which the settler aims to displace and replace the native. Indeed, the very logic of settler colonialism as Patrick Wolfe stresses, '[…] is premised on the securing—the obtaining and the maintaining—of territory. This logic certainly requires the elimination of the owners of that territory, but not in any particular way'.[1090] The temporariness argument not only disregards the significance of the territory for the settler colonial regime, but it also works to erase the extreme violence that the occupation engenders. Eve Tuck and Wayne Yang define claims such as the ones made by the professor, as 'strategies or positionings that attempt to relieve the settler of feelings of guilt or responsibility without giving up land or power or privilege, without having to change much at all'.[1091] Thus, the insistence on the temporariness of the settlements can be understood as a pedagogical attempt to exempt Israel from some settler colonial burden.

The professor described a third claim as 'the most critical'; namely, 'the impact [of the Jewish settlements] on the welfare of the protected population', but in this instance the professor highlighted a relatively rare settler practice—expropriation of private land—to legitimise and justify a much broader practice. The professor explained that since the two higher court decisions regarding the Jewish settlements Beit El (1979)[1092] and Elon Moreh

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[1087] Peace Now (n 162).
[1088] 'Data – Jerusalem' (*Peace Now*) <https://peacenow.org.il/settlements-watch/matzav/jerusalem> accessed 20 March 2022.
[1089] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 53.
[1090] Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 17) 402.
[1091] Tuck and Yang (n 535) 10.
[1092] *Ayub et al v Minister of Defense et al* [1979] Israeli High Court of Justice HCJ 606/78, 33(2) PD 113.

(1979),[1093] the government's argument has been that because 'Israeli settlements are built on state lands only, and private Palestinian lands are not expropriated for this end, then the Israeli settlements do not harm the welfare of the local population' (an argument which I have already shown to be false).[1094] The professor added that there is some planned Israeli legislation that threatens this argument, aiming to allow Israel to unilaterally and retroactively expropriate private Palestinian lands, that Israeli settlements were already illegally built on.[1095] The professor emphasised that 'such a provision saws off the branch on which the Israeli argument sits'.[1096] The 'State lands' argument is challenging in itself, the professor stressed, just like the ongoing general effort to claim that the situation in the West Bank, and particularly the settlement enterprise, is legal.[1097] Therefore, such a law, that retroactively expropriates private lands from the occupied population, would endanger even those flimsy arguments that Israel hangs on to, according to our professor.

On the surface, it seems that the professor is criticising the Israeli argument here, or at least the particular manoeuvre that would have contradicted the State's longstanding position regarding the establishment of settlements only on state lands. This was a prevalent critique across Israel at the time, that allowing the retroactive appropriation of Palestinian lands on which illegal Israeli settlements are already built, is not only unconstitutional but might even pave the way for legal proceedings against Israel at the International Criminal Court. Furthermore, the Israeli Attorney General himself refused to fulfil his role and represent the Israeli Government during petitions that were filed to the High Court of Justice against the 'Regulation Law', claiming it to be unconstitutional.[1098] But the real issue lies in the Government's initial argument, that the settlements are legal because they are built on state lands. In other words, by questioning only the legality of establishing settlements on private land, the professor reaffirmed the claim that the settlements that were built on state land are legal.

[1093] *Dweikat et al v Government of Israel et al* [1979] Israeli High Court of Justice HCJ 390/79, 34(1) PD 1.
[1094] 'Public International Law Lecture' (n 1064).
[1095] The Judea and Samaria Settlement Regulation Law 2017 (IL) was enacted in 2017 by the Israeli Knesset; Following a series of petitions to the High Court of Justice, the new Act had been immediately postponed and finally revoked by the Court in 2020 in *Silwad Municipality v Israeli Knesset* [2020] Israeli High Court of Justice HCJ 1308/17, Nevo.
[1096] 'Public International Law Lecture' (n 1064).
[1097] ibid.
[1098] Tova Tsimuki, 'The Attorney General to the High Court of Justice: The Regulation Law Is Unconstitutional and Must Be Repealed' *Ynet* (18 December 2018) <https://www.ynet.co.il/articles/0,7340,L-5427803,00.html>.

In HCJ Beit El (1979), Palestinian plaintiffs petitioned against the appropriation of their lands for the establishment of a settlement, claiming that the settlement fulfils no military need. The government argued that there is a security need behind the settlements, an argument that was accepted by the Court and led to the rejection of the petition.[1099] In HCJ Elon Moreh (1979), again Palestinian plaintiffs petitioned against the appropriation of their lands for a new settlement, claiming not only that the settlement had no military significance, but that this argument was made by the government in bad faith.[1100] The government argued yet again that there was a military need behind the new settlement. This time, settlers joined the case as respondents, one of them claiming in his affidavit that 'the settlement itself... is not due to security and physical needs, but in virtue of a vocation, and by virtue of the return of the Israeli people to its land'.[1101] The settler's openness as to the real reasons behind the planned settlement, combined with affidavits from former officials in the Israeli security system affirming that there is no military need behind Elon Moreh, led the Court to accept the petition, and to reverse the appropriation of Palestinian land.

Following the Elon Moreh ruling, as Neve Gordon points out, 'the government adopted a new method for seizing land'.[1102] The new method, as Gordon explains, utilises two articles of the Hague Regulations and one Ottoman law to promote Israel's land grab enterprise. Article 43 to the Hague Regulations sets that 'the laws in force in the country' must be respected, 'unless absolutely prevented',[1103] thus allowing Israel to deploy the Ottoman Land Law of 1858, that had been in force in the West Bank prior to its occupation. The Ottoman Land Law allowed the sovereign to appropriate privately owned lands that were not cultivated, as well as remote lands.[1104] In addition, Article 55 to the Hague Regulations defines the occupying power as an 'administrator and usufructuary' of public property and natural resources 'belonging to the hostile State, and situated in the occupied country',[1105] thus allowing Israel to administer and benefit from the lands it managed to declare as state lands. This combination of laws allowed Israel to 'legally' take possession over private Palestinian lands

[1099] *Ayub et al v. Minister of Defense et al* (n 1092).
[1100] *Dweikat et al v Government of Israel et al* (n 1093).
[1101] ibid 8.
[1102] Gordon (n 159) 128.
[1103] Second International Peace Conference, The Hague (n 667) art 43.
[1104] Gordon (n 159) 129.
[1105] Second International Peace Conference, The Hague (n 667) art 55.

and transform them to state lands.[1106] Thus, state lands in the West Bank are in many situations private Palestinian lands that the Israeli military converted to State lands. Following the conversion, such lands served in many cases to build new settlements in the Occupied Territories.

The way the professor presented this reality, describing how the Israeli government claims that 'private Palestinian lands are not expropriated for [Israeli settlements]'[1107] is simply false. By not explaining the meaning of 'State lands', and the fact that most of this land is private land that had been converted, the professor justified the ongoing dispossession of the Palestinian population, simply by presenting it as a lawful, valid argument.

This part of the lecture presented the relevant international law, then turned to discuss the Israeli position and some critique of the State's arguments and actions. At the time, I felt that this discussion was quite balanced, in terms of presenting different perspectives, and not adhering solely to the Israeli position. But revisiting the professor's explanation—namely, that Israel claims that article 49(6) 'is not meant to protect the residents of the occupied territory'[1108]—reveals the discussion to be very limited in scope. As the article sets that the occupying power shall not move its citizens to the occupied territory, it is not enough to present its content and simply state that Israel argues that its purpose is different from its widely accepted interpretation. Expanding this discussion to an assessment of the situation in the West Bank, including the impact of Israel's settlement enterprise on the occupied population, the point of view of various international institutions on this issue, and most significantly, spelling out Israel's motivation behind its position, that is, to maintain its control over the West Bank and expand its settlement project, could equip us, the students, with a better understanding of the situation.

While the professor's description of the *de jure* situation was elaborate, the *de facto* situation, was totally absent in class. The decontextualisation of the law, or the practice of distinguishing the *de jure* explanation from the *de facto* reality allows professors to politically limit the scope of the discussion, generating, as Paulo Freire describes, an 'adapted person'

[1106] Gordon (n 159) 128–129.
[1107] 'Public International Law Lecture' (n 1064).
[1108] ibid.

who is 'better "fit" for the world',[1109] acquainted with the State's arguments and unaware of the reality on the ground, that is largely incompatible with the descriptions provided in class, as elaborated above. Wittingly or not, the professor strengthened the settler colonial logic, providing a seemingly tenable legal argument for acts of colonial dispossession and the movement of hundreds of thousands of settlers to an occupied area.

6.3 Criminal Law and Belligerent Occupation

The existence of Israel's occupation was mentioned in only one topic of my Criminal Law module, in relation to the territorial and extraterritorial applicability of criminal law. While in other countries, questions of extraterritoriality are rather marginal, mainly relating to seacraft and aircraft, or to armed forces abroad, in Israel, this matter is quite significant. First, out of Israel's 9,453,000 citizens,[1110] 465,000 reside in the occupied West Bank (not including occupied East Jerusalem),[1111] outside the State's sovereign territory.[1112] Thus, almost 5% of Israel's citizenry lives in an occupied territory, where the State's domestic law does not apply directly. Second, approximately 3,250,000 noncitizen Palestinians live in the occupied West Bank,[1113] subject to Israel's military regime. Noncitizen Palestinians are subject to an assortment of laws, including Israel's domestic law in some situations. Therefore, territorial, and extraterritorial applicability of criminal law is crucial within the Israeli reality.

My professor dedicated approximately two lectures to discuss the issue of territoriality and extraterritoriality in Israeli criminal law. The applicability of Israeli law to the occupied territories was only one aspect among several others. With time dedicated to the definition of 'internal' and 'external' offences according to Israel's criminal law; the meaning of the term 'part of the offence', that refers to instances where an offence took place abroad but is subject to Israeli jurisdiction; the concept of 'multiple item offence', which allows defining a series of offences that were carried out in Israel and abroad as one internal offence; detailing every

[1109] Freire (n 388) 76.
[1110] 'Localities and Population, by District, Sub-District, and Population Group' (*Israeli Central Bureau of Statistics*, 2022) <https://www.cbs.gov.il/he/publications/doclib/2022/2.shnatonpopulation/st02_16x.pdf> accessed 23 August 2023.
[1111] ibid.
[1112] It should be mentioned that another 230,000 Israeli citizens reside in occupied East Jerusalem an occupied territory in which Israeli domestic law applies directly, following its unilateral annexation by Israel; 'Data – Jerusalem' (n 1088).
[1113] Palestinian Central Bureau of Statistics (n 2).

type of offence that yield extraterritorial jurisdiction according to the Criminal Law Act of 1977, and explaining the unique status of drug related offences—the discussion of criminal law in the context of Israel's occupation ended up very limited in scope and time. The brief class discussion about Israel's occupation focused on the applicability of Israeli criminal law to the West Bank. In other words, Israel's occupation was mentioned almost incidentally, and only with respect to question how Israeli criminal law applies to Israeli citizens who live in an occupied territory—namely, to Jewish settlers.

Within the limited time allocated, class discussion touched upon several issues relating to Israel's occupation—the definition of Israel's sovereign territory, the applicability of Israel's domestic criminal law in the occupied territories, customary criminal law in the occupied territory, and criminal legal authority regarding Israeli citizens in the occupied territories. One of the central terms that was mentioned in the beginning of this discussion is 'belligerent occupation', a term that was rarely mentioned throughout my four years of LLB studies, cited only in a handful of lectures that discussed Israel's control over the West Bank. During the lecture, the Criminal Law professor described the legal system in the West Bank for us, and explained that:

> With the military takeover in 1967, the Israeli government decided not to apply Israeli law in Judea and Samaria. Belligerent occupation is a state of military occupation. I know that [the phrase belligerent occupation] has a political connotation, but we will use this term in its legal connotation. In an area that is occupied and administered by the military, there is no exertion of internal sovereignty by the local population. The authority [of the occupying power] on the ground is derived from a combination of two elements—international law and the military control on the ground.[1114]

The professor's statement describing Israel's control over the West Bank includes two significant remarks. First, that Israel decided not to apply its domestic law to the West Bank, meaning, in other words, that Israel decided not to unilaterally annex this territory. Second, that Israel controls the West Bank under a 'belligerent occupation', with authority obtained from military presence and from international law.

