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## **Legality and [Dis]membership: Removal of Citizenship and the Creation of “Virtual Immigrants” in the 1967 Israeli Occupied Territories**

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This article seeks to show that liberal law continues to justify and legitimize displacements of minority populations, even in an age of universal human rights. As demonstrated by the Israeli court's 1988 decision legitimating the deportation of Mubarak Awad, citizenship and immigration laws provide juridical justifications for contemporary ethno-national settler projects. In the aftermath of a territorial conflict that defines or redefines the bounds of the state, racially-marked indigenous populations are vulnerable to being legally recast as “aliens” or “virtual immigrants.” National conflict may thus be transformed by legal formalism into a question of immigration law, allowing the power relations that produce state sovereignty to slip into the background.

### **Introduction**

In May 1988, the Israeli government issued a deportation order against Palestinian activist and Jerusalem native Mubarak Awad. In the previous five years, Awad's Palestinian Centre for the Study of Nonviolence had actively encouraged Palestinians to use nonviolent actions such as planting olive trees to halt proposed settlement projects. Awad also encouraged Palestinians in the occupied territories to resist economic and legal colonization by refusing to pay taxes, by boycotting Israeli goods, and by driving on the left side of the road. Most controversially, from the Israeli government's perspective, Awad urged Palestinian refugees in the West Bank to abandon their refugee camps and to walk en masse back to their former homes in Israel. The order to deport Awad cited, “...his open and intensive campaign against Israeli presence in the territories, including a call for civil rebellion, violation of the law, disobedience to orders of the military administration and noncooperation.”

Awad appealed the deportation order to the Israeli Supreme Court. During the course

of the Court's deliberations, the case received extensive coverage in the U.S. and Israeli press and Awad himself later said that following the proceedings of the Court was like hearing an account of a famous political divorce case (Ingram, 2003). It is important to emphasize, however, that the enduring effect of the case lies not in its individual outcome but in the principled reasoning through which Palestinian natives were rendered deportable by the Court.

Scholarship on migration and citizenship has been mainly focused on discussion of how nation-states regulate the rights of arriving migrants. Liberal scholars have suggested that, in a liberal democratic state, full civic incorporation is the "natural" endpoint of immigration. For example, Bauböck (1995) argues that the liberal democratic state's fundamental commitment to civic equality manifests itself in the regular enactment of large-scale immigrant legalization programs. Similarly, Joppke (2001) suggests that the universalizing principle of liberal law is of sufficient strength to make it difficult for liberal states to limit the rights of immigrant permanent residents.

This focus on the inclusive consequences of contemporary liberal legality for non-citizen subjects has been challenged by studies that have examined the role of law in excluding immigrants from citizenship. Empirical research has shown not only that lawmakers have gone out of their way to create substantial linguistic and cultural barriers to naturalization, but also that administrative practices have made naturalization *de facto* inaccessible to subaltern communities (Spire, 2005).<sup>i</sup> Moreover, critical legal scholarship has highlighted the ways in which both the content of immigration laws and the practices of legal institutions implementing these laws have worked to buttress and support a pervasive system of oppressive, inegalitarian relations (Ngai, 2005, Nevins, 2002).<sup>ii</sup>

Yet, by conceptualizing border control and naturalization as involving either integration into or exclusion from a state with fixed borders, both liberal and critical scholars have failed to question nationalist claims that their state has always existed within its current territorial boundaries. The narratives of indigenous minority populations caught in the path of projects of ethno-national territorial domination call these assertions into question. In these instances, racially-marked indigenous groups have not sought to move into another political community, but rather another group's assertive ethno-nationalist ideology prevents continued territorial coexistence. The population exchanges/expulsions following the First World War in the former Austro-Hungarian and Ottoman Empires provide an emblematic case (Zolberg, 1983). In recent times, citizens of the former Communist Block have been rendered stateless through the imposition by several Eastern European states of a distinction between "autochthonous" and "non-autochthonous" populations, thereby allowing some minority communities to be denationalized en masse (Weissbrodt and Collins, 2006, Bauböck et al., 2009).<sup>iii</sup>

The seeming dissonance between the denationalization/removal of racially-marked indigenous groups and liberal values has not prevented judges from upholding these practices. Throughout the 19<sup>th</sup> and early 20<sup>th</sup> centuries, courts either subordinated the residency claims of Native American and Australian indigenous populations to the needs of settlers or treated these claims as non-existent, relying on the rationale that settlers alone were capable of contracting to establish justiciable claims to tenure and title (Pateman, 2008). As demonstrated by the massive population exchanges following the First World War, the cover of law has not always been necessary for the expulsion, containment, or forced assimilation of racially-marked populations. However, racism is both compatible with and integral to law

(Fitzpatrick, 1992), and liberal states have historically gone to some trouble to discover legalized means for carrying out settler colonial projects.

This article argues that liberal law continues to justify and legitimize displacements of racially-marked indigenous populations, even in an age of universal human rights. As demonstrated by the Israeli court's decision legitimating the deportation of Mubarak Awad, citizenship and immigration laws supply juridical justifications for contemporary ethno-national projects. When the ethno-national state's boundaries are being defined or redefined, racially-marked indigenous populations are vulnerable to being legally recast as "aliens" or "virtual immigrants."<sup>iv</sup> National conflict may thus be transformed by legal fictions into a question of immigration law, allowing the power relations that produce state sovereignty to slip into the background. Emphasizing the role of liberal legality in constituting matters of citizenship, the case provides a window for examining how structures for controlling migration, characteristic of sovereignty in global times, provide courts with tools for cementing and legitimizing the expulsion of indigenous communities, while at the same time producing the conquering state's "sovereign" identity.

