Palestine: This Land Is Our Land

Saturday 20 January 2018, by SHEHADEH Raja (Date first published: 18 January 2018).

Review of *Enclosure: Palestinian Landscapes in a Historical Mirror* by Gary Fields. University of California Press, 404 pp., $29.95 (paper).

Between 1922 and 1925 my great-uncle, the journalist Najib Nassar, rode on horseback throughout Mandate Palestine and the newly created country of Transjordan. He published his observations as a series of letters in *Al-Karmil*, the weekly newspaper he edited in Haifa. In a number of these letters Najib voiced his fears about the fate of Palestinian farmers, especially in the north of the country, where absentee Arab landowners were selling their large estates to new institutions of the burgeoning Zionist movement.

During his travels northward from Jenin to Nazareth, Najib proposed that the nature of the Palestinian struggle with the Zionist movement was in essence economic. In the north of Palestine, wealthy Lebanese landowners owned entire villages. Starting in the mid-nineteenth century, a series of legal developments in the Ottoman Empire—which ruled Palestine until 1917—had enabled the growth of these large land holdings. They included the promulgation of the Ottoman Land Code of 1858, which attempted to eliminate the musha system, whereby land was held in common, and required that the cultivator-turned-owner register his land with Treasury officials. Two things dissuaded farmers from doing so: the desire to avoid paying taxes on their land and the fact that the land registry was based in faraway urban centers such as Beirut and Damascus.

These developments had nothing to do with the Zionist project. They were simply intended to help implement a more centralized and rational method for the collection of taxes. In the hilly parts of Palestine, where the land was mainly planted with olive and fruit trees, holdings were small and the arrival of the Zionists changed little. But in the arable plain and valley regions, where water was more readily available, the Zionists sought to acquire land. Soon Lebanese landlords—the Sursuk, Twani, and Khoury families—started selling their holdings in Marj Bani Amer (now called the Jezreel Valley).

These feudal landowners had little interest in supporting the Zionist enterprise; they were unconcerned with colonization. But the profits from their lands were falling, and the cotton crops they planted had failed. They were investing in large-scale capitalist ventures in Egypt and Lebanon, such as the Suez Canal Company and the port in Beirut, and they needed cash. “By selling all they had in this plain,” Najib predicted, “these landowners would be contributing to the distress of the country that would arise from the establishment of a Jewish kingdom.”

The legal processes the Ottomans had begun were continued in the years after the end of their rule—first by the British military occupation of Palestine from 1917 to 1922, and then when the League of Nations granted the British a mandate over Palestine from 1922 to 1948. During both periods, the British continued to revise the land laws with a view to making the land more marketable and facilitating its sale to the Zionists. Among the British figures whose ideas provided the foundation for British land policy in Palestine was Sir Ernest Dowson, who believed that what the Palestinian fellah, or peasant, needed was “enclosure and partition of the common fields.”

In his book *Enclosure: Palestinian Landscapes in a Historical Mirror*, Gary Fields defines enclosure as "a practice resulting in the transfer of land from one group of people to another and the establishment of exclusionary spaces on territorial landscapes." Dowson was intent on creating blocks of property that could be surveyed and registered with the Mandate Land Authority. Mandate authorities also sought to repeal the musha system. British officials were convinced that the enclosure of common land, which had already been implemented in England, had brought about "improvement" and "progress," and they sought to replicate it in Palestine.

This British policy represented a victory for the Zionist movement. It made it possible for more Palestinian land to be sold to Zionist Jews. Yet although many offered lucrative sums for the land, not all landowners were tempted to sell. In some places, Najib wrote, landowners were establishing an agricultural school and planting more olive trees to stand against the encroachment. Enough Palestinians refused to sell that the Zionists ended up acquiring little land. The Palestinian writer and educator Khalil Sakakini was an educational inspector under the British Mandate. In his diary he described a trip he took on December 13, 1934:

"If the Jews have a few impoverished colonies the Arabs have thousands of villages. We travelled from Jerusalem to Hebron to Beir Sabaa [now Beersheba] to Gaza to Khan Yunus to Majdal to Ramle to Lydda to Kalkilia to Tul Karam and only passed through Arab lands. What is owned by the Jews compares as nothing to what is owned by the Arabs in Palestine."

His observation was not far from the truth. By 1949, a year after the State of Israel was established, only 13.5 percent of its land was under formal Jewish ownership, either by private individuals or by the state.