It is also important to note that already at the outset, my professor made a clear distinction between the 'legal' and the 'political', stating: 'I know that [the phrase belligerent

[1114] 'Criminal Law Lecture' (n 664).

occupation] has a political connotation, but we will use this term in its legal connotation'.[1115] In other words, the professor made clear that the lecture will focus on 'belligerent occupation' as a legal term, while disregarding its political connotation. The professor's apology for using an established legal term in class can be understood within the Israeli context, as the term 'occupation', is indeed highly controversial within Israeli political discourse and used almost solely by liberal Zionists and people who identify on the political left. The professor explained that the term 'occupation' will be used in its strict legal sense, in order to depoliticise the discussion and intimate that students should not assume that the professor is advancing any political position. Thus, by distinguishing between the legal and the political connotation of the term 'belligerent occupation', the professor attempted to produce the class as a 'neutral space',[1116] depoliticised and therefore objective, as it focuses on the 'legal connotation' only. Using the legal connotation while bracketing the political one is presented in class as straightforward, but in fact it is an effective pedagogical tool that paves the way for disregarding the de facto situation on the ground. This doctrinal approach to law, which assumes that students should learn the law itself and become acquainted with the legal system in a way that is divorced from reality, is an essential component of settler colonial pedagogy. It is extremely useful for covering up the wide gap between the situation on the ground and the international legal edicts and is essential for suggesting that liberal law can operate in an illiberal context.

Describing Israel's control over the West Bank, my professor stated that Israel is holding the West Bank under a 'belligerent occupation', but since Israel's definition of its control over the West Bank is different from the one provided by the international law of occupation, it is important to first present both positions. In international law, belligerent occupation is defined as 'the effective control of a power […] over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory'.[1117] This phenomenon is regulated under the international law of occupation, which is comprised of customary international law, the Hague Regulations, the Fourth Geneva Convention, and Additional Protocol I to the Geneva Conventions.[1118] This legal regime involves two central aspects, one

[1115] ibid.
[1116] Bourdieu (n 417) 805, 830.
[1117] Benvenisti, *The International Law of Occupation* (n 691) 43.
[1118] Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009) 4–8.

is focused on the protection of the life and property of the occupied population, and the other is concerned with the rights of the sovereign of the occupied area.[1119] International institutions have repeatedly stated that the West Bank, along with other territories held by Israel, is subject to a belligerent occupation and that Israel's control is therefore subject to provisions set out in international law.[1120]

The Israeli position, on the other hand, maintains that while the West Bank is held under military occupation, this control is not subject to the international law of occupation. As mentioned, Israel justifies this position claiming that the West Bank was not part of a sovereign territory of another country prior to its occupation in 1967. This argument had been rejected by several international institutions, stating that the status of the territory prior to its occupation is not relevant, as the main purpose of the law of occupation is to protect the occupied population, not state sovereignty.[1121]

My professor did not present the two positions in class, and simply stated that Israel is holding the West Bank under a 'belligerent occupation'. It is not clear whether the professor simply presented the international perspective, while disregarding Israeli claims for lack of applicability, or deliberately avoided the disagreement between Israel's position and international institutions' view on this issue. In any case, the professor adhered to the description of the West Bank situation according to the law, whether Israeli or international, while widely disregarding the situation on the ground.

While the legal description of the West Bank as subject to a 'belligerent occupation' suggests that it is a distinct occupied territory, that is administered by the Israeli military for the sake of the occupied population, and subject to a distinct military regime, the situation on the ground is quite different. Recently, scholars and human rights organisations have been reporting that the reality on the West Bank's ground had changed.[1122] If in the past the legal term 'belligerent occupation' was suitable to describe the West Bank reality, it is no longer

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[1119] Eyal Benvenisti, 'The Origins of the Concept of Belligerent Occupation' (2008) 26 Law and History Review 621, 622.
[1120] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 1050) arts 96–99.
[1121] ibid 90–95.
[1122] Al-Haq – Law in the Service of Man and others (n 1); Amnesty International (n 1); B'Tselem (n 1); Dugard and Reynolds (n 291); Falk and Tilley (n 146); Sfard, 'The Israeli Occupation of the West Bank and the Crime of Apartheid: Legal Opinion' (n 1); Shakir (n 1).

applicable to portray Israel's control over the West Bank. Israel's prolonged control over the West Bank, its extensive settlement enterprise, massive investment in infrastructure and development of a complex legal system, all suggest that the West Bank reality had changed. Recent studies and reports indicate that Israel has no intention to end the occupation, as the State aims to maintain its domination over the whole area between the river and the sea. In light of their findings, scholars and organisations conclude that the West Bank is in fact subject to an Israeli apartheid regime.

Insisting on using 'belligerent occupation' as a legal term to describe Israel's control over the West Bank, promotes settler colonialism through its concealment. As Lorenzo Veracini asserts, 'settler colonialism obscures the conditions of its own production',[1123] preferring, in other words, to continue expanding quietly on the ground, as '[t]he more it goes without saying, the better it covers its tracks'.[1124] Thus, adhering to the legal description of Israel as a 'belligerent occupier' (regardless of the definition one adopts), and avoiding discussing the reality the occupation has constituted on the ground, not only fails to accurately describe the *de facto* situation, but also facilitates the operation of the settler colonial regime. Our professor did explain that Israel has been avoiding the annexation of the West Bank, yet the professor did not clarify how this prolonged abstention of annexation or withdrawal is translated into daily reality.

Regarding the West Bank's legal status, as mentioned above, the professor asserted that following the 1967 war, 'the Israeli government decided not to apply Israeli law in Judea and Samaria'. In another lecture the professor noted that Israel's sovereign territory 'does not include Judea and Samaria and the Gaza Strip where Israel has not exercised sovereignty, it does include East Jerusalem and the Golan Heights'.[1125] Thus, from the Israeli perspective, as my professor presented it, the West Bank is not part of Israel's sovereign territory, because Israel did not apply its domestic law to the West Bank. This is the situation *de jure*, from the Israeli point of view, but it is completely decontextualised from reality and from accepted International Law.

[1123] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 14.
[1124] ibid 15.
[1125] 'Criminal Law Lecture' (17 January 2017).

Describing Israel's occupation as a belligerent occupation that continues to exist without any level of annexation of the West Bank, while disregarding the immense settlement enterprise that had altered the entire area, grants the students with a very specific and limited knowledge as to the reality of the West Bank and its complex legal status. According to Freire, this is how the pedagogy of the oppressor works, '[t]he more completely [the students] accept the passive role imposed on them', in which the professor speaks, and the students mainly take notes, 'the more they tend simply to adapt to the world as it is and to the fragmented view of reality deposited in them'.[1126] Refraining from questioning whether the legal status of the West Bank had changed over the years and given the significant changes that this area has been going through, allows the professor to provide a very specific description of reality, that correlates with the Israeli preferred description of the region. This, according to Freire, generates students that are 'better "fit" for the world'.[1127]

The time dimension is also significant, as Israel occupied the West Bank during the 1967 war, along with other territories,[1128] yet, the class in which we were discussing the occupation took place in 2017, just a few months before the fiftieth anniversary of Israel's occupation. Belligerent occupation is supposed to be a temporary situation, as reflected by the law of occupation itself.[1129] Israel's occupation of the West Bank is therefore quite unique since, at the time of writing, it has existed for over 55 years.[1130] While my professor referred to the problems arising from this prolonged belligerent occupation, it did not facilitate any questioning of the nature of this particular regime. The professor explained that 'the concept of belligerent occupation was designed for the intermediate state, until a country decides whether to annex or return [an occupied territory]. The territories of Judea and Samaria became entangled, because they remained under a temporary legal concept that manages them for fifty years; this is a serious trouble'.[1131] Thus, while the professor admits that this prolonged occupation causes trouble, the temporal circumstances of Israel's protracted

[1126] Freire (n 388) 73.
[1127] ibid 76.
[1128] Shafir, *A Half Century of Occupation: Israel, Palestine, and the World's Most Intractable Conflict* (n 137) 2; Khalidi, 'The Palestine Problem: An Overview' (n 24) 9.
[1129] Benvenisti, 'The Origins of the Concept of Belligerent Occupation' (n 1119) 621.
[1130] Dinstein (n 1118) 12–13.
[1131] 'Criminal Law Lecture' (n 664).

occupation does not seem to challenge Israel's legal definition of the West Bank reality in our classroom.

6.4 Conclusion

Giroux and Penna suggest that when probing the *hidden curriculum*, 'the unstated norms, values and beliefs that are transmitted to students through the underlying structure of meaning in both the formal content as well as the social relations of school and classroom life',[1132] the question we should address is 'what is learned in school?'[1133] Joe Kincheloe adds that in the 21st century, scholars should inquire both 'the purposes of existing educational practices and their consequences'.[1134] As presented in this chapter, not much is taught in the Israeli law school regarding the occupied territories and the Israeli regime between the river and the sea. Similar to many other countries, the Israeli law curriculum is largely focused on civil and domestic matters, from contract and corporate law, through family and land law, to criminal, constitutional and administrative law. The main focus is on Israeli daily life, with almost no mention of the occupation, the West Bank, Palestinians or the military regime.

What would have happened if the professors in these three modules provided a coherent description of the *de facto* situation in the West Bank, along with the *de jure* description of the law? In such a case, the large gap between the situation on the ground, as described above, and Israeli law itself, would have become crystal clear, demanding the professors to account for these sheer inconsistencies. In a settler colonial context, where the law actively works to disguise the illiberal reality in which it operates, such a disclosure is not an option, as it would reveal the oppressive arena that liberal law seeks to facilitate and hide.

As I have shown focusing on the *de Jure* situation, at the expense of *de facto* reality, is a central pedagogical tool that works to bolster settler colonialism. This practice allows law professors to describe a legal situation, using the law itself to conceal the settler colonial

[1132] Giroux and Penna (n 388) 22.
[1133] ibid 23.
[1134] Kincheloe (n 443) 13.

reality, but also the relevant international law interpretations that contradict the State's preferred interpretation. This is not to suggest that law professors act in this manner consciously or on purpose. As shown in this chapter, this is the outcome of a legal education system that trains law students to become successful practitioners within a particular legal system. From this perspective, alternative interpretations or the *de facto* situation can only 'harm' the student since it might push them to margins of the juridical field. It therefore makes sense to invest most of the time on the law itself, as the doctrinal approach urges professors to do.

The concentration on the State's position within the context of the Israeli domination over the occupied territories, not only renders it legal in the eyes of law students, but promotes settler colonial practices. Thus, presenting the Israeli settlements as both legal under international law and holding no influence over the occupied population, facilitate not only the acceptance of the Israeli territorial expansion into the West Bank as legitimate, but also, as Veracini suggests, it allows the deterritorialization, that is, the transfer, of noncitizen Palestinians.[1135]

This specific pedagogy also assists settler colonialism to remain formally invisible. By constituting settler colonial practices as 'legal', the more visual aspects of the occupation and its manifestation on the ground, stay beneath the surface.[1136] One consequence is that Israeli law schools are able to teach and practice liberal legal concepts, within a non-liberal reality and they do this by maintaining a distinction between the law and reality.

[1135] Veracini, *Settler Colonialism: A Theoretical Overview* (n 330) 81.
[1136] ibid 15.