### **Historical Background**

The territory over which Israel is the governing state is characterized by processes of jurisdictional mapping and administration that divide the area into politico-legal formations with different statuses, ranging from sovereign Israeli territory (i.e. inside the 1949 armistice or "Green Line") to military administration in territories occupied in war.<sup>v</sup> Moreover, Israeli governance is also characterized by demographic distinctions in so far as population groups whose national identities and identifications

span geographic boundaries – Jews, Arabs, Druze, West Bankers, Gazans; urbanites, villagers, refugees, settlers, etc – are distinguished through legal and administrative processes and their consequences (Hajjar, 2005). Within this governmental complexity, the status of East Jerusalem and the rights of its Palestinian residents remain particularly complex and contested.

During the 1967 War, the territory now identified as East Jerusalem and comprising the Old City and five east Jerusalem neighbourhoods was conquered by Israel. A government order on June 28, 1967 declared that Israeli law, jurisdiction, and administration were in force in the Eastern part of the city, differentiating it from the rest of the West Bank (Law and Administrative Ordinance, 1967). In the weeks that followed, East Jerusalem's municipal government and courts were superseded by those of West Jerusalem and Israel's Absentee Property Law was applied to confiscate the property of Palestinian residents of Jerusalem (Secretary-General, 1967). The Israeli government constructed barriers between East Jerusalem and the West Bank and removed barriers that had previously separated East and West Jerusalem. It also redefined the municipal boundaries of Jerusalem, expanding the historical municipal boundaries to include an additional 6 square kilometres so as to maximize the city's Jewish population. Israeli tax laws were applied to East Jerusalem's residents. Finally, and most significantly for the purposes of this paper, the Israeli Ministry of Interior opened an office in East Jerusalem which undertook a population census and distributed identity cards to "Jerusalem residents."<sup>vi</sup> Separately, the Ministry of Interior also set up a "Bureau for Registration of Israeli Citizens," which required residents of East Jerusalem to relinquish all other allegiances as a condition of Israeli naturalization.

While Israel asserted its sovereignty over East Jerusalem, the status of the territory was contested by the Palestinian residents of East Jerusalem who overwhelmingly resisted the Israeli claim. Those interviewed by the UN Personal Representative during this period said that while they “recognized a military occupation regime as such” and were ready to co-operate with such a regime in dealing with current questions of administration and public welfare, they were “opposed to civil incorporation into the Israel State system” (Secretary-General, 1967). According to the UN Personal Representative, the Palestinian residents of East Jerusalem regarded civil incorporation as a violation of the acknowledged rule of international law, which prohibited an occupying power from changing the legal and administrative structure in the occupied territory. Acquiring Israeli citizenship was understood by Palestinian Jerusalemites to mean sacrificing their right of self-determination.

Israel’s claim to sovereignty over East Jerusalem was also contested at the international level. The UN Security Council expressed its view that, “all legislative and administrative measures and actions taken by Israel which purport to alter the status of Jerusalem...are invalid and cannot change that status” (Security Council, 1969). The UN Partition Resolution of 1947 resolved to place Jerusalem under international trusteeships administered by the United Nations. The United States and United Kingdom had both opposed Jordan’s assertion in 1960 that Jerusalem was its “second capital,” referring to the ongoing interest of the United Nations in the status of Jerusalem. After the 1967 War, the Security Council dropped its attachment to a UN trusteeship in Jerusalem and adopted the position that Jerusalem was an “occupied territory” until its status could only be resolved through a comprehensive settlement to the Middle East conflict (Security Council, 1967). This position was

reiterated most recently by a 2004 decision of the International Court of Justice, which maintained that the areas in and around East Jerusalem constitute occupied territories whose status remains subject to negotiation between the parties.

Thus, in the aftermath of the 1967 War, Israel's unilateral assertion of sovereignty over Jerusalem remained highly controversial. Perhaps for this reason, the Israeli government did not immediately alter the residence rights of Palestinian Jerusalemites who had participated in the 1967 census. In the first decade after the 1967 War, the Israeli government focused primarily on expanding Jerusalem's Jewish population<sup>vii</sup> and was less concerned about forcibly displacing its Palestinian population.<sup>viii</sup> So long as Jerusalem residents returned to renew their cards when they expired, their right to residence in the city remained formally intact (Stein, 1997). This was part of a broader "Open Bridges Policy" under which Israel routinely granted exit permits to Palestinians in the Occupied Territories who wished to live in Jordan.

Nevertheless, the State did not provide encouragement for Palestinian residents to remain in the city. The "Open Bridges Policy" was a tacit and pragmatic acknowledgement that Palestinian population would need to travel abroad for jobs and higher education. The Israeli municipal authorities systematically privileged Jewish Israeli citizens coming to settle in East Jerusalem over the city's Palestinian residents (B'Tselem, 1997). The application of Israeli Absentee Property Laws within East Jerusalem significantly weakened the aggregate power of the Palestinian population. In addition, arriving Jewish residents received the lion's share of public services and were granted permits for private construction and resources for town planning as Palestinians were regularly denied them (B'Tselem, 1997).

Israel's de facto annexation of East Jerusalem starting in 1967 constituted an assertion of state power to organize and regulate the lives and relations of those subject to its rule. Within the city, whose municipal boundaries were themselves redrawn, the state constructed a hierarchy of rights. Jews who took up residence in the city were privileged over non-Jews and Jewish national/collective interests were prioritized, in keeping with the hierarchical identity-based structure of the Israeli polity. As non-citizens, Palestinian Jerusalemites, unlike Palestinian citizens of "1948 Israel," could not vote in national elections. But as residents of a territory over which Israel asserted sovereignty, Palestinian Jerusalemites were exempted by Israel from the military and emergency laws to which Palestinian residents of the West Bank and the Gaza Strip were subjected. For more than a decade, the ambiguous legal position of the Palestinian residents of East Jerusalem coincided with the contested nature of Israeli control over the city.