In the course of the 1948 Arab–Israeli War, some 750,000 Palestinians fled the fighting or were forced off their land. In 1950 Israel passed a law designating those lands as "absentee" territory and through a series of other legal measures reserved it for the use of the Jewish Israeli population. But there remained heavy concentrations of land—in the Galilee, the north of Israel, and the Negev in the south—that was still owned by the Palestinians who stayed in Israel and became Israeli citizens. In these areas, Palestinians still far outnumbered Jewish Israelis in 1950. The new state was confronted with two questions: how to "Judaize" those areas, and how to transfer most of the land there to Jewish Israelis.

As Gary Fields makes clear, the Israeli government used methods to achieve these two objectives not unlike the ones it used in the West Bank after the Six-Day War of 1967. In these areas, most of the land ownership was recorded only as written descriptions, such as that a particular parcel was bordered in the north by a road and in the south by an escarpment. The Israeli government did not recognize such descriptions as valid records of ownership. In the Galilee, Fields writes, Palestinians were compelled to prove, through documents, that they were the legal owners of the land:

"Palestinians who held rights to their land through the Ottoman notion of continuous occupancy and cultivation were invariably unable to meet this requirement. As a result, their land passed into the category of state property. This newly designated state property became the foundation of Jewish settlement."

Over the past two decades, most of the land used for Jewish settlements in the West Bank has been acquired on the grounds that it belongs to the state. This tactic has enabled Israeli leaders to maintain that the state of Israel does not confiscate land from Palestinians to build settlements.

The state only began to use this legal ploy in earnest after 1982. Until then, the authorities acquired land for settlement primarily by requisitioning it for military purposes. A smaller percentage of land

had been acquired by declaring it absentee land or territory formerly held by the Jordanian government. By 1979, when I cofounded the organization Al-Haq with several other lawyers to bring legal challenges against the Israeli occupation, Israel had gained control of roughly 30 percent of the land in the West Bank. But those acquisitions were for the most part scattered and separated by plots of private land, rendering most of them unsuitable for settlement building.

It was around this time that I was driving to Tel Aviv and passed by the land of François Albina from Jerusalem, one of my clients. I could see that mobile homes were being brought in. When I next returned to the site I saw a cluster of nine houses, which later developed into the settlement of Beit Horon. That evening I wrote in my diary that what was built so hastily could just as quickly be removed. I should have known better. I had seen the settlement master plan that the Jewish Regional Council in the West Bank had drawn up in cooperation with the Settlement Division of the World Zionist Organization. According to this plan, 80,000 Israeli Jews were to be settled in the West Bank by 1986 in twenty-three settlements and twenty outposts. Ariel Sharon, then Israel's minister of defense, declared that "we are going to leave an entirely different map of the country that it will be impossible to ignore."

The custodian of absentee property had transferred Albina's land to the Zionist agency with a long-term lease, because it was deemed to be state land. When I proved before an Israeli court that the land was privately owned by Albina, the judge decided that the transaction had been "in fact standard, strong and binding and this in spite of the fact that we concluded in our opinion that the ownership of the said land belongs to the appellant."

The Israeli judges based this oddly contradictory decision on Article 5 of Military Order 58, according to which "any transaction carried out in good faith between the Custodian of Absentee Property and any other person, concerning property which the Custodian believed when he entered into the transaction to be abandoned property, will not be void and will continue to be valid even if it were proved that the property was not at that time abandoned property." The presiding judge did not concern himself with the question of how the custodian could "in good faith" have believed that Albina's land was abandoned. The custodian had, after all, had access to the area's land registry, which was confiscated by the Israeli military immediately after the occupation. A circular dated November 14, 1979, restricted public access to land records. Such records are still restricted for most of the land in the West Bank that Israel controls.

Soon after the court ruled against Albina, two representatives from the illegal settlement of Ofra—established mainly on private Palestinian land—came to see me at my law office in Ramallah. They wanted me to register a local West Bank company for them. When I refused, they were incensed. "Why not? We are bringing progress to the area. Do you want to say you're against that?" I responded that most Palestinians felt as I did and would not want to have anything to do with the settlers. They answered: "But why? We are not depriving you of anything. The more settlements, the more progress. How can that be bad for you?"

Albina's case, which began in 1979, dragged on for several years. During that period, a change took place in the primary method the Israeli government used to acquire land for building Jewish settlements in the West Bank. We began seeing fewer cases of seizure for military purposes and more cases like that of Albina, which turned on the declaration of land as state property. The case that forced this shift in strategy occurred in 1979 and centered on a settlement called Elon Moreh.