Chapter 7: Spatial Ambiguity and Fragmentation

In 2016, the Israeli Ministry of Environment Protection passed a new law that prohibits retail chains from providing customers with free shopping bags, requiring them to charge 2p per bag.[1137] The Israeli Law for the Reduction of Use of Disposable Carrier Bags came into force in January 2017,[1138] and supermarkets all across the country, including those run by Jewish settlers in pre-1967 Israel and also in the Occupied Palestinian Territories, began charging customers for plastic bags. A couple of days later, a settlers' organisation called 'The Legal Forum for a Zionist and Democratic Israel' approached all the large supermarket chains operating in Israeli settlements within the West Bank, asking them to drop the bag charge.[1139] The new 'Bag Law', the organisation claimed, does not apply to the occupied Palestinian territories, and can therefore only be enforced in Israel.[1140]

While the large supermarket chains had assumed that the 'Bag Law' was applicable in the West Bank settlements, the Forum's instructions appeared to be legally sound. Indeed, when the law was drafted, the Israeli Ministry of Environmental Protection failed to formulate it in a way that rendered it applicable to the Occupied Palestinian Territories, a region that at least legally speaking is not part of Israel proper. Israeli civil law does not apply directly to the Occupied Territories. Straightforward application of Israeli law to the West Bank would constitute a de jure annexation of the territory, and so, Israeli legislators had developed a variety of mechanisms to apply the law to Israeli citizens in the West Bank, and not to the territory itself.

What, one might ask, led the supermarket chains to assume that the law applies to the Jewish settlements in the West Bank? How was the Ministry supposed to formulate the law so that it would apply to settler supermarkets in the West Bank? And are Israeli settlers against environmental protection? As negligible as it might seem, the dispute over 2p touches the core of the complex relationship between law and space in Israel and the Occupied Palestinian Territories and illustrates the wide gap between the legal status of these territories

[1137] Law for the Reduction of Use of Disposable Carrier Bags 2016 (IL).
[1138] ibid.
[1139] Elisha Ben Kimon, 'The Settlers: "The bags law does not apply in Judea and Samaria' *YNET* (9 January 2017) <https://www.ynet.co.il/articles/0,7340,L-4904924,00.html> accessed 26 June 2021.
[1140] ibid.

and how Israelis comprehend them. What are Israel's internationally recognised borders and does the State adhere to this definition of its territory? What happened to the Green Line, that used to constitute some kind of border between Israel and the West Bank? And if the Green Line has become irrelevant, why does Israel refrain from describing this area as one united territory?

Law and space are intricately connected.[1141] On the one hand, almost every aspect of the law involves spatial features, while, on the other hand, places and spaces not only bear legal and juridical meanings but are also shaped by the law.[1142] In the most basic sense, space needs law to define it—mark national borders, determine land ownership, and define public and private spaces.[1143] Law, in turn, requires space, to apply to a specific territory. Ultimately, 'law is always "worlded" in some way';[1144] it takes place in a specific location, and likewise, 'there is *nothing* in the world of spaces, places, landscapes and environments that is not affected by the workings of the law'.[1145] Insofar as law and space operate together in shaping our realities, then spatial aspects of the law and legal aspects of space ought to be addressed in the classroom, where law is being taught to future practitioners.

Different spatial and territorial aspects of the occupation could have been addressed in almost every module within the law school. Constitutional Law, for instance, a module that discusses Israel's basic laws, touches upon citizenship laws, and considers questions of equality and human rights in Israel; it could have included either in-depth classes specifically about Israel's occupation, or a thread on the occupation within each and every topic brought up within the module. And yet, the occupation is completely absent from its syllabus and lectures. In a similar manner, Property Law, a module that mainly focuses on land ownership laws, could have explored questions of land acquisition and ownership in the occupied territories, as well as specifically discuss its relation to the international law of war. But by and large, Israel's occupation remains outside the classroom. The fact that the occupation is

[1141] Marie-eve Sylvestre, Nicholas Blomley and Céline Bellot, *Red Zones : Criminal Law and the Territorial Governance Ofmarginalized People* (Cambridge University Press 2019) 23.
[1142] Irus Braverman and others, 'Expanding the Spaces of Law' in Irus Braverman and others (eds), *The expanding spaces of law: a timely legal geography* (Stanford University Press 2014) 1.
[1143] David Delaney, 'Legal Geography I: Constitutivities, Complexities, and Contingencies' (2015) 39 Progress in Human Geography 96, 99.
[1144] Braverman and others (n 1142) 1.
[1145] Delaney (n 1143) 99.

mostly absent, does not mean that the legal studies focus on Israel 'proper' only. As this chapter reveals, the notion of 'Israel' is much more ambiguous and complex and does not simply represent Israel's sovereign territory within the Green Line. The ambiguous attitude toward Israel's occupation, keeping it largely outside the official curriculum while focusing on 'Israel', exposes the elision and amnesia that is central to settler colonial pedagogy.

In this chapter I examine one aspect of Israeli legal training, focusing on the relation between the law and territory (which is much broader than land law). To provide an account of how the settler colonial logic is introduced and rationalised within a liberal legal education system, I begin by presenting the ambiguity that characterises the description of space in the classroom, and in Israel more generally. Next, I describe how the space between the Jordan River and the Mediterranean Sea is presented in the classroom and discuss the fragmentation strategy that is deployed by law professors, the judicial system and by the State itself. I then turn to account for the differences between Israel's description of its territory and international perspectives on these issues, and the manner in which these disagreements are mediated in class. The chapter's concluding remarks discuss the implications and consequences of these three pedagogical aspects of law and space—ambiguity, fragmentation, and the inconsistency between the local and international.

7.1 Spatial Ambiguity

When teaching law in the United Kingdom, one of the phrases that I find myself uttering repeatedly is 'England and Wales'. As English, Welsh, Scottish and Northern Irish laws are at times different, I must constantly remind my students of the specific territory and jurisdiction I am discussing. Therefore, instead of asking whether it is legal to possess cannabis in the United Kingdom, the proper question is whether it is legal to possess it in England and Wales. By and large, when specifically addressing a particular territory within the United Kingdom, the students in class have approximately the same understanding of what one means. It is clear what constitutes England, Wales, Scotland, and Northern Ireland and where their borders are located. Moreover, when one mentions England and Wales, it implicitly suggests that Scotland and Northern Ireland are not included. Likewise, when a law teacher says 'Scotland' in class, each student's understanding of its meaning is quite similar. This is not to suggest that questions regarding jurisdiction and territory do not exist in the

United Kingdom, nor does it suggest that all spatial disputes are settled. Yet, the United Kingdom is a good example of a sovereign country that applies various legal systems to distinct territories, in a clear and informed manner.

By sharp contrast, when a law professor says 'Israel' in an Israeli classroom, that six lettered word bears a variety of different and conflicting meanings. The utterance 'Israel' might signify for some students the territory within the Green Line, the one agreed upon following the 1949 armistice agreements and recognised by the international community as Israel's legal borders. For others, 'Israel' might also include the Syrian Golan Heights, East Jerusalem, and the West Bank, or it might include only some of these territories and not others. Still others might understand 'Israel' to refer to the entire area between the Jordan River and the Mediterranean Sea, which includes the Syrian Golan Heights and the Occupied Palestinian Territories, including or excluding the Gaza Strip. Most of the time, these different interpretations of what 'Israel' means are not discussed and left for every student to decide. And yet, one cannot overstate how important the issue is for determining the adequate application of the law.

Already in 1948, the Jurisdiction and Authorities Ordinance[1146] provided a cryptic definition of the State's area of jurisdiction, stating that: 'every law that applies to the whole State of Israel will be seen as applying to the entire territory that includes […] the territory of the State of Israel'.[1147] Apart from a tautological definition of the State's territory, the Ordinance did not include a map or any description of Israel's actual borders.[1148] Similarly, the Criminal Law Act of 1977[1149] provides a distinction between internal and external offences, as well as a list of offences that are subject to extraterritorial jurisdiction,[1150] but does not offer a clear definition of 'Israel's territory'. Section 7(c) of the Act provides that 'Israel's territory' is 'the sovereign area of the State of Israel including its territorial waters, as well as seacraft and aircraft which are registered in Israel'.[1151]

[1146] The Jurisdiction and Authorities Ordinance 1948 (IL).
[1147] ibid 1.
[1148] Rubinstein and Medina (n 686) 79.
[1149] Criminal Law Act 1977 (IL).
[1150] ibid 13–17.
[1151] ibid 7(c).

The opacity in which different laws describe Israel's territory corresponds to the Israeli regime's ongoing deliberate refraining from addressing its territorial borders issue. As the Jurisdiction and Authorities Ordinance suggests, the Israeli government avoided determining the state's borders from the outset, as if expanding into neighbouring territories was only a matter of time. Israel's *intentional ambiguity* toward the boundaries of its sovereign territory can be understood within the framework of settler colonialism as a manifestation of a persistent drive to expand.[1152] Patrick Wolfe maintains that the logic of the settler colonial regime, that displaces the natives in order to replace them and take over their territory, manifests itself in 'a range of historical practices that might otherwise appear distinct'.[1153] Once one accepts that the settler colonial project is a structure rather than an event then it becomes logical to treat its territorial borders as ambiguous, at least as long as there is more land available to settle and invade.

The Israeli government aimed to blur the Green Line demarcating the 1949 Armistice Agreements shortly after the 1967 war.[1154] Already in November 1967, the government decided that the state map will not include the 1949 armistice borders, suggesting that Israel's borders actually encompass the West Bank, Gaza Strip, East Jerusalem and the Syrian Golan Heights. In a similar vein, the Green Line had been removed from almost all official documents.[1155] The Israeli education system has also contributed to this blurring process by providing students with misguided and indistinct understanding of the state's borders,[1156] erasing the Green Line from textbooks and atlases,[1157] and more recently, authorising and facilitating school fieldtrips to illegal settlements and historical sites located in the occupied territories, presenting the area as an integral part of Israel.[1158]

[1152] Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (n 19) 167.
[1153] ibid 163.
[1154] Rubinstein and Medina (n 686) 96.
[1155] ibid.
[1156] Larissa Fleishman and Ilan Salomon, 'The Answer to the Question "Where is the Green Line?" is "What is the Green Line?" 29: 26–52' (2006) 29 Alpayim 26, 30, 49.
[1157] Gordon (n 159) 7.
[1158] Talila Nesher, 'Israeli Students to Visit West Bank City of Shiloh on School Trips, Education Minister Says' *Haaretz* (13 December 2011) <https://www.haaretz.com/2011-12-13/ty-article/israeli-students-to-visit-west-bank-city-of-shiloh-on-school-trips-education-minister-says/0000017f-f6c5-ddde-abff-fee528c40000> accessed 11 October 2023.

Public International Law

Law schools have not been immune to Israel's drive to expand. An example of spatial ambiguity occurred during one of my Public International Law lectures, when one of my classmates raised their hand to ask about the legal status of the West Bank. 'Can I ask a question about the labelling of goods from the Territories?', the student queried our professor during a lecture about the law of occupation. 'How does it affect us? And is it legal at all?'.[1159]

The questions referred to the ongoing debate regarding the labelling of products originating from illegal Jewish settlements in the West Bank. While the Israeli government claims that such goods should be labelled as originating from 'Israel', the Court of Justice of the European Union ruled in 2019 that 'foodstuffs originating in a territory occupied by the State of Israel must bear not only the indication of that territory but also, where those foodstuffs come from a locality or a group of localities constituting an Israeli settlement within that territory, the indication of that provenance'.[1160] Moreover, these goods will not be subjected to the preferential trade agreements Israel signed with the EU.[1161] Thus, from the European Court of Justice's perspective, the borders of the State of Israel are clear. Israel denotes the areas agreed upon in the 1949 Armistice Agreements, and therefore the goods produced in the West Bank should be labelled so as to advise consumers about their actual origins—which is not Israel. The Court based its decision on international law and Israel's borders as recognised by the international community.