### **Legalizing Expulsion**

In July 1980, Israel codified the physical annexation of East Jerusalem by passing the Basic Law on Jerusalem, declaring Jerusalem "whole and united" and Israel's permanent capital, over which Israel exercised exclusive sovereignty. This action came in the context of the peace agreement the previous year between Israel and Egypt and reflected the Israeli government's desire to cement its claims over Jerusalem in any forthcoming peace negotiations with Jordan or with the Palestinians. Although the Basic Law on Jerusalem simply formalized the governance framework applied in practice by Israel since 1967, the legalization of sovereignty nevertheless destabilized the position of Palestinian Jerusalemites.

The codification of Israeli sovereignty over Jerusalem was followed by a formal codification of Israeli administration of Jerusalem residence permits. In 1985, the Ministry of Interior adopted for the first time regulations officially stating the conditions under which residence cards may expire. The regulations stated that Palestinian Jerusalemites would be considered to have settled in a state outside of Israel if they: 1) sojourned outside of Israel for a period of at least seven years, 2) received a permanent residence permit in that state, or 3) received the citizenship of that state by naturalization (Entry into Israel Regulations, 1985). The regulations went on to state that, “the validity of the residence permit will expire...if the possessor of the permit abandons Israel and settles in a state outside of Israel.”

During the 1990s, as Israel engaged in peace negotiations with the newly formed Palestinian Authority, additional steps were taken to create facts on the ground that would weaken Palestinian claims to Jerusalem. In 1996, the Israeli Ministry of Interior issued a new directive to its East Jerusalem office stating that sojourning “outside of Israel” for the purposes of expiration of a residency card would also include the West Bank and the Gaza Strip. Even more significantly, the directive further stated that short visits to renew residence permits would not break the continuity in the seven-year counting period for expiration of Jerusalem residency. The Ministry of Interior now demanded proof of continuous uninterrupted stay in the city each time a residency card was submitted for renewal. Jerusalem residents living in Jordan or the West Bank coming to the city to visit their family and renew their exit permits were henceforth required to sign a declaration foregoing their Jerusalem identity cards. A few years later, the ratchet was further tightened when the right-wing Minister of Interior, Natan Sharansky, issued another directive shortening the time frame for expiration of residency from seven years to one year.

The Israeli government's move to squeeze the Palestinian residents of East Jerusalem occurred in the midst of a growing juridicization of Israeli politics. Israel lacks a written constitution, meaning that the Israeli Supreme Court does not assess the overall normative validity of legislation. Nevertheless, the Court does possess the broad powers of interpretation and classification typical of the common law judiciary.<sup>ix</sup> Starting in the 1980s, under the leadership of Chief Justice Aharon Barak, the Court came to be conceived within Israel as a reference point for liberal values and as a defender of civil rights (Dotan, 2001). The Israeli Supreme Court also came to enjoy a reputation overseas, particularly in the United States, as a guarantor of Israel's commitment to democracy and rule of law (Shamir, 1990).

The juridicization of Israeli politics extended to the domain of the Palestinian-Israeli conflict as Palestinians developed an increasing interest in asserting their claims through law. In 1979, several Palestinian lawyers founded the first human rights organization in the occupied territories and within a few years the creation of similar organizations followed. Palestinian human rights lawyers aimed to utilize international law to challenge the legality of Israeli policies and to frame the Palestinian-Israeli conflict as, foremost, a problem of governance rather than as a problem of terrorism or as an intractable inter-ethnic struggle (Hajjar, 2005). Cases were brought before the Israeli Supreme Court both with the aim of changing existing conditions and for the sake of contesting the Israel's discursive dominance by voicing a Palestinian counter-narrative. On the status of Jerusalem as well, the Israeli Supreme Court became a central arena of struggle.

### **The *Awad* Case**

The decision of the Israeli Supreme Court in the *Awad* case (42 Supreme Court Decisions 426, 1988) illustrates both the effects of the Israeli government's increasingly aggressive efforts to alter the demographic balance of Jerusalem and the increasing legalization of the Palestinian-Israeli conflict. Crucially, the case presented the Court for the first time with the issue of the legal validity of the Israeli residence regime for Palestinians in East Jerusalem.

Although the case turned on the issue of citizenship rights, Mubarak Awad was himself a proponent not of court-based strategies but rather of direct non-violent resistance. Awad, was a native Jerusalemite who had completed a doctorate in child psychology in the U.S. during the 1970s and had acquired American citizenship. Influenced by Quakerism as well as by political scientist Gene Sharp's writings on nonviolent political action, and drawing upon Gandhi's successful use of nonviolence against colonial occupation in India, Awad returned to Jerusalem in 1983 and published a blueprint in which he laid out a strategy for passive resistance to Israeli occupation (Awad, 1984). In 1985, he set up the Palestinian Centre for the Study of Nonviolence in a small East Jerusalem office. As his activities gained increasing attention, Awad was jailed on a number of occasions by the Israeli authorities in the West Bank for involvement in civil disobedience (Ingram, 2003).

The deportation proceedings at issue in the case began in May 1987, when the Israeli Ministry of Interior refused to renew Awad's Jerusalem resident identity card on the ground that he was no longer a resident of Israel under the regulations in effect since 1985. Although Awad was not prevented from using his American passport to reenter Israel on a tourist visa in August of that year, his attempt to extend his tourist visa was refused and he was told to leave Israel before November 1987. When Awad remained in Israel, he was jailed and a deportation order was issued against him in

May 1988. The order to deport Awad cited “his open and intensive campaign against Israeli presence in the territories, including a call for civil rebellion, violation of the law, disobedience to orders of the military administration and noncooperation” (Lapidoth and Hirsch, 1994).