On June 7, 1979, from a hilltop within the boundaries of the village of Rujeib, 1.5 miles east of the Jerusalem–Nablus highway, Mustafa Dweikat and sixteen other owners of 125 dunums of land (about thirty-one acres) witnessed the start of a "settlement operation." With the assistance of helicopters and heavy equipment, a road was being built from the highway to the hilltop. The chief of staff had

given his approval on April 11 for the requisitioning of the area for military purposes. On June 5, Brigadier General Binyamin Ben-Eliezer, the military commander of the West Bank, had signed the requisition order, which designated an area of approximately seven hundred dunums as "seized for military purposes."

The seventeen owners of the land appealed to the Israeli High Court of Justice. At the trial, their counsel presented an affidavit signed by the former chief of staff of the Israeli army, Haim Bar-Lev, in which he refuted the claim that the settlement contributed to Israel's security. If anything, it would impede military operations. In the event of a war, he testified, the army might find itself having to protect the civilian Israeli settlement instead of fighting the enemy. For their part, the settlers submitted an affidavit by Menachem Felix, who maintained on behalf of Gush Emunim, the early pioneers of settlement in the West Bank, that "the settlement of the People of Israel in the Land of Israel is the realm of the most effective, the truest act of security." He then concluded: "But settlement itself does not arise out of security reasons or physical needs, but by the power of destiny of the return of Israelites to their land."

The Israeli court did not accept Felix's statement. Nor did it accept Bar-Lev's; but for the first and last time, lawyers for Palestinians succeeded in having the establishment of a settlement overturned. In its ruling the court said that the military government could not create facts about military needs that are designed ab initio to persist even after the end of the military rule in a given area, when the fate of the area after the end of such rule cannot yet be known. [1]

After that ruling, the government depended significantly less on military land seizures. The primary method of acquiring land for settlement construction from then on was to declare it state property. To determine what land could be so designated, a 1979 military survey estimated that 1.53 million dunums of land in the West Bank lacked a registered title or had been recorded, as in the Galilee, through written description only.

When I traveled to the United States in 1985 to promote my book *Occupier's Law: Israel and the West Bank*, I spoke about the settlements and the danger they presented to solving the Israeli–Palestinian conflict. I found that many audience members were convinced by what they had been told by Israeli propagandists: that the settlements were necessary for the security of the State of Israel. I would remind my audiences of Bar-Lev's statement, but most still accepted Israel's security justification for building settlements. Now that the occupation of the West Bank is in its fiftieth year, the Israeli government no longer uses that justification. The leaders of the settlements and state officials today claim that this is their God-given land.

This biblical justification does not apply only to what Israel has classified as public property. It also applies to privately owned Palestinian land. According to Fields, a report by Talia Sasson of the Israeli State Attorney's Office

documented systematic confiscations of private Palestinian land by settlers who, assisted by complicit government officials, established numerous unauthorized ***outposts*** *on the landscape…which were later granted legal status as official settlements.*

Nothing has been done to right this wrong and return the land to its registered owners. Menachem Felix's justification for Jewish settlement using the authority of the Bible has trumped the secular law of the land.

The story of the transformation of the land in Palestine/Israel from the Ottoman period to the present takes up much of Fields's book. But he tells it in a larger setting, tracing the idea of "enclosure" through England and North America before arriving at his discussion of the Palestinian

landscape. What has happened there, he argues, belongs to a "lineage of dispossession" that can be followed back "to the practice of overturning systems of rights to land stemming from the enclosures in early modern England." He describes at length how maps, property law, and landscape architecture were enlisted by modernizers from the seventeenth century onward in the Zionist practices in the Occupied Palestinian Territories to "gain control of land from existing landholders and remake life on the landscape consistent with their modernizing aims."

In his chapter on the colonization of North America and the subjugation of Native Americans, Fields describes how "the law emerged as a crucial instrument in dispossessing Amerindians and transferring their land to colonists." In the seventeenth and early eighteenth centuries, he argues, the English "tended to favor acquisition of Amerindian land through what colonists considered lawful purchase," although it was invariably the colonists who had the advantage in such transactions. By the early nineteenth century, in contrast, "the law had become an instrument…enabling the transfer of Amerindian land to settlers through forcible seizure." A crucial moment in this development, for Fields, was Chief Justice John Marshall's ruling in the 1823 Supreme Court case *Johnson v. M'Intosh* that "conquest gives a title which the courts of the conqueror cannot deny." In this way, Fields concludes,

a discourse of land improvement and property rights—supplemented with notions of savagery and racism—had settled upon the landscape…while a ravaged and decimated population of Indians was enclosed in reservations.