To the student's questions, our professor responded that we should understand the rationale informing labelling in the following manner: 'If you are in a position that the settlements are illegal, then there is a rule in international law, stating that an illegal action of a state should not be recognised, and then the question that can be asked is whether to allow import of the products at all'.[1162] The professor proceeded:

[1159] 'Public International Law Lecture' (n 1064).
[1160] *Organisation juive européenne, Vignoble Psagot Ltd v Ministre de l'Économie et des Finances* [2019] CJEU Case C-363/18, ECLI:EU:C:2019:954 [60].
[1161] Neve Gordon and Sharon Pardo, 'The European Union and Israel's Occupation: Using Technical Customs Rules as Instruments of Foreign Policy' (2015) 69 The Middle East Journal 74.
[1162] 'Public International Law Lecture' (n 1064).

> Another aspect is that consumers have the right to know all sorts of things about the products they purchase, not only their nutritional content but also if this tuna was obtained by harming dolphins, and in the same manner they are entitled to know if this product originated in an area that they may not want to cooperate with, that they think is illegal. Therefore, products should be marked so the European consumer can know where they originate from such as the Occupied Territories and not from Israel'.[1163]

The professor's answer described two positions, one that sees the whole settlement enterprise as illegal and therefore implies that all products that originate from illegal settlements should be banned. The second answer reflects the position made by the Court of Justice of the European Union,[1164] according to which, each consumer must be informed as to the origin of each product, so they can decide whether to purchase goods from the settlements. While the different positions are clear, the borders demarcating the occupied territories in this short discussion remained ambiguous.

In their question, the student simply used the term 'Territories', and from the context of the class discussion one could infer that the student was referring specifically to Israeli settlements in the West Bank. The professor used the wording 'the Occupied Territories and not […] Israel', from which one could infer that the professor too was referring to the West Bank and that 'Israel' and the 'Occupied Territories' are two distinct territories. But since the professor did not use a map in the presentation, it was not clear whether the professor's observations aligned with the Court of Justice of the European Union which refers to the area as 'a territory occupied by the State of Israel', including as it were not only to the West Bank but also to East Jerusalem and the Syrian Golan Heights.

While Israel's occupation had been mentioned several times throughout our Public International Law module, we never took the time to define Israel's territory in the classroom. We did discuss the different areas comprising the territory between the Jordan River and the Mediterranean Sea and their status throughout that year. Our professor used the Gaza Strip as an example of the concept of 'effective control' in international law, questioning whether the area is subject to a belligerent occupation following Israel's unilateral disengagement in 2005. To illustrate the concept of self-determination, our professor presented Basic-Law: Israel - the Nation State of the Jewish People, which explicitly determines that '[t]he

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[1163] ibid.
[1164] *Organisation juive européenne, Vignoble Psagot Ltd v Ministre de l'Économie et des Finances* (n 1160).

complete and united Jerusalem is the capital of Israel' (see chapter 5),[1165] implying that East Jerusalem is an integral part of the State's territory. Under the law of occupation, we discussed the legality of the Israeli settlements in the West Bank and the Fourth Geneva Convention (see Chapter 6). These isolated remarks do not really clarify where Israel's borders lie, and the ambiguity that prevails does not address the elephant in the room.

Abstaining from a clear explanation and analysis of Israel's territorial borders in the classroom, including the complexity surrounding this matter, leaves the matter vague and contributes to the production of a common sense in the classroom, in which a shared perception of Israel's territory as a fluid, undefined and changeable space is slowly formed among the students. This 'philosophy of nonphilosophers', as Gramsci describes it, is gathered from different social settings and absorbed uncritically by the individual.[1166]

Ambiguity, according to Paulo Freire, is embedded in the situation of oppression and imposed on individuals, transforming them into 'ambiguous beings', who are 'partly themselves and partly the oppressors housed within them'.[1167] Applying this point of view to scrutinise the law classroom allows us to understand ambiguity as much more than a rhetorical tool. If ambiguity is embedded in the situation of oppression, then it is, in fact, less of a strategy and more a component of the reality and the setting in which Israeli legal education takes place. Lending the concept of 'ambiguous beings' to describe Israeli law students, allows thinking of the new knowledge embedded in them, or deposited, in Freire's words, throughout law school, as constituting them as 'ambiguous beings', who are inculcated with the ambiguity that is rooted in the situation of oppression, and turn into carriers of this ambiguity.

From a pedagogical perspective, maintaining ambiguity regarding the status of East Jerusalem and the Syrian Golan Heights, yet again suggests that the stances of both Israel and the international community are equally legitimate, which allows the professor to avoid 'picking a side', while relying on the fact that from the Israeli point of view, which is the perspective of most of the students, East Jerusalem and the Syrian Golan Heights are a legitimate part of Israel. The professor's seemingly abstract position which refuses to offer a

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[1165] Basic-Law: Israel as the Nation-State of the Jewish People s 3.
[1166] Gramsci, *Prison Notebooks* (n 386) 333.
[1167] Freire (n 388) 127.

clear position on the legal status of the different areas, legitimates in turn, the different ways to interpret the correct application of the law. In this case, the law is presented within a context but since the context is intentionally made ambiguous numerous interpretations are cast as legitimate. This pedagogical approach, whereby the context is invoked but is presented as ambiguous and therefore can be legitimately interpreted in many ways informs liberal legal education and as we will see plays a key role in bridging liberal law with an illiberal political reality.

In a situation of belligerent occupation, in which a large population of noncitizen Palestinians is subjected to Israeli control, the ambiguous description of space in the classroom constitutes the law as an Israeli domestic issue, and when disagreement arises the Israeli High Court of Justice is responsible for adjudicating the different positions. Even if (or when) Israel acts contrary to international law provisions, it does not matter because the government's policy decisions are presented as legal, based on a dual approach to international law which provides the local authority to determine the legality of the case at hand. This perspective works to inculcate Israeli law students into a juridical field that consider its domestic law and its local interpreters as superior to international law and its Supreme Court as the highest instance. With Israel's ongoing control over the West Bank, and continuous siege of the Gaza Strip, the relevance of international law in this territory is crucial. This perception is a central component of the common sense of the Israeli juridical field in general, and is fundamental in forming Israeli lawyers that accept only Israeli interpretation of international law.

Presenting the space between the river and the sea as ambiguously defined is thus more than a tool to avoid explaining Israel's controversial borders and dubious annexations. Such ambiguity conveys a liberal legal system, operating within an undefined territory with no clear borders, as not only legally possible, but as a legal situation. Combined with selective and vague references to the occupied population of noncitizen who are also subject to Israeli control, ambiguity works to constitute this reality as legal, and at the same time, free of international law's criticism or intervention.

It also advances the settler colonial perception of dynamic space, that relentlessly changes and does not remain fixed. If the borders are not set, they can always move and change, and this spatial flexibility is constituted as reasonable in the classroom. This perception of

borders, it should be noted, is not only uncommon today, but is also contrary to international law provisions, which set a short list of ways to acquire territory.[1168] Unilateral annexation, transferring the occupying power's population to occupied territories, or effacement of recognised borders, do not appear on this list. Yet, such actions are produced as legal in the law classroom. The pressure to move and expand is possible not only because of borders' ambiguity, ambiguity constitutes such pressure as a legitimate act, that coincide with relevant law.

Caroline Elkins and Susan Pedersen explain that 'settler colonialism is defined […] also by a particular structure of privilege'.[1169] The description of space as ambiguous conceals the fact that this movement works only in one direction, as Israelis, and specifically Israeli Jews, are free to wander around the territory between the river and the sea, but Palestinians, and specifically noncitizen Palestinians, are subject to severe movement restrictions. The focus of class discussions on space and particularly its ambiguity, while disregarding the different subjects of Israeli control, constitutes the privilege of Israeli citizens as deriving from a different citizenship status, but take place in an ambiguous space that is allegedly disconnected from civil statuses. In this manner, ambiguity constitutes a shared space that grants excessive rights to some people, and excludes the rights of others, that is presented as legal in class, because as elaborated below, the territory is constituted as fragmented and not as one cohesive unit.

Civil Procedure

The firm connection between territory and law was emphasised in several modules in the course of my LLB studies. Most of the time, this connection was illustrated in a manner that was isolated from the actual territory in which we were studying law. One such instance occurred in a Civil Procedure module, during my third year in law school, when the professor introduced the concept and procedure of jurisdiction in civil proceedings, including subject matter, territorial and international jurisdiction. While the words 'Israel', 'territory', 'abroad', and so on, were mentioned repeatedly in our lectures and modules, the definition of Israel's territory remained relatively vague.

[1168] RY Jennings, *The Acquisition of Territory in International Law* (9th edn, Manchester University Press 2017) ch 2 The Modes of Acquisition.
[1169] Elkins and Pedersen (n 332) 4.

Civil Procedure was a required module in my LLB program. While incorporating some substantive aspects, it was a very technical and practical module. Over two terms, we had 19 one hour and a half lectures, and another 4 one hour and a half tutorial sessions, all delivered by the same professor. During the first term, our lectures took place in a large lectures hall, with about a 100 students attending lectures. Our tutorials and second term lecture were smaller, with only a few dozens of students attending the sessions. Our assessment included a written assignment based on a field observation in court, and a final exam.

My Civil Procedure professor explained at the outset that '[t]he idea of jurisdiction is that the court is an institution of the state and by virtue of that, it is given the authority to make decisions, that is the ability to translate words into force, namely the power to say that you will go to jail and the police will actually come and take you to jail'.[1170] 'This is the authority of the judiciary', the professor continued, 'the whole idea of the legitimacy of the judges and the idea that they can do what they can do, is related to jurisdiction, that is, that a court can make decisions only in matters that it is authorised to discuss'.[1171] Territorial jurisdiction, which translates in Hebrew to 'local jurisdiction', is one such jurisdiction that the court is expected to properly attain in order to hear a case. The professor stressed that territorial jurisdiction is perceived as less crucial when compared to subject matter and international jurisdiction, as it simply questions where, geographically, one should file a civil lawsuit. 'Justice Levin once compared it to opening a phone book and simply finding out where you need to file your lawsuit',[1172] the professor added to illustrate courts' disregard of territorial jurisdiction. 'As far as the courts are concerned', the professor reiterated, 'the way of thinking is that in a small country like Israel, as the courts like to define it, it actually doesn't really matter where you filed your lawsuit'.[1173] While Israel is indeed a relatively small country, it was not clear to which territory the professor and the courts, referred to when stating 'Israel'.

The professor then turned to explain how territorial jurisdiction works in practice. If one knows that their lawsuit should be filed to the District Court, territorial jurisdiction simply sets in which out of the six District Courts in Israel, from a geographical perspective, the

[1170] 'Civil Procedure Lecture' (18 January 2019).
[1171] ibid.
[1172] ibid.
[1173] ibid.

lawsuit should be filed. At that point, the professor described Israel's territory, in a very interesting manner:

> So basically, we have six districts in Israel—Tel Aviv, Central District, Jerusalem, Northern District, Haifa, and the Southern District—in each of them there is one District Court, so we file lawsuits to District Courts according to the six districts. Within each district there are several Magistrates' Courts, and they all have jurisdiction [...], you can file a lawsuit in any of the Magistrates' Courts in the district.[1174]

This description of Israel refers to districts, rather than borders. Even though they were not explicitly mentioned, one can infer that this vague description includes the occupied Syrian Golan Heights and occupied East Jerusalem, as Israel already unilaterally applied its domestic law to both these territories. Interestingly, although Israel's borders are quite ambiguous, none of the students in the classroom asked what this description of Israel encompasses, and more importantly, what is left unsaid.

Evidently missing from the list of districts is the occupied West Bank and its illegal settlements and outposts. That short list of the six districts was also projected on a large screen in our classroom, yet no one raised their hand to ask how territorial jurisdiction works for Jewish Israeli settlers and for noncitizen Palestinians. Our professor also refrained from addressing this aspect of territorial jurisdiction, and did not explain that in fact, Israeli illegal settlements are not subject to territorial jurisdiction, and are generally referred to the Jerusalem District that holds a residual authority in matters of territorial jurisdiction. Sharing this piece of information would demand our professor to explicate why territorial jurisdiction is not available in the West Bank, and maybe even elaborate on the different manoeuvres that Israel had come up with over the years to rationalise and thus bypass this problem.