Awad’s lawyers argued not only that the government’s deportation order was invalid since it was made for improper political reasons, but also that Awad should never have been deprived of his Jerusalem residency rights. Two distinct arguments were central to Awad’s challenge to the Israeli residence regime. First, the regulations issued by the Ministry of Interior in 1985 and listing criteria for the expiration of a Jerusalem residency identity card, including acquisition of a foreign citizenship, were challenged as being *ultra vires* to the Entry into Israel statute under which they were issued. According to this argument, the Minister had interpreted too narrowly the statutory language allowing residency to be rescinded when the permit holder has “settled in a foreign country” (*Awad*, at 429). Awad’s lawyers suggested that a more appropriate interpretation would be whether the permit holder had lost his Jerusalem domicile, and they argued that acquiring a foreign citizenship was no indication that Palestinian Jerusalemites, who had refused Israeli sovereignty and who remained an occupied population waiting to exercise their right to self-determination, had abandoned their home, i.e., given up their residency rights in Jerusalem.

Second, and more ambitiously, Awad’s lawyers argued that he has special status as a resident of Jerusalem, both under common law norms and under International Law. Since Palestinian residents of Jerusalem had not “entered” into Israel but rather Israel had entered their home territory, they should not be governed by the Entry into Israel Law of 1950 and its subsequent implementing regulations. According to this argument, Israel’s attempt to force the Palestinian residents of East

Jerusalem to apply for Israeli citizenship in order to maintain their residency rights was fundamentally illegitimate. Awad's claim to residency rights was made not at the level of his individual attachment to Jerusalem, but rather was made on behalf of all Palestinian residents of East Jerusalem. The members of this community should not be legally classified as alien guests in Israel, present by virtue of revocable permits. Instead, Palestinian Jerusalemites' "quasi-citizenship" in their hometown should be protected as a right to "constitutional residence" (*Awad*, at 430).

The decision by Justice Barak flatly rejected the claim that the Entry into Israel Law did not apply to residents of East Jerusalem. Relying on the language of the Israeli government's administrative order of June 1967 extending Israeli control over the city, Barak declared that since that time the law, jurisdiction and administration of the State have applied to East Jerusalem. The decision acknowledged that classifying East Jerusalem residents under the "permanent resident alien" category in the entry law was mildly problematic, because this category had originally been constructed to apply to foreigners who arrived in Israel with a visa and who had received permanent residents' permits on arrival. However, Barak stated that he would choose to assume that the government's 1967 issuance of Jerusalem resident identity cards was a "virtual" grant of permanent resident status under Israeli law (*Awad*, at 430). He justified this exaggerated formalism with the following statement: "The trend of the legislation is to bring about synchronization between the law, etc, of the State on the one hand and East Jerusalem and its inhabitants on the other. The purpose of interpretation is to give effect to this trend as far as it is possible to find a basis for it in the statutory language" (*Awad*, at 430). In other words, the Court legitimized the State's sovereignty over East Jerusalem by finding a basis for it in the law. But it did so by taking the position that the State's law was

capable of “natural” extension and that an application of international law need not be considered because this would be “artificial.”<sup>x</sup> Thus, any seeming lacunae in the laws would be filled by the Court with a juridical interpretation that privileged the State.

So as to leave no doubt about which side had won, the decision sharply dismissed the notion that Palestinian residents of East Jerusalem enjoyed any status of “quasi-citizenship” or rights to “constitutional residence” (*Awad*, at 430). According to Barak, these categories are not referred to in the statute, suggesting their legal irrelevance. Barak added that granting special status to East Jerusalem residents would discriminate against other permanent residents in Israel who are not part of this group. Were this to occur, he argued, the principle of equality would be violated. Furthermore, Justice Barak then went on to justify Israel’s residence regime in the terms of liberal citizenship theory, stating:

As is well known, for reasons connected with the interests of East Jerusalem residents, they were not granted Israeli citizenship without their consent, and each one had the option of applying for, and receiving, Israeli citizenship voluntarily. Some did; the petitioner and many others did not. Once they refrained from accepting Israeli citizenship, it is hard to accept their submission as to “quasi-citizenship,” carrying only rights and no obligations (*Awad*, at 430).

With this discussion, Barak added two new elements to justify a legal regime of deportation and displacement, namely that citizenship was a matter of each separate individual’s relationship with the state, and that the only legal alternative to Israeli citizenship was the status of “virtual” immigrant. Israeli citizenship for conquered Palestinians is presented as the inclusion of previously unaffiliated individuals within an abstracted civic republic, and no mention is made of the fact that opting for Israeli citizenship meant that Palestinians would waive their self-determination claims or that they would settle for second-class citizenship as a minority population within an ethno-national state. Nations and territorial conflict are written out of the picture.

After this brief foray into liberal citizenship theory, Justice Barak returned to legalism, suggesting that an additional reason for dismissing the possibility of “quasi-citizenship” is that under Israeli law a naturalized citizen can have his citizenship abrogated in certain circumstances, while “quasi-citizenship” is not subject to abrogation. It follows, he argues, that a legal “anomaly” would be created “without any justification or logic” (*Awad*, at 430). This reasoning asserts that residence rights that are not subject to control by the State are problematic because they threaten the coherence and rationality of modern law, and it implies that no countervailing justification for their existence is worthy of the Court’s consideration.