The popular image of Native Americans in the minds of most Palestinians is mostly derived from Hollywood movies and bears little similarity to the lives and social worlds they made in North America before the colonists arrived. Yasser Arafat was fond of repeating that "the Palestinians are not Red Indians," by which he meant to distance us from the Native Americans and suggest that ours was a much more highly developed culture than what he judged to be their wild, rudimentary one. But reading Fields's chapters on North America, I recognized the similarities between the treatment of Native Americans and some of Israel's tactics and attitudes toward the Palestinians.

Yet I doubt that, despite Israel's assiduous efforts over several decades to push Palestinians into confined areas within the West Bank, the outcome will be the same. What distinguishes Israel/Palestine from the other regions Fields describes is that the usurpation of land in the Occupied Palestinian Territories is taking place long after the age of colonialism came to an end, sixty-nine years after the passage of the Universal Declaration of Human Rights, and in defiance of international law. Jewish settlements violate Article 49 of the 1949 Fourth Geneva Convention, which prohibits an occupying power from transferring its own people into occupied land. And this is happening in full view of the media in one of the most reported conflicts in the world.

Despite the extensive documentation, both visual and textual, of what took place in the part of Mandate Palestine where the Israeli state was established sixty-nine years ago and is currently taking place in the West Bank, Israel remains unable to come to terms with its past, unwilling to recognize the Nakba (catastrophe) that took place in 1948, and unprepared to accept that the Palestinians are a nation entitled to self-determination.2 The claim continues to be heard that the Zionists made the desert bloom and that the Palestinians were not forced off their land. And yet, as Ramzy Baroud shows in his moving new book, *The Last Earth, A Palestinian Story*: "The Nakba, the genesis of all the pain that has been endured by every Palestinian over the last four generations, persists." [2]

In his conclusion, Fields tell us that he wrote *Enclosure* to show

how the making of private space, the making of white space, and the making of Jewish space on

territorial landscapes all spring from the same exclusionary impulses deriving from the enclosures and the appropriation of land in England. Such impulses have enabled groups of people across time and territory to proclaim: "This is my land and not yours."

In the West Bank, where I live, the effect of the creation of "white space" became more evident as time passed. In the first decades of the Israeli occupation settlements were established mostly in remote areas and did not have a significant impact on the daily lives of Palestinians. It is entirely different now. The separation wall divides many communities from their arable land; roads have been built that Palestinians are not allowed to use; nature reserves have been established from which Palestinians are excluded. Now when I try walking in most of the hills in the West Bank I am called a trespasser. The enclosure of the land has given rise to a system of discrimination over the use of natural resources of land and water that is akin to apartheid. Where interaction between the two communities was possible in the past, they now live entirely separate existences in the tiny space that they share unequally.

Although Fields's book provides convincing evidence that what took place in Palestine/Israel shares a common lineage with what took place in England and North America over the past three centuries, it must be pointed out that most of the land in Israel was taken after the 1948 Arab–Israeli War. In the West Bank it was only after the Oslo Accords of 1993–1995 that Jewish settlements tripled in number. Only then did the Israeli public come to believe that the more than 60 percent of the West Bank classified as Area C—under sole Israeli control—would eventually be annexed to Israel.

Reading *Enclosure* brings home the tragedy of such immense and irrevocable destruction. The sad truth is that the creation of gated communities and walled states is spreading well beyond the three regions he discusses and is fast becoming the norm in today's world. A few years ago, while taking a hike close to my home, I encountered a young settler from Dolev who objected to my presence in the hills where I've walked for many years. Challenging my right to hike there, he tried to call the army to evict me from the land. As we waited for them to arrive, he claimed with unflinching conviction that it was he, not I, who "really lives here."

Raja Shehadeh

P.S.

* NEW YORK REVIEW OF BOOKS. JANUARY 18, 2018 ISSUE:
http://www.nybooks.com/articles/2018/01/18/palestine-this-land-is-our-land/

Footnotes

[1] The case is discussed at length in Michael Sfard's excellent new book, The Wall and the Gate: Israel, Palestine, and the Legal Battle for Human Rights, translated by Maya Johnston (Metropolitan, 2018), pp. 164–176.

[2] To be published by Pluto in Februar