My professor explained that if a lawsuit involves a land claim, then it must be filed in the district in which the land is located. With the list of six districts in front of our eyes, none of us asked what happens if the land under dispute is situated in a West Bank illegal settlement. The professor added another rule, which sets that in some situations, a lawsuit must be filed in the district where the respondent resides. Once again, even though there were about a hundred students in the classroom, no one asked what happens if they live in an illegal

[1174] ibid.

settlement in the West Bank? The professor did not address any of these possible scenarios so, we continued with our lecture. Our professor, it should be stressed, did not mention the West Bank even once throughout our year-long module.

These scenarios, it should be stressed, are not fictional, with almost half a million Jewish Israeli citizens residing in the occupied West Bank (not including occupied East Jerusalem), it is probable that many of the students that were sitting in that very classroom, will encounter these questions in their future careers, when they will aim to serve a settler for a civil lawsuit. Indeed, it is likely that some of the students were settlers from the West Bank.

Louis Althusser stresses the significant role played by the education system in the production of a skilled labour force, its reproduction as competent to work in the system, and ensure its subordination to the dominant ideology.[1175] Following Althusser, within the Israeli context, the production of excellent law students, who are familiar with every aspect of the civil procedure is insufficient. To be able to join the Israeli juridical field and operate within it, Israeli law students must be inculcated with the ideology that allows it to apply different legal systems, to different people, in a fragmented but united territory. This does not necessarily demand explicit utterances; the dominant ideology can be transmitted through the hidden curriculum, and at times, learning not to ask questions is another important skill that serves the interests of dominant groups.

In our tutorial (that was delivered by the same professor) we discussed the concept of international jurisdiction. The professor stressed that '[i]nternational jurisdiction, which is essentially the authority of an Israeli court to compel a foreign defendant (that is, a defendant who is not Israeli and is not present in Israel) to litigate in an Israeli court. The question of international jurisdiction asks when an Israeli court can hear a lawsuit against a foreign defendant'.[1176] The professor emphasised that there is an issue of legitimacy here, as 'As long as we are concerned, when we exercise this authority and power toward members of our society, then it has legitimacy, it is our decision as a society'.[1177] The question, the professor continued, is 'when it is legitimate for a foreign court to hear the affairs of foreign people,

[1175] Althusser (n 11) 5–7.
[1176] 'Civil Procedure Tutorial' (11 January 2019).
[1177] ibid.

[...] there should be some kind of infrastructure that would justify the activation of the sovereign power against people who are foreign defendants'.[1178]

The professor explained that the guiding concept regarding the issue of international jurisdiction is a territorial approach, suggesting that 'I, as a court, acquire authority in relation to people or entities that are either in Israel—the easiest—or that operate in Israel in some manner'.[1179] But is it really the easiest? The only description of Israel's territory that had been provided in this module had been the list of districts, that clearly does not include the West Bank. Are settlers in the West Bank considered in the eyes of the civil procedure as present in Israel? And if not, should they be served according to Israeli local procedure or maybe following the rules of international jurisdiction? The professor did not even mention this issue, and none of the students asked about it. Our professor managed to deliver the entire topic of civil jurisdiction in Israel, including explicitly discussing territorial and international jurisdiction without mentioning the occupied territories, Israeli illegal settlements, Jewish Israeli settlers or noncitizen Palestinians even once. It was a very good example of the working of liberal legal education, that manages to disregard the reality in which it operates and present a picture that suits how it wishes to be perceived.

7.2 Fragmented Space

How is the space between the river and the sea described in the law classroom? Throughout my law studies, the most direct and thorough discussion of Israel's territory and borders took place during my first year, in a Criminal Law module. While issues relating to territory came up time and again, the central issues crystalised during the class that dealt with territoriality and extraterritoriality in criminal law (see Chapters 4 and 6).

'Every legal system has territorial borders', the first slide of the PowerPoint presentation declared at the outset of the 'territorial and extraterritorial jurisdiction' lecture.[1180] The reason, the professor explained, is because the application of criminal law is an expression of sovereignty over a defined territory, involving enforcement of laws that in many situations entail the employment of physical force. Enforcing the law beyond state borders, the

[1178] ibid.
[1179] ibid.
[1180] Criminal Law, 'Presentation: Territorial Application of Israeli Criminal Law'.

professor continued, could in fact violate the sovereignty of another country. The next slide presented a question, 'So what is the problem when one says: Criminal law will apply only in Israel's territory?'.[1181] The professor provided four answers: '1) the Territories; 2) El-Al aircraft; 3) Nazis; 4) Money laundering'. In all four situations, the professor made clear, criminal law transcends Israel's borders.

All four examples involve situations in which Israeli law does not apply territorially, but the State holds an interest to apply it in an extraterritorial manner (the professor did not mention that Israel does so at times legally and in other instances illegally). The 'El-Al aircraft' refers to every Israeli aircraft and seacraft that operate outside Israel's sovereign area, where Israeli law does not apply territorially but continues to apply on the craft itself. The 'Nazis' symbolises the role that Israel took on shortly after World War II and the establishment of the state, to prosecute and punish Nazis and their collaborators, who were situated outside Israeli borders. 'Money laundering' denotes international criminal activity that take place across the globe, and therefore demands international conventions and cooperation.

Binding 'the Territories' with these other examples suggests that it is yet another legal issue of extraterritorial application, but it is much more complex than that. By 'the Territories', the professor meant that while the West Bank is not part of Israel's sovereign area, the large number of Israeli citizens who reside there requires the application of Israeli law to the area. 'The settler colonialist [contrary to the immigrant] refuses to come under local laws', as Raef Zreik asserts, '[h]e is the law […]. He accepts no partners in making the law. The native […] cannot be the co-author of the nomos of the land'.[1182] Indeed, Jewish Israeli settlers take the law with them, so Israeli domestic law continues to apply to them extraterritorially, even though they are located outside Israel's sovereign area, where military law applies. Thus, spatial ambiguity as it appears in the classroom also constitutes the regime of Jewish privilege as legal, or at least operating within the law.

The professor went on to note that under a chapter dedicated to 'the applicability of criminal law according to the place where the offence was committed', Israel's Criminal Law Act of 1977 distinguishes between internal and external offences. An internal offence is 'an offence

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[1181] ibid.
[1182] Zreik (n 325) 357.

committed in whole or in part within Israel's territory'.[1183] An external offence is residually defined as any offence that is not internal.[1184] According to the Act, 'Israel's penal code will apply to any internal offence'.[1185]

Given the lack of clear official definition of Israel's sovereign territory and its borders, as elaborated above, my professor decided to describe it in their own words: 'Israel's sovereign territory—according to Israeli law, regardless of what is recognised in international law—does not include Judea and Samaria [West Bank M.R] and the Gaza Strip, but it does include East Jerusalem and the Golan Heights'.[1186]

It should be noted that while describing Israel's sovereign territory, the professor did not mention Israel 'proper', within the 1949 armistice line, yet the professor did mention the West Bank, Gaza Strip, East Jerusalem, and the Golan Heights. This description suggests that the area between the river and the sea is not one united territory that is subject to an Israeli regime but divided into five distinct units. This depiction of space corresponds with the local legal discourse regarding Israel's territory, highlighting the divisions of the territory while avoiding even the slight suggestion that the Israeli regime dominates one cohesive territory, and therefore could be defined as an apartheid regime.

To put these divisions in context, one can go back to the 1967 war, when Israel occupied the Syrian Golan Heights, East Jerusalem and the West Bank, as well as the Gaza Strip and Sinai Peninsula.[1187] Over the years, Israel negotiated a peace treaty with Egypt, which led to Israel's withdrawal from the Sinai Peninsula by 1982.[1188] The rest of the territory remains under Israeli control, and while Israel acts as the sovereign it treats each area differently and consequently applies different legal regimes to control each one. Israel unilaterally annexed two territories after the 1967 war. By the end of June 1967, Israel applied its domestic law to East Jerusalem and its surroundings,[1189] the municipal borders of the city were extended to

[1183] Criminal Law Act s 7(a)(1).
[1184] ibid 7(b).
[1185] ibid 12.
[1186] 'Criminal Law Lecture' (n 1125).
[1187] Erakat (n 1073) 18.
[1188] Shafir, *A Half Century of Occupation: Israel, Palestine, and the World's Most Intractable Conflict* (n 137) 3.
[1189] Matar (n 143).

‘reunite’ West and East Jerusalem,[1190] and in 1980, following the constitution of Basic-Law: Jerusalem, Capital of Israel,[1191] even the Israeli Supreme Court acknowledged that East Jerusalem and its surroundings had been unilaterally annexed.[1192] In 1981, the Israeli Knesset enacted the Golan Heights Law, and unilaterally applied its domestic law to the occupied Syrian territory.[1193] After the war, the Green Line became known in Israel as demarcating the pre-‘1967 borders’,[1194] signifying the area that is perceived as the ‘legitimate’ part of Israel.[1195] This area has been contrasted with the occupied Palestinian territories, while the Jewish settlements that have been built in these territories have been classified in Israel as disputed and among the international community as illegal.[1196] During the first three decades following the 1967 war, the majority of Israeli society were ambivalent toward the Occupied Territories and the settlement project, and there were several efforts to reassert the Green Line as the country’s legitimate border. Over the years, however, the Green Line has been obfuscated and the border distinguishing pre and post 1967 has been blurred.[1197]

The Criminal Law professor explained that Israel’s sovereign territory does not include the West Bank and Gaza Strip, because the State of Israel itself has been refraining from officially applying its law there. The professor then elaborated: ‘applying the law is an act of annexation, Israel has been avoiding it for fifty years’.[1198] The law is thus presented as a tool of annexation, and so the lack of application of the law to these territories suggests that even as Israel holds on to them it sustains a certain kind of externality—which is the basic idea informing the law of occupation. This implies that legally, each area is subjected to a different form of control according to the distinct legal system that applies to it. Sovereignty is no longer linked to a specific legal system that executive and judicial branches are responsible to uphold and enforce as one would expect in a liberal setting, but rather sovereignty has at its disposal a number of legal systems which are applied based on the territory and/or the identity of the population. The question as to whether a liberal conception

[1190] Yacobi and Pullan (n 144) 114.
[1191] Basic Law: Jerusalem, Capital of Israel 1980 (IL) s 1.
[1192] Benvenisti, *The International Law of Occupation* (n 691) 205.
[1193] The Golan Heights Law s 1.
[1194] Yehouda Shenhav, *Beyond the Two State Solution: A Jewish Political Essay* (Polity Press 2012) 5.
[1195] ibid.
[1196] Rubinstein (n 277).
[1197] Fleishman and Salomon (n 1156) 29; Hajjar, ‘Zionist Politics and the Law: The Meaning of the Green Line’ (n 687) 44.
[1198] ‘Criminal Law Lecture’ (n 664).

of the rule of law can tolerate this model of sovereignty and how it might impact basic liberal assumptions is not discussed in the classroom.

As elaborated in previous chapters, even though Israel did not annex the West Bank or apply its domestic law to the territory it still maintains de facto sovereign control over almost every aspect of the lives of the occupied population there. In a similar vein, the fact that the Israeli military is not present on the ground in the Gaza Strip, does not mean that the area is not subject to Israeli domination. The fragmentation of space plays a significant role in the sensemaking process that takes place in class and constitutes the reality on the ground as consistent with liberal law. Referring to each territorial unit separately, not only obscures Israel's domination over the entire area, but suggests that the application of different laws to different individuals makes sense. After all, if Israel within the Green Line is a liberal democracy, then the State's legal system should apply equally to its citizens. But at the same time, if the West Bank is subject to a belligerent occupation, then the occupied population should be subject to military law, which is aimed to protect it as long as the occupation lasts. Referring to the territory as contiguous and united would suggest that an apartheid regime is operating between the River and the Sea. Fragmentation thus serves to present Zionist territorial expansion as legal, concealing the settler colonial logic informing it.