Having upheld the application of the Entry into Israel Law to East Jerusalem, the decision then went on to address the issue of whether the Minister had interpreted too narrowly the statutory language allowing residency to be revoked when the permit holder has “settled in a foreign country.” Barak not only upheld the regulations but also invited the Minister of Interior to promulgate even more restrictive conditions for permanent residence. The statute should not be interpreted, as *Awad* argued, to imply that permanent residency may only be revoked if the individual has lost his domicile. Instead, Barak formulated a principle of interpretation according to which the status of the permanent resident in Israel is held to be a status reflecting “the reality of life” (*Awad*, at 434). According to Barak, permanent residency includes a declarative aspect that expresses the “reality” of the permanent residency: “When this reality disappears, there is no longer anything to which the permit can adhere, and it is automatically revoked, without any necessity for formal revocation” (*Awad*, at 434). In *Awad*’s case, acquiring U.S. citizenship was held to demonstrate that his center of life was no longer in Israel. But the impact of creating such a principle is that “life” and thus membership becomes a matter of electricity bills and place of employment.

As “virtual” immigrants, Palestinians have no other claim to residence in Jerusalem besides physical presence, determined on an individual basis, whereas Jews around the world have a “birth right” to residence in this territory derived from their ethnic group’s religious and historical connection to the land.

The *Awad* decision concluded by considering Awad’s claim that his deportation had been improperly determined for political reasons. Here Barak affirmed the Court’s commitment to rule of law values, saying, “The Minister’s power of abrogation does not turn permanent residence into residence ‘by grace’. Permanent residence is lawful, so that only under relevant considerations can the Minister exercise his power and it is obvious that its exercise is in practice subject to judicial review” (*Awad*, at 431). Despite this affirmation of the need for legally-grounded administration, Barak upheld the discretion of the Minister of Interior that “the activity of the petitioner endangers security and public order since it operates openly and intensively against Israeli control of Judea, Samaria and Gaza.”<sup>xi</sup> The deportation was thus upheld by the Court as legal because Awad was acting against the interests of the State and was in the country illegally, having no residence permit.

Subsequent decisions by the Israeli Supreme Court built on the groundwork laid by the *Awad* decision’s precedent. In a 1994 decision, the Court placed the burden on the holder of a Jerusalem resident permit to refute the State’s claim that the “center of life” has changed, even if this claim is not based on a circumstance listed in the regulations (*Fatiya Sheqaqi et al v. Minister of the Interior*, 95 Supreme Court Decisions 1615, 1994). Two years later, the Court upheld the Minister of Interior’s new designation of the West Bank and Gaza Strip as “outside of Israel” for the purposes of the expiration of a Jerusalem permanent-residency permit (*Fares Bustani v. Minister of the Interior*, 97 Supreme Court Decisions, 1996). In 1997, the Court

received several petitions claiming that the Minister of Interior was denying Palestinians the right to confront the administration following the revocation of a permanent-residency permit. When the Ministry announced that every resident may appeal the decision by providing information rebutting its conclusions, the Court rejected the petitions, accepting without examination the State's contention that the Ministry grants the right to be heard (*Abtasa Yusuf et al v. Minister of the Interior*, 97 Supreme Court Decisions 681, 1997). Similarly, in 1998, the Court refused to hear claims against then Minister of Interior Natan Sharansky's policy of revoking permanent-residency permits after one year's absence when Sharansky promised to "soften" the policy to some extent (Stein, 1998) Thus the basic framework of the *Awad* decision has remained unchanged and has, if anything, been further articulated to the advantage of the State.

## **Discussion**

The decision in the *Awad* case was debated at the time that it was decided in terms of the Court's unwillingness to challenge the Israeli government's policy of stamping out all forms of resistance to its control of the Occupied Territories. Political commentators questioned whether the deportation of a nonviolent activist was a wise strategy or whether such activity should be encouraged as an alternative to militant Palestinian nationalism. However, the impact of the decision extends beyond the immediate outcome of the case and the deportation of an individual nonviolent Palestinian activist. The *Awad* precedent contributed to the institutionalization and legitimization to the legal regime accompanying Israel's policy to "Judaize" East Jerusalem.

On one level, placed in the broader perspective of a legality of conquest and expulsion, Israeli courts are not charting new legal territory. European settlement in the New World was made possible by the removal of indigenous American and Australian populations through a combination of assimilation, expulsion, and extermination. For example, policies of systematic displacement are clearly visible in the United States during the first half of the 19<sup>th</sup> century, when the relatively non-formalized colonial settler project of removing American Indians from the eastern U.S. was formalized through statutes at the federal and state level. The Indian Removal Act of 1830 signed into law by President Andrew Jackson aimed to “separate the Indians from immediate contact with the settlements of whites” by settling tribes to land west of the Mississippi River. In cases where tribes refused to take part in the federal “emigration” program, state laws barred them from occupying certain parts of their former territory on penalty of imprisonment.<sup>xii</sup> Tribes who proved unwilling to sell their land even after this significant coercion were “removed” en masse and at gunpoint to “reservations” from which the army forcibly prevented any escape (Banner, 2005).

The U.S. Supreme Court played a significant role in this expulsion of American Indians from their ancestral homelands. By ruling that tribes “occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases,” Chief Justice Marshall in *Cherokee Nation v. Georgia* (1831) declined to uphold tribal claims based either on existing treaties or on historical and religious attachment to the land against the State of Georgia’s move to curtail them. A few years earlier, Marshall’s decision in *Johnson v. M’Intosh* (1823) set the stage for removal of the Indians. Rewriting colonial history, the *Johnson* decision asserted that English colonial law had treated

Indians as occupants of the land but not owners. In doing so, Marshall secured the titles of all the settlers who had obtained land grants from states within territory not yet purchased from the Indians but from which the Indians were soon to be removed.<sup>xiii</sup> American Indians thus found their place in the constitutional order as “domestic dependent nations” with limited residency rights.<sup>xiv</sup> Although Native Americans claimed a sovereign right over their territory, their legal residence rights depended not on their own will but rather on the policy of the conquering state.

Yet, on another level, Israel’s residence regime of conquest and expulsion is significantly different from its American 19<sup>th</sup> century antecedent. To begin with, the Israeli legal repertoire for removing Palestinian Jerusalemites involves no explicitly ethnic or racial distinctions, since immigration law’s categories do this classification work. As the Israeli Court notes, Palestinian residents of East Jerusalem were given the individual choice to register for Israeli citizenship in 1967. Thus, the Court can depict an individual’s status as a resident alien, vulnerable to expulsion, as a matter of freely exercised individual choice. This residence regime has been referred to by human rights groups as effectuating a “quiet deportation” because it operates at the level of individual administrative decisions regarding revocation of residence permits (Stein, 1997, Stein, 1998). Palestinians must repeatedly furnish proof that they personally have been physically present in Jerusalem in order to maintain their residence rights. The Israeli Court rejected the collective claims made in the *Awad* case, and the decision itself never once uses the word “Arab” or “Palestinian,” but instead refers only to “East Jerusalem residents.”

The differential treatment of the Palestinian population is justified by the Israeli Supreme Court through racially-neutral formalism. Israeli judges, at least rhetorically, portray the State’s laws as realizing Weber’s modern law ideal type of a

legal system grounded in formality and rationality. This tendency towards formalism is visible in the *Awad* decision's assertion that the political question of the status of Jerusalem is unproblematically susceptible to determination by a legal norm. Even in the absence of a constitution, the Israeli Court purports to find a seamless web of legality in a mixed bag of statutes and administrative orders employing different categories but reworked by the Court into rational coherence. Likewise, the hesitancy to acknowledge customary international law is, referring to constructions based on non-State norms as "unnatural" and "artificial," exemplifies the system's formalism. Finally, the ultimate justification for *Awad*'s deportation is not his ethno-national affiliation but simply his "illegality," as a non-citizen who has remained in the territory without a valid permit.

By contrast, American law in the 19<sup>th</sup> century was not bashful about referring to uncodified norms according to which American Indians were "fierce savages" and "a people with whom it was impossible to mix." (*Johnson v. McIntosh*, 21 U.S. 590, 1823). Tribes would be incorporated into citizenship only once they achieved the necessary level of development through the assistance of U.S. policies, but in the early 19<sup>th</sup> century citizenship for the Indians was not yet in sight. For example, in 1830, U.S. President Andrew Jackson claimed that removal of the Indians would "perhaps cause them gradually, under the protection of the government and through the influences of good counsels, to cast off their savage habits and become an interesting, civilized, and Christian community" (Kanstroom, 2007). Chief Justice Marshall had similarly rationalized the disparate treatment of Indians by relying on the claim that indigenous groups were unprepared or unsuited for the equal rights enjoyed by citizens. The Indians were, he said, "in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian" (*Cherokee Nation v.*

*State of Georgia*, 30 U.S. 17, 1831). Just as laws distinguish between children and adults without seeming to violate liberal norms, indigenous governance operated under a separate legal regime. In the early 19<sup>th</sup> century version of liberal legalism, these dual regimes are justified not in reference to coded law but in reference to the common sense understandings of civilization and barbarism.

By contrast, in liberal legalism's contemporary form, the identification of national identity with genetic descent has not gone away but *de jure* racial distinctions are universally taboo. In his study of cooperation between state and civil rights lawyers in Israel, Dotan proposes that the tendency towards "legalism" on the part of Israeli lawyers and judges demonstrates the increasing "globalization of law" (Dotan, 2001). Judges such as Chief Justice Aharon Barak are, in this reading, an example of "Jewish Israeli Liberals" who have been influenced by their close connections to U.S. law schools or human rights organizations. Barzilai likewise makes the argument that Israeli legal ideology is heavily influenced by concepts and doctrines developed in the U.S., particularly notions of equal protection before the law (Barzilai, 2007). Clearly, the U.S. legal values that these authors have in mind are not those of the 19<sup>th</sup> century Marshall Court but rather those of post-Civil Rights Movement America. Perhaps it would be more accurate to say that, although Zionist national identity, like all other national identities, has been and continues to be constituted in opposition to a racially-marked "other" (Said, 1979, Kimmerling, 1992), the alteration of international standards has had caused explicit racial distinctions in the law to recede in respectability.

Yet, the absence of explicitly racialized language in contemporary law should not be mistaken for the elimination of race-based social hierarchies, let alone the curtailment of settler state projects associated with a form of nationalism that

identifies nationality with genetic descent. Ethno-national states are premised on and constituted by the existence of a racially-marked “other” even as the strategies used for maintaining these hierarchies have shifted. As states have increasingly built their legitimacy on both claims of equality of citizenship and full control of their sovereign territory (Sassen, 2006),<sup>xv</sup> immigration law has emerged as a powerful tool for constructing and reinforcing hierarchical relations, including those delineated by race. Immigration laws are not the only mechanism through which ethno-national projects can be effectuated, and property laws provide another powerful tool for acquisition of territory by the settler state (Banner, 2005, Kedar, 2003, Braverman, 2009).