The professor's description of the territory between the River and the Sea is quite dynamic. The professor briefly described how the 1967 Israeli occupation began and then turned to explain how Israel unilaterally applied its domestic law, first to East Jerusalem, and then to the Syrian Golan Heights. While the professor explained that Israel did not annex the West Bank, the professor intimated that this might happen in the future. The professor's description elides the violence of territorial and legal annexations and thus normalises the settler colonial pressure to expand. And indeed, of the almost 100 students sitting in the classroom not a single one asked about the legality of legal annexation.

The division of the territory between the Jordan River and the Mediterranean Sea as five distinct areas—Israel within the Green Line, the Syrian Golan Heights, East Jerusalem, the West Bank and the Gaza Strip—is part of Israel's strategy of maintaining its domination over the entire territory. Jeff Halper argues that 'since 1967 Israel has laid a matrix of control over the West Bank, East Jerusalem and Gaza', emphasising that 'the issue is one of control, not

simply territory'.[1199] Richard Falk and Virginia Tilley accentuate that Israel is dependent on geographic fragmentation, arguing that this method serves also to obscure the type of regime, which they claim is best characterised as an apartheid.[1200] They maintain that the Israeli regime operates by controlling four distinct domains each one in a different way,[1201] the area within the 1949 armistice lines,[1202] East Jerusalem,[1203] the West Bank and Gaza Strip,[1204] and outside Mandatory Palestine.[1205] The fragmentation of the territory, they maintain, is intricately tied to the fragmentation of the population and allows Israel to treat the Palestinian community within each domain differently. Referring to the first three domains, they claim that the fragmentation obscures Israel's domination over what is de facto a united territory. Thus, presenting the territory between the river and the sea as fragmented constitutes the West Bank as a distinct territorial unit that had not been annexed to Israel, not de jure, but also, not de facto. This continues to produce the West Bank as a territory that is subject to a belligerent occupation, and therefore administered according to international law provisions. Focusing on its spatial distinction while disregarding the occupied population in the West Bank forms this as a territorial dispute, obscuring the implications of spatial divisions on rights violations that Falk and Tilley expose.

In a series of reports, a similar argument has been made by international human rights organisations like Amnesty International and Human Rights Watch, which actually followed the footsteps of Palestinian and Israeli human rights organisations.[1206] All of the human rights organisations characterise the space between the River and the Sea as one territorial unit. The Israeli rights group B'Tselem, for instance, claims in its report that 'the geographic space, which is contiguous for Jews, is a fragmented mosaic for Palestinians'. The organisation

[1199] Jeff Halper, 'The 94 Percent Solution: A Matrix of Control' (2000) 216 Middle East Research and Information Project: Critical Coverage of the Middle East Since 1971 <https://merip.org/2000/09/the-94-percent-solution/>.
[1200] Falk and Tilley (n 146) 37.
[1201] ibid 37–38.
[1202] ibid 39–41.
[1203] ibid 41–43.
[1204] ibid 43–47.
[1205] ibid 47–48.
[1206] Al-Haq – Law in the Service of Man and others (n 1); Sfard, 'The Israeli Occupation of the West Bank and the Crime of Apartheid: Legal Opinion' (n 1); B'Tselem (n 1); Shakir (n 1); Amnesty International (n 1).

further claims that Israel defines and governs each area differently, 'according Palestinians different rights in each. This division is relevant to Palestinians only'.[1207]

One should note that this fragmentation, which manifests itself as territorial divisions and distinctions, not only determines which law is applied to which populations, but also that the law itself is a key tool used to create the fragmentation of space. As Henri Lefebvre points out, '[t]he illusory clarity of space is in the last analysis the illusory clarity of a power that may be glimpsed in the reality that it governs, but which at the same time uses that reality as a veil. Such is the action of political power, which creates fragmentation and so controls it - which creates it, indeed, *in order to* control it'.[1208]

The fragmentation of space alongside the official ambiguity towards the legal status of the space is, I maintain, key for understanding how legal pedagogies reconcile the use of liberal law in an illiberal environment. The Israeli juridical field, including Israeli law schools, tend to take both the fragmentation and ambiguity as a given, and at times, present this reality as forced on Israel. The description of the Israeli settlement project as a given situation that the Israeli legal system must contend with, as if that same very system had nothing to do with this project from the outset, was reproduced into our classroom on different occasions. Presenting this reality as forced upon Israel, clears the path to discuss the fact that Israeli citizens live outside Israeli sovereignty as an issue that seeks a liberal, legal solution, to protect Israeli citizens' right to be tried in their own country. Thus, treating the territory as fragmented works once again to maintain Israeli citizens' supremacy over Palestinian noncitizens, while obscuring the connection between the two by deconstructing space. In this manner, the only legal subject that is constituted in the law classroom is the Israeli citizen, and not the noncitizen Palestinian who is barely mentioned in lectures and module materials.

Spatial fragmentation works much further than merely concealing the illiberal character of the Israeli regime in the law classroom, allowing students to discuss Israeli democracy free of the burden of Israel's occupation. This fragmentation constitutes the Israeli Jew as the central legal subject of the law degree, while erasing the Palestinian from the map—a settler colonial pedagogy par excellence. The focus on every part of the territory with relation to Israel and

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[1207] B'Tselem (n 1).

[1208] Henri Lefebvre, *The Production of Space* (Blackwell Publishing 1991) 320–321.

particularly the Jewish citizens who live there, simply removes ‘Palestine’ from the space between the river and the sea. In other words, accounting for the settlers in the West Bank, the unilateral annexation of East Jerusalem and the Syrian Golan Hights, and not even mentioning Israel proper, leaves the occupied Palestinian territories outside the classroom. In this manner, the settler colonial end, to take the land without the people is achieved, at least on the intellectual level.

7.3 As differently defined locally (Israel) and internationally

Considering Israel’s unilateral acts of annexation, my Criminal Law professor tried to clarify which Israeli areas are recognised by international law and the international community. ‘We need to remember that the vast majority of the states in the world do not recognise Israel’s sovereignty over the Golan Heights and East Jerusalem’.[1209] As for the Israeli position, the professor reiterated: ‘Israeli law sees no controversy—it considers the Golan Heights and East Jerusalem as Israeli territory—offences there are internal offences, even though the world does not recognise it’.[1210]

Thus, from the international community’s point of view, Israel’s sovereign territory is limited to the space within the Green Line only, and its acts of unilateral annexations are void from international law’s perspective. But international condemnations of these actions were ignored,[1211] and today, both East Jerusalem and the Syrian Golan Heights are indeed considered by the vast majority of Israelis to be an integral part of the country’s territory, as well as by the State itself.

One notices how the professor presents the annexation of East Jerusalem and the Occupied Syrian Golan Heights as a disagreement between two legitimate views. On the one hand, Israel which maintains that both areas are subject to its sovereignty, and on the other hand, the rest of the world which do not agree. This presentation of the issue also generates a sense of Israeli solidarity against the international community, which condemns actions that from the Israeli perspective seems undebatable. One can appreciate how the unilateral territorial

[1209] ‘Criminal Law Lecture’ (n 1125).
[1210] ‘Criminal Law Lecture’ (n 664).
[1211] See, for instance: United Nations Security Council, ‘Resolution 465 Territories Occupied by Israel’ (n 707); United Nations Security Council, ‘Resolution 497 Israel-Syrian Arab Republic’ (n 150).

annexation was followed by ‘judicial annexation’—to use Baruch Kimmerling’s phrase[1212]—and how the legality of both these acts is glossed over in the classroom, without a single student questioning the extension of Israeli law to territories that had been occupied and then (illegally) annexed. This is a crucial step in settler colonial pedagogy since it reveals the deployment of law to cover up and legitimise an act of violence—the occupation followed up by annexation of East Jerusalem and the Golan Heights—is presented as something normal and self-evident that requires no further interrogation.

Both East Jerusalem and the Syrian Golan Heights became areas for Israeli territorial expansion. Over the years, large ‘neighbourhoods’, that are in fact settlements, were built in the outskirts of the city of East Jerusalem.[1213] In 2020, approximately 230,000 Jewish settlers were residing in East Jerusalem, and about 360,000 Palestinians.[1214] While Jewish settlers are Israeli citizens, following the annexation of East Jerusalem, the Palestinian inhabitants were granted permanent residence only.[1215] A high degree of segregation is maintained between West and East Jerusalem, with some of the Palestinian neighbourhoods completely detached by the ‘Separation Barrier’. Yet, about 3,000 Jewish settlers reside in Palestinian neighbourhoods,[1216] due to a growing effort of settlers’ groups to take over Palestinian homes and hand them over to Jewish settlers to live in.[1217] Over the years, 33 Jewish settlements were established in the Syrian Golan Heights. In 2020, the total population in the area amounted to 52,500, of which 24,000 are Israeli settlers.[1218]

This pressure to expand the settler colonial project into areas that it unilaterally annexed is constituted in the classroom not only as a disagreement between local and international law, but also, to some extent, as a domestic issue. This description in class suggests that Israel can

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[1212] Baruch Kimmerling, ‘Jurisdiction in an Immigrant-Settler Society: The “Jewish and Democratic State”’ (2002) 35 Comparative Political Studies 1093, 1131.
[1213] Falk and Tilley (n 146) 42.
[1214] ‘Data – Jerusalem’ (n 1088).
[1215] Shafir, *A Half Century of Occupation: Israel, Palestine, and the World’s Most Intractable Conflict* (n 137) 16.
[1216] ‘Data – Jerusalem’ (n 1088).
[1217] Noa Dagoni, ‘The General Custodian “Unsettles” Residents of East Jerusalem’ (2022) 72 Palestine - Israel Journal of Politics, Economics, and Culture <https://www.proquest.com/docview/2674055403?parentSessionId=Nd14YmPnQPpqG865o227ylJ79kfDJT3nvXzbCztmcs8%3D&pq-origsite=primo&accountid=14484>.
[1218] Israeli Central Bureau of Statistics, ‘Population by District, Sub-District and Religion, Sheet 2.15’ <https://www.cbs.gov.il/he/publications/doclib/2021/2.shnatonpopulation/st02_15x.pdf> accessed 20 March 2022.

simply declare the annexation of territories it occupied, and apply its domestic law not only to the land itself and the citizens it settles there, but also to the occupied population who reside there. The legal violence that is inherent to this kind of application of the law was not discussed in our lecture, as our constant focus was on Israeli citizens, and not the local population. The bottom line, it should be noticed, was that Israeli local law overpowers any other law that might apply to those annexed territories, constituting them as an integral part of Israel. In this manner, international law had been understood in our classroom as a more theoretical tool, that might define reality different to Israeli domestic law, but has no impact on the ground.

7.4 Conclusion

What would have happened if on the first day of Law School, during the first session of Introduction to Law modules, professors would project a map of the region on the screen, and ask students to draw Israel's borders, and then earnestly explain the territorial and legal issues surrounding this lack of clear circumscribed sovereign territory? The differences among students' maps would probably be quite significant, as well as the differences between professors and students. Yet, the main issue would be the deliberate description of the fact that not only that Israel has no clear and agreed upon borders for its domestic law to freely apply in, but also, the exposure of the apartheid regime that has been formed between the river and the sea and becomes more and more evident in the region's maps. Spatial ambiguity and the fragmentation of territory are therefore central tools in the sensemaking operation of the Israeli juridical field in general, and in Israeli legal education in particular. To maintain the perception of Israel as a liberal democratic state, one must retain a flexible map of the area, that is able to encompass the lack of clarity of the State's borders, the simultaneous unity and fragmentation of the territory under Israeli domination, and the ongoing conflicts such a dynamic map encounter with international law and the international community.