Yet immigration laws are particularly useful since sovereignty is nowhere more absolute, as Arendt saw clearly, than in matters of emigration, naturalization, nationality, and expulsion (Arendt, 1976). The concept that racially-market populations could be legally classified as foreigners has early roots, as demonstrated by Parker’s historical study of post-revolutionary American townships and their largely unsuccessful attempts to appropriate administrative structures for the “warning out” of paupers - distant antecedents of the contemporary immigration law regime - so as to utilize them for the removal of native blacks (Parker, 2001). In this example from post-revolutionary New England, the presence of a racially-marked population within the polity came to be construed as problematic precisely at the time when liberal law was undergoing a process of transition, abolishing slavery and according rights to groups that had previously been legally invisible. In the contemporary era, the further flattening of formal hierarchies and tightening of the territorially-demarcated state’s control over its internal population have heightened the salience of immigration classifications and the deportation regime (Kanstroom, 2007). Although it is “race thinking” that primarily accounts for the reluctance of ethno-national states

to incorporate racially-marked populations as full citizens (Razack, 2008), the physical eviction of members of these communities from the national territory is facilitated by immigration control bureaucracies operating through seemingly routine procedures.

Juridical reasoning makes a crucial contribution to this legal regime by naturalizing the transformation of racially-marked peoples into “irregular migrants,” constituting the territorially-demarcated state’s sovereignty in the process. Peter Fitzpatrick argues that sovereignty cannot be sovereign without law, since a stable appearance is necessary for any particular nation to be defined (Fitzpatrick, 1992). For enforcement of boundaries to be legitimate and authoritative, it must have a “vener of stability and solidity.” Legal proceedings are rituals of reassertion of a reality within which the suffering of “others” cannot exist. The Israeli case study demonstrates that this legal rhetoric of “illegal residence” and deployment of immigration law in service of national territorial consolidation is powerful enough to legitimize even the transformation of native populations into right-less outsiders and “virtual” immigrants. Seemingly neutral principles of immigration law allow judges to avoid tainting the liberal modern state with explicitly racist jurisprudential doctrines justifying dispossession.

To what extent has globalization transformed old liberal exclusions? Catherine Dauvergne (2008) suggests that, in an era of globalization, membership is not merely limited to a single nation but to all “prosperous nations.” Migration laws have been transformed so that they center on preventing migrants and refugees from entering “Fortress Europe” or from penetrating the increasingly fortified United States, territories which are now more open than ever to global flows of people and goods. The importance of classifying people as “illegals,” according to Dauvergne,

lies not in their actual exclusion, but in the effect of this act of exclusion in legitimizing new forms of sovereignty in this era of free trade and open borders. She writes, “In order for the community to operate against an assumption of closed borders, there must be a way of closing them, of identifying who has a right to cross them” (Dauvergne, 2008). In the era of globalization, according to Dauvergne, the primary effect of immigration laws is to sort people into categories, producing and reproducing economic hierarchies by allowing legal residents to enjoy the privileges of membership as well as the benefits of a cheap workforce of irregular migrants who are unlikely to complain.

Yet, as the Israeli case study demonstrates, contemporary states are not only in the process of reconstituting themselves as globalized entities with selectively permeable borders. States such as Israel are also very much in the process of conquest, settlement, and ideological construction and this process takes place across ethno-national as well as economic hierarchies. Israeli sovereignty is being established in an era of modern administration and when international norms dictate the necessity of formal legal equality. In this context, the displacement of indigenous populations cannot take place through legal double standards applied to separate populations. Rather, contemporary juridical justifications for projects of settlement and displacement make a point of showing that political incorporation – on a strictly individual basis – is legally accessible, albeit on paper rather than in practice. Individuals are provided with the option, at least nominally, of applying for citizenship. In practice, what was “offered” to Palestinian Jerusalemites after the 1967 War was not just citizenship but a kind of second-class citizenship. As a racially-marked population, Palestinians occupy the lowest position in Israel’s ethnic hierarchy (Khazzoom, 2003). Moreover, the acceptance of Israeli citizenship

diminishes Palestinian sovereign claims, at least to the extent that these claims are based in the framework provided by public international law governing occupied territories.<sup>xvi</sup> On the other hand, by rejecting Israeli sovereignty, Palestinian Jerusalemites remain in the status of foreign residents, barely tolerated and exposed to the individuated deportation process of the modern administrative state.<sup>xvii</sup>

The ethno-national settler project can be seen to rest on a refusal to recognize residency apart from formal citizenship. When sovereignty based on assertions of ethno-racial superiority faces problems of legitimacy, immigration status becomes a crucial mechanism for institutionalizing contested territorial claims. In this instance, the constructed nature of citizenship is masked by a language of following the letter of the law, which has the added benefit of maintaining the image of the state as a lawful state. Courts repackage members of subordinated populations as immigrants from nowhere who are nominally free to become members of the unrivaled polity. Shifting into immigration law both cements sovereign control over contested territory and at the same time legitimizes the state as upholding liberal standards of rule of law.

## **Conclusion**

Previous studies of the operation of the “myth of rights” in the Israeli context have shown how the mere ability to petition the Israeli Supreme Court has been regarded as a sign of the State’s commitment to human rights (Hajjar, 2005) and has cemented the hegemony of Jewish Israelis while obscuring this structure of power (Kedar, 2003). In tracing the path by which the Palestinian population of Jerusalem came to be identified, in the words of the court, as “virtual immigrants,” this study extends this form of inquiry to show that, in the context of Israel/Palestine, courts can also create sovereignty.

Legality is a crucial component of this process. Through this device, the native population is trapped within the immigration law category of “permanent resident.” This legal transformation allows a project of conquest and settlement to be masked in terms of a sovereign state’s right to deport non-citizen aliens. Individualization also plays a central role in this process. Historical collective presence in Jerusalem is deemed irrelevant by the Israeli Court to determining whether an individual’s “center of life” remains physically based in the city. The actual deportation is then carried out by administrative mechanisms that simply apply this constructed residence regime on an individualized basis. Legal formalism resolves, at least rhetorically, the tension between liberal legality’s universalistic claims and the ethno-national state’s project to exclude racially-marked peoples.