As Althusser's description of the operation of schools in general suggests, legal education involves three to four years in which 'a certain amount of "know-how" wrapped in the ruling ideology […] or simply the ruling ideology in its pure state […]'[1219] is bestowed in law students. Such a continuous effort that produces a unique perception of space and territory

[1219] Althusser (n 11) 29.

turn crucial within settler colonial context in general, and the Israeli one in particular, as the settler colonial perception and manipulation of space that is described above is not intuitive, and requires ongoing sensemaking processes that reconstitute the territory as dynamic, both in its borders that circumscribe it, but also in its ability to split and reunite at the same time.

Chapter 8: Concluding Remarks

The first text that I was asked to read in law school was *HCJ Eyal Nir*.[1220] My Constitutional Law professor had assigned the text before the second class, which focused on the rule of law. The *Eyal Nir* high court decision dealt with a petition challenging the legality of the Termination of Proceedings and Deletion of Records Regarding the Disengagement Plan Law of 2010.[1221] Also known as the Pardon Law, it exonerated right wing Israeli citizens who had been convicted of criminal offences in relation to their opposition to Israel's plan to withdraw from the Gaza Strip and discontinued proceedings that had begun but had not yet been determined by a court of law.[1222] The *Eyal Nir* petitioners were mostly leftist activists who had been involved in the ongoing struggle against the eviction of Palestinian families from East Jerusalem's Sheikh Jarrah Palestinian neighbourhood. They argued that 'they support, as a sweeping concept, granting amnesty or leniency to any person arrested, suspected or accused of crimes that derive from ideological opposition to one or another political process'.[1223] Yet, they maintained, that a law that pardons only members of one political/ideological group, is illegal since it violates the principle of equality before the law, particularly the freedom of expression and the right to protest of other political groups.[1224] Since I knew many of the petitioners and was part of the ongoing struggle in the Palestinian neighbourhood of Sheikh Jarrah, I was naturally excited that this was the first legal text I was assigned during my legal studies.

The Constitutional Law professor used *HCJ Eyal Nir* to illustrate the formal aspect of the rule of law principle, according to which, all citizens are equally subject to the rule of law. The professor gave us a few excerpts from the ruling that served as a concise background regarding the legislation of the Pardon Law itself as well as a description of how this bill violated the principle of equality before the law. Our professor clarified that eight out of nine Supreme Court Justices agreed that the Pardon Law should remain in force, even though they

[1220] *Eyal Nir et al v Speaker of the Knesset* [2012] Israeli High Court of Justice HCJ 1213/10, Nevo.
[1221] The Termination of Proceedings and Deletion of Records Regarding the Disengagement Plan Law 2010 (IL).
[1222] According to Section 3(a) to the law, only offenses that did not carry a prison sentence were pardoned; ibid 3(a).
[1223] *Eyal Nir et al v Speaker of the Knesset* (n 1220) para 7 J Beinish.
[1224] ibid.

thought it violated the equality before the law principle. The reasons leading to this decision, the professor went on to explain, were that the Court found the Pardon Law to be both proportionate, as it did not exempt those convicted of serious offences, as well as destined for an appropriate purpose, as it promoted a public interest to unite the Israeli society following exacting public strife that caused a rupture within Israeli society. Finally, the professor stressed that the law was mainly declarative, and as the justices claimed, it applied to a limited number of cases.[1225]

The professor went on to explain that eight Justices concurred and saw no reason to abolish the law, and only one Judge, Justice Salim Joubran, wrote a dissenting opinion, claiming, as my professor explained, that the Pardon Law severely breached the rule of law principle as it applied the law differently to individuals that committed similar offences, and that it violated the public interest to maintain equality among social groups.[1226] Justice Joubran, the professor summarised, argued that we do not want to be a state that has such laws.[1227] The analysis was both fascinating and disturbing, but instead of interrogating the different views and their wider implications for the rule of law and a liberal worldview more generally, the professor moved on to discuss the next court decision.

Only two weeks into law school, with four years of study ahead of me, that discussion left me perplexed. The court decision introduced many interesting questions about how the law addresses the challenges rising from the different struggles mentioned, but the context was completely missing from our brief class discussion and as a student I could not make sense of what exactly happened in that lecture hall. The fact that the dissenting opinion to this controversial decision had been written by the only Palestinian citizen who served as a Justice in the Supreme Court, against the voices of eight Jewish Justices, fascinated me, but was not even mentioned in the classroom. The decisions to pardon illegal settlers who fought to settle in an occupied territory and to dismiss a petition filed by Israeli activists who struggled in solidarity with noncitizen Palestinian residents of East Jerusalem against their eviction and dispossession by Jewish settlers who were set to take over their homes, felt like issues that the professor should have at least mentioned in the classroom. Parts of Justice Joubran's

[1225] 'Constitutional Law Lecture' (18 November 2016).
[1226] ibid.
[1227] ibid.

dissenting opinion (that we were not asked to read by the professor) had argued that in the Pardon Law, the legislator effectively declares which ideological standpoint grants citizens with privileges and which does not.[1228] This seemed like a particularly interesting claim to discuss, but it was left unmentioned in our classroom.

The weeks passed by, and my frustration grew as I learned how limited the scope of legal discussion was to be, and as I slowly understood that all my questions and comments were simply irrelevant in the study toward an LLB. I felt that I would never fit in law school. I failed to understand what I was supposed to do there, and my interests revolved around issues that came up in the readings but were never discussed in the classroom. This ongoing frustration turned over time into sheer resentment, and then, to an extensive study of Israeli legal education. My initial question, that led to this PhD project, was, unsurprisingly, what is it about pursuing an LLB degree in an Israeli law school that had been so unsettling to me. Once I managed to answer this question, I was able to formulate the more formal research question that has informed this study: *what does it mean to study liberal law in an apartheid settler colonial setting?*

8.1 The Research

Going through the entire experience of a law student, attending lectures and tutorials, preparing for each class, submitting assignments and studying for exams, as well as participating in a legal practice program, provided me with a rare opportunity to scrutinise Israeli legal education, to offer analytical insights as to the nature and purpose of the Israeli law classroom.

Attending law school after completing an MA in Politics and Government, while working for an Israeli human rights organisation, significantly affected both my law school experience and indeed my thesis. I brought to the classroom a rich understanding of Israeli politics, extensive involvement in local political struggles and a radical critique of the Israeli settler colonial regime and the reality it sustained. While I made some significant effort to moderate my personal opinions during my observations, the knowledge and experience I gathered

[1228] *Eyal Nir et al v Speaker of the Knesset* (n 1220) para 54 J Joubran.

undoubtedly affected the focus of my research, my understanding of the field, and my actual thinking processes and analysis.

My data collection process had been informed by two lines of inquiry. First, I searched for comments, texts, or other materials, that implicitly or explicitly mentioned the Israeli political context, including, for instance, Israel's occupation, Israel's territory and borders and Israel's illegal settlement enterprise. Second, I carefully looked for all those moments in which the topic that was being discussed invited a discussion of the Israeli political context, but where the political context remained outside the discussion. I was interested, in other words, by what was said as well as by what was left unsaid.

The data slowly accumulated, including field notes, class materials, class recordings, syllabuses and reading materials, and after four years I turned to the lengthy process of textual analysis, reading and rereading the materials, in search of themes that repeated themselves across modules and professors. It took me a long time to identify and then conceptualise what had been happening in the classroom. But once I established the recurring patterns in my notebooks, I was able to describe them and later on characterise them as a manifestation of a *settler colonial pedagogy.*

8.2 Settler Colonial Pedagogies

So, what does it mean to study liberal law in an apartheid settler colonial setting? To a large extent, studying law in Israel is quite similar to studying law elsewhere: the political context is hardly present in the classroom. As many critical legal scholars have already shown, this is exactly how liberal law works.[1229] Indeed, as Pierre Bourdieu asserts, liberal juridical fields form legal universes, separating themselves from the realities in which they operate and the societies they are rooted in.[1230] But studying law in Israel, given the ostensible contradiction between liberal law and the settler colonial apartheid reality in which such studies take place is, I believe, a rather uncommon experience.

On the surface, Israel's apartheid regime, including its military domination over the Palestinian territories simply does not exist within the law classroom. It is almost as if there is

[1229] Duncan Kennedy, 'Politicizing the Classroom' (1994) 4 Southern California Review of Law and Women's Studies 81; Kennedy, 'Legal Education as Training for Hierarchy' (n 390).
[1230] Bourdieu (n 417) 815–816.

an invisible gatekeeper standing in front of each class door refusing entry to the apartheid reality. Accordingly, one must look very carefully for those rare moments in which this political reality suddenly infiltrates the classroom, and even more carefully, for so many other moments in which that reality would have assisted the professor in contextualising the discussion but never materialised. This is the essence of Israeli legal education. On the one hand, it intends to provide a liberal legal education to its students, as if it operates in a distinct universe, separate from Israeli political reality. Yet, on the other hand, it invests many efforts in inculcating settler colonial logic to its students, and surreptitiously inducting them into the world of oppression.

Studying liberal law in an apartheid settler colonial setting means, therefore, studying the laws that apply to Israeli citizens only, with an emphasis on Jewish citizens. It means studying the laws that privilege Jewish citizens (and Jewish noncitizens) over Palestinian citizens of Israel, as if they are legitimate laws that do not contradict the basic principles informing democracy and indeed the rule of law. It means not studying about military law or the Military Court System, even though they are part of the Israeli legal system and have been used to try millions of people over the years. It also means not studying the illegal reality in which the Israeli juridical field operates, a reality of illegal occupation, illegal settlement enterprise, and lately, an apartheid regime that constitutes, in many respects crimes against humanity.

Analysing my field notes alongside my class notes, class transcriptions, reading materials and syllabuses, led me to identify several pedagogies that appeared in different classes, in various manners, and varied volumes. These pedagogies, which when taken together can be characterised as *settler colonial pedagogies*, work to facilitate the teaching of liberal law within an oppressive settler colonial setting, that includes an active apartheid regime as well as a prolonged military occupation. The aim of these pedagogies is to bolster a settler colonial logic among future legal practitioners, and to provide law teachers with a toolkit with which to make sense of that logic. In the preceding chapters, I detected and outlined four central settler colonial pedagogies that operate in the Israeli law school—silence and utterance, Judaising democracy, de facto and de jure distinction, and spatial ambiguity and fragmentation.

The core of the settler colonial logic, according to Patrick Wolfe, is 'a sustained institutional tendency to eliminate the Indigenous population'.[1231] While the elimination and dispossession of the native populations characterises all settler colonial projects, it can be executed in different ways.[1232] In the Israeli context, the assimilation of the Palestinian Indigenous community into the Jewish settler one had never been an option.[1233] Thus, the central methods of elimination had changed over time, from violent expulsions and killings during the 1948 and 1967 wars,[1234] to a variety of legal and political mechanisms directed at Judaising the land and dispossessing the Palestinians while increasing the Jewish population.[1235] The law plays a central role in these processes, because it helps rationalise and legitimise the racialised forms of governance informed by the settler colonial project. It mediates the meanings and implications of the 'settler-colonial will',[1236] Jewish supremacy, Palestinian erasure and obscuration, as well as unbridled territorial expansion and provides them with legal common sense through its version of a 'liberal democratic lens'. In this way the Israeli juridical field, is able to accept the law as part of a liberal field that is subjected to a democratic regime.

Settler colonial pedagogies are made up of a variety of different components, some are unique to the settler colonial context, while others appear in an array of different contexts. Yet, their amalgamation together, as well as the particular ways in which they operate in the classroom, make them settler colonial pedagogies. They work together to either conceal or justify the ongoing process of elimination and dispossession, and make sense of the operation of an alleged liberal legal field within a reality of apartheid and settler colonialism.

Silence and utterance is a pedagogy that exists in every classroom. It can be defined also specifically as a settler colonial pedagogy, as within this particular context, and in collaboration with other settler colonial pedagogies, it is able to provide a very high level of insulation, mute the settler colonial reality and emphasise the liberal universe that is produced

[1231] Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (n 19) 163.
[1232] Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 17) 402.
[1233] Rottenberg (n 21).
[1234] Masalha (n 42); Wolfe, 'Purchase by Other Means' (n 22) 133–136.
[1235] Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 17) 401.
[1236] Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (n 19) 167.

in the classroom. Silence and utterance allows law teachers to mute some aspects of the law, while emphasising others. They work together, operating in different registers and in a variety of volumes, as well as in varied ways to promote the settler colonial logic. They do this through a complete disregard of the existence of military law in the law school curriculum, by emphasising liberal aspects of Israeli law and concealing its settler colonial ones, by remaining silent about the specific circumstances informing a particular court decision while at the same time erasing Palestinian history and geography from the discourse. Therefore by juggling silence and utterance, the unsaid and said, law teachers are able to curtail or avoid any questioning of the political structures underpinning Israeli law and thus control the discourse accordingly. This way, liberal and democratic aspects are emphasised in the classroom, and settler colonial, apartheid related issues remain unsaid and untreated, to the point where Israeli law students are almost completely unaware of them.

Judaising democracy is a settler colonial pedagogy that works to settle the evident inconsistencies inherent to the definition of the State of Israel as both Jewish and democratic. Instead of admitting that Jewish supremacy, guaranteed by a variety of laws that are taught in law school, contradicts the democratic principle of equality before the law and therefore violates the rule of law principle, this settler colonial pedagogy is a form of acrobatics that allows law teachers to introduce frameworks that make sense of this discrepancy primarily by Judaising the concept of democracy. This is achieved by portraying the Jewish democracy contradiction as an occasional tension that can be solved whenever encountered, as well as utilising democratic concepts to make sense of Jewish supremacy. Liberal ideas, like the 'rule of law' or 'defensive democracy', are used in order to bind Jewishness and democracy together, and then to defend antidemocratic supremacist legislation. Any criticism of such legislation is portrayed as an assault on democracy itself. This settler colonial pedagogy directly promotes the notion of the supremacy of the settler, and at the same time, sanctions the inferiority of the native.

The *de facto and de jure distinction* is a settler colonial pedagogy that facilitates law professors' ability to focus their teaching on the law itself, while disregarding the reality on the ground. While law is often taught by separating it from the context in which it operates, what distinguishes the *de facto and de jure distinction* from teaching law without context is

that as I show, in many times the context is provided, but it fails to accurately describe the reality in which the law operates. This pedagogy is deployed mainly when issues relating to Israel's occupation of the Palestinian territories come up in class, allowing law teachers to concentrate on the legal aspects only, and refrain from exposing the wide gap between the legal description and the reality it allegedly describes. The de facto and de jure distinction allows law professors to discuss the occupation as if it can be understood solely from a legal analysis. While teaching law without context involves detaching some relevant circumstances, this pedagogy is much wider in scope, as it allows law teachers to ignore reality as it is and introduce the empirical world merely as it is described by the law. For instance, a law professor can present a court decision instructing the government to change the 'Separation Barrier's' route, implying that the rest of its route is legally sound, while disregarding the fact that in numerous other places the 'Barrier' separates Palestinian villages from their agricultural lands, places of work and education, and healthcare services. The professor will also conveniently ignore dozens of similar petitions that were dismissed by the Court. De facto and de jure distinction therefore works to bolster settler colonial logic as it manages to discuss aspects of Israel's occupation, yet present them in bright colours, and make sense of the ongoing dispossession it involves. It acknowledges to some extent that a military occupation exists, but it is introduced as a legal, enlightened project, in the classroom.

Spatial ambiguity and fragmentation is a settler colonial pedagogy that addresses the complexity of teaching law in a contested territory, circumscribed by disputed borders. Space is significant to law, as it constitutes the area in which the law applies and operates. In the absence of a defined territory, it is virtually impossible to apply law and navigate the relevant jurisdiction. In turn, any confusion regarding the applied law makes it difficult to individuals to follow the law and respect it. It is therefore difficult to understand law, without appreciation of the space in which it works and its borders of sovereignty. Within the Israeli context, the juridical field tends to treat the space between the river and the sea, that is subject to Israeli domination, as several distinct territories. Revealing the space as contiguous, forming one territorial unit between the river and the sea, would expose the existence of an apartheid regime, since it would uncover the operation of two legal systems in one space, one for noncitizen Palestinians, and the other for Israeli citizens. Furthermore, as Richard Falk

and Virginia Tilley maintain, the fragmentation of space works together with the fragmentation of the Palestinian population, allowing the Israeli apartheid regime to treat each group, located in a 'distinct' area differently, thus obscuring the existence of the regime itself.[1237] If space between the Jordan river and Mediterranean Sea would have been described in the classroom as contiguous and under Israel's supreme authority, law teachers would encounter a serious problem. Spatial ambiguity and fragmentation allows law teachers to refrain from describing Israel's sovereign territory and the debates surrounding it, or alternately, to fragment the territory between the river and the sea and refer to specific parts of it while ignoring others. Thus, even when explicitly discussing Israel's territory and its borders, this pedagogy allows the fragmentation of the area into sub-territories, to avoid portraying it as one united territory, in which citizens and noncitizens are subject to one Israeli regime.

Deploying these different settler colonial pedagogies in the Israeli law classroom bolsters the settler colonial logic by both masking and rationalising it, while emphasising the liberal aspects of the Israeli juridical field. Settler colonial pedagogies work to construct a specific, limited reality, highlighting Israeli alleged liberal democracy, while obscuring the actual regime that dominates citizens and noncitizens between the river and the sea, by framing what is part of the Israeli juridical field and what is not. Law school's total disregard of Israeli military law and the Military Courts System in the West Bank, for instance, constitutes this legal area as irrelevant to the Israeli lawyer's knowledge, and therefore, sets the boundaries of the juridical field. Moreover, it works to erase indigenous presence in the territory, while constituting the Jewish settler as the native in the area. This is achieved in a variety of ways, from disregarding the illegality of the settlements and the erasure of the Green Line in the classroom, while insisting on calling the West Bank in its assigned biblical name, 'Judea and Samaria', all the way to presenting students with a controversial interpretation of the international law of occupation, as approving of the ongoing dispossession of the Palestinian community and the settlement enterprise in the West Bank.

Simultaneously, settler colonial pedagogies allow law teachers to allocate plenty of time to emphasise Israel's allegedly strong liberal democracy. Turning the spotlight away from

[1237] Falk and Tilley (n 146) 37–48.

Israel's settler colonial project and keeping it behind a liberal-democratic veil is carried out by discussing human rights and liberties, basic laws and judicial review extensively, continuously highlighting their essential role in the Israeli legal system. At the same time, as settler colonial pedagogy dictates, the law professors tend to completely ignore the relevance of such concepts to Israel's occupation and noncitizen subjects. In other words, while human rights are discussed in great depth in a variety of modules, law professors focus on Israeli citizens' human rights, disregarding questions of the access of noncitizen subjects of the Israeli regime to the rights mentioned. The same violations that are routinely discussed in law school with respect to Jews, are almost never mentioned in the classroom or in the reading material with regards to noncitizen Palestinians. The whole discussion of liberalism, democracy, and its different components, is limited to Israeli citizens only, most of the time to Jewish ones.

On a different scale, settler colonial pedagogies allow law teachers to ignore a plethora of court decisions that expose Israel's settler colonial logic, and selectively choose liberal court decisions to bring to class, showcasing Israel's advanced liberalism and highlighting liberal and democratic values. With hundreds of High Court of Justice decisions released every year, it is obvious that some selection is needed, yet, settler colonial pedagogies, with the tools they offer to hide, rationalise and bolster the settler colonial project, inform the choice of reading materials to suit its ends. In other words, court decisions that find their way into syllabuses and reading lists tend to either illustrate Israel's liberal legal system, or be compatible with specific interpretations, that rationalise the settler colonial logic by casting it as liberal.

The settler colonial pedagogies also constitute a specific legal subject of the law. While liberalism claims the legal subject to be universal, in the Israeli law classroom, the Jewish subject is formed as the universal legal subject. This, in turn, works to protect Jewish difference and privilege, while constituting Palestinian citizens and noncitizens as inferior subjects of the law. Jewish citizens are constantly at the centre of attention in the classroom and in class materials, and they enjoy many privileges. It is almost impossible to imagine that subject of the laws that are discussed in the classroom as a Palestinian, whether citizen or noncitizen, except for very specific areas in which a Palestinian name may appear, such as security judgments or serious crime. There are of course exceptions, but overwhelmingly, the

vast majority of the court decisions mentioned in the law school, concern Jewish subjects. This is another manner in which liberalism works to conceal the settler colonial logic and mask Jewish supremacy, as allowing cases concerning non-Jews in the classroom, would expose Jewish privilege and jeopardise the liberal appearance of the juridical field. In Semera Esmeir's words, 'the human is chained to the power of modern state law, not simply because the state's laws are imposed on the human, but because they decide its statue as human'.[1238]

8.3 The Law Student

Masquerade is a pretence or deception, but it is also a 'festive gathering of persons wearing masks and other disguises'.[1239] Visualising the Israeli law school experience as an ongoing masquerade, not only accounts for the disguise that is needed to teach liberal law in the Israeli context, but also adds dimensions of time and movement, a crowd that is taking part in the event, and the important notion of diversity within that crowd. In other words, it captures the continuous quality of that extensive law school pretence, but also its fluctuation and change over time; it accounts for the large number of people involved in this journey, and addresses the difference among them, whether their social roles or their identities.

Israeli legal education offers an intriguing opportunity to scrutinise one of the first stages through which future lawyers and judges are initiated within the Israeli juridical field; it is the site where the specific knowledge, skills, and worldview of the soon-to-be lawyers are introduced and reproduced. To join the Israeli juridical field, it is not enough to master different areas of the law, be fluent in Hebrew, or to be able to draft legal documents, future members of this field must be capable of joining the legal masquerade, presenting itself as a liberal progressive field, while reinforcing the Israeli ongoing settler colonial project.

As this research shows, the Israeli law school, along with other actors in the Israeli juridical field, put effort into the interpellation of Israeli law students in a juridical field that is simultaneously liberal and oppressive, that operates within an apartheid regime while actively enabling and maintaining it. This way, future lawyers will be able to practice law according to the liberal principles that characterise the Israeli legal field, while accepting the settler

[1238] Esmeir (n 387) 2.
[1239] 'Masquerade' (*Dictionary.com*) <https://www.dictionary.com/browse/masquerade> accessed 2 August 2023.

colonial logic that informs that very field. That logic includes the elimination of the Palestinian native, safeguarding Jewish supremacy and the ongoing exploitation of Palestinian natural resources, including land for territorial expansion.

The main contribution of this research lies in its conceptualisation of four distinct settler colonial pedagogies. These pedagogies are not limited to the Israeli political setting, nor are they restricted to legal education, and can therefore be implemented in further inquiries of different academic fields in varying settler colonial settings. The research also offers methodological insights, specifically in its insistence on studying powerful groups, and the extensive four-year fieldwork this inquiry is based on, providing a full, in-depth and firsthand account of the law school experience. This research also adds to the existing body of critical studies that work to expose the relations between liberalism and repression. On a normative level, this dissertation sheds light on the production and reproduction of an alleged liberal legal field that *de facto* facilitates and maintains the ongoing Israeli apartheid regime. If, in Paulo Freire's words, education can be a practice of freedom as much is it can serve as a practice of domination,[1240] then this research offers a critical account of the possible implications and consequences of Israeli legal education, inviting its members to reflect on the pedagogical endeavour they take part in.

Research for this thesis granted me the opportunity to change direction yet continue with my LLB studies, this time as a setting for fieldwork. It also allowed me to undertake this experience with an analytical purpose which in itself reduced my growing frustrations. That change in framing allowed me to unveil the masquerade while fully participating in it, in order to properly probe it. It was only then that I could genuinely embrace the masquerade, and turn into a law student.

[1240] Freire (n 388) 81.

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