As the *Awad* decision shows, the operation of formalism and rationality obscures the ongoing subjection of Jerusalem’s Palestinian population to an aggressively pursued and actively contested ethno-national settlement project. By constructing political membership as a matter of individual choice, the State draws on the ideological apparatus of liberal citizenship theory and justifies the exclusion of those who chose not to accept the obligations of citizenship. This rhetorical move serves to deflect debate about which type of citizenship is being “offered” and which type of citizenship is negated. The foundational identification of Israeli nationality with ethnic descent ensures that Palestinians are inevitably relegated to the bottom tier of Israeli society regardless of whether they have legal citizenship. Moreover, the formal rigidity of the citizen-alien binary hides the work that law is doing to extend Israeli territorial sovereignty. Jerusalem’s contested status under international law is written out of the picture when the court asserts that only Israeli citizenship, not

Jerusalem citizenship or Palestinian citizenship, is relevant in determining residency rights.

By extending its immigration and citizenship laws to Jerusalem, Israel justifies and institutionalizes its possession of conquered territory. Perhaps more importantly, by juridically formulating Israel as a state with immigration problems, rather than a state engaged in a project of conquest and settlement, the overall legitimacy of Israel as a modern liberal state, governed by rule of law, is reinforced. The quiet deportation of Palestinian Jerusalemites reminds us that liberal immigration laws not only do the work of constructing and maintaining structures of power between “prosperous nations” and the formerly-colonized global South. Contemporary immigration laws have also replaced the explicitly racist regimes of conquest that operated in earlier times, legitimizing the settler nation-state and its control over territory while excluding those who are transformed into outsiders.

## Notes

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- <sup>i</sup> Spire’s study of several decades of French administrative records found that North African citizenship applications were rejected on the slightest pretext, while those of other nationalities did not face this bias.
- <sup>ii</sup> To give an example from the U.S. context, Mexican laborers who crossed the border to work in commercial agriculture have been constructed through law as the prototypical illegal alien, a status that justifies their subordination and control.
- <sup>iii</sup> The denationalizations of the Albanian minority in Macedonia and Croatia and of the Roma in Slovenia are recent examples.
- <sup>iv</sup> This is particularly the case if they fail to take advantage of a certain window of opportunity for individuated and formally egalitarian citizenship registration, since residency rights are then predicated on the citizenship statuses resulting from this legally foundational moment.
- <sup>v</sup> Within the latter, jurisdictional divisions were multiplied as the result of changes resulting from the Oslo Accords.
- <sup>vi</sup> Under its Absentee Law, the State refused residence permits to Palestinian Jerusalemites who were not present or failed to take part in the census.
- <sup>vii</sup> Installing settlers in an “occupied territory” is itself a violation of international law. See IV Geneva Convention Article 49, section 6 (1949)
- <sup>viii</sup> In 1977, approximately 150,000 Jewish residents had been settled in East Jerusalem. See HODGKINS, A. (1996) *The Judaization of Jerusalem: Israeli Policies since 1967*, Jerusalem, PASSIA.

- <sup>ix</sup> The Israeli Supreme Court serves a dual function: as a high court of appeal and as a high court of justice with original jurisdiction over disputes that are not within the jurisdiction of other courts.
- <sup>x</sup> In fact, the decision cited the Israeli Foundations of Law Statute of 1980 to justify this prioritization of state law over international law. Even here, the State's law is coordinated and rational, and thus, by implied assertion, legitimate.
- <sup>xi</sup> The initial determination of the Ministry of Interior not to extend Awad's tourist visa for unspecified but presumably political reasons is not mentioned in the court's decision.
- <sup>xii</sup> For example, the State of Georgia in December 1828 passed "an act to add the territory lying within this state and occupied by the Cherokee Indians, to the counties of Carroll, De Kalb, Gwinett, Hall, and Habersham, and to extend the laws of this state over the same." The act authorized the governor to punish any person trespassing on certain parts of the former Cherokee country.
- <sup>xiii</sup> As Stuart Banner meticulously documents, English colonial law had included no such concept, nor had American law before the 1790s. Unsold Indian land had been thought to be owned by the Indians. BANNER, S. (2005) *How the Indians Lost Their Land*, Cambridge, MA, Belknap Press.
- <sup>xiv</sup> The situation of indigenous Australians was even more precarious, since until recently Australian courts refused to accord any recognition to Native peoples' pre-settlement existence and thus made no attempt to create or apply law relating to land title that aboriginals could invoke. See PATEMAN, C. (2008) *The Settler Contract*. IN PATEMAN, C. & MILLS, C. (Eds.) *Contract and Domination*. Malden, MA, Polity Press.
- <sup>xv</sup> A significant moment in this trajectory was the international consolidation of the Westphalian system of hardened territorial borders following the post-World War I. See SASSEN, S. (2006) *Territory, Authority, Rights*, Princeton, Princeton University Press.
- <sup>xvi</sup> The United Nations Security Council, the High Contracting Parties to the Fourth Geneva Convention, and the International Committee of the Red Cross, have each resolved that the territories acquired by Israel during the 1967 War are occupied and that the Fourth Geneva Convention provisions regarding occupied territories apply. In its advisory opinion on the separation barrier, the International Court of Justice described the West Bank, Gaza Strip and East Jerusalem as occupied territories.
- <sup>xvii</sup> A strong majority of Palestinian Jerusalemites continue to live in this situation in which they may have their residency revoked. As of 2007, some 250,000 Palestinians resided in Jerusalem and only 12,000 of them had obtained Israeli citizenship since 1967, an average of about 300 new citizens a year. See *Yediot Aharonot*. 7 November 2007. In 2008, the most recent year to date for which figures are publically available, Israel revoked the residency of 4,577 East Jerusalemites, including 99 minors. See *Haaretz*. 2 December 2009.

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