The al-Uqbi Supreme Court Appeal for Araqib and Zkhiliqa Lands

The Israeli Supreme Court pressures the state to begin mediation process for a 'fair solution' to the Bedouin land issue

On Monday, 2 June 2014, the Israeli Supreme Court met to hear an appeal by the al-Uqbi Bedouin Arab tribe against the District Court's 2012 ruling to deny the tribe's ownership over its ancestral lands. The bench was headed by chief Justice Eliyakim Rubinstein, alongside Salim Jubran and Esther Hayot.

The session lasted over two hours, and concluded with a suggestion and pressure by the court for the sides to enter a mediation process in order to reach "a fair solution" for the tribe's land claims. Although there is no ruling, **it is the first time the Supreme Court criticizes state policies and asks for a "fair alternative"** implying that to date these policies have been unfair. It's the first time an appeal openly challenges the 'Dead Negev Doctrine' (DND)[i] under which large swathes of Bedouin land were appropriated by the state, turning their inhabitants into 'trespassers' on their ancestral lands, and forming the basis for systematic denial of human and civil rights.

Background:

The case was heard in the Beersheba District Court for six years as part of the land settlement process declared by Israel in the early 1970s. Israel froze the settlement proceedings and in 2006 the al-Uqbi tribe appealed on its own accord to restart them.

During the hearing of evidence it was also revealed that the state had expropriated the land in 1951 without notifying the previous land possessors , who had been evicted to a military zone some 20 kilometers east of Araqib.

Judge Sara Dovrat rejected the tribe's claim and ruled that the land should be classified as 'mewat' ('dead land' – according to Ottoman law - uncultivated, uninhabited, unassigned, unregistered lands; situated further than 2.5 kilometer from an inhabited place). Dovrat ruled according to the 'Dead Negev doctrine', articulated by the Israeli Ministry of Justice during the 1970s, under which the whole Negev region was classified as 'mewat', and hence as state lands. Accordingly, Dovrat justified her decision arguing that the Uqbis did not prove the existence of village or cultivation in 1858, and that they forewent (the putative) last possible date for

registration of the land in 1921. Therefore, the tribe's ancestral lands in both Araqib and Zhiliqa (some 20km North-West of Araqib) should be registered as state lands.

Dovrat's decision, despite holding 37 full text pages, ignored the testimonies of 11 Bedouins who resided in Araqib and reported the rich history of residence, construction, cultivation and daily life. The judge relied mainly on legal precedents, and chose to ignore the presentation of three expert witnesses, most notably **Prof. Oren Yiftachel** of Ben-Gurion University, who submitted hundreds of pages of evidence to the court, demonstrating systematically the existence of settlement and agriculture, and hence property rights in the two tribal areas.

Dovrat's decision preferred instead to accept the expert opinion of **Prof. Ruth Kark**, who claimed, on behalf of the state, that the Bedouins invaded the Negev by force, and that until 1921 were nomadic, without settlement, land system or permanent agriculture. Dovrat accepted Kark's opinion despite being exposed as replete with distortions and contradictions during the cross examination. Most dramatically, during the examination Kark was forced to admit "changing her mind" since the publication of her last book on the subject in 2002. The book describes widespread Bedouin land ownership and farming in the region, including Araqib, and hence Bedouin land ownership. It appeared like Kark 'changed her mind' in order to support the state doctrine.

Dovrat's ruling continued to follow the DND, relying on the al-Hawashlah precedent (1984) and placing an impossible burden of proof on the Bedouins. It therefore continued to deny not only al-Uqbis land rights, but any grain of property rights for the Bedouins in the entire Negev.

<u>The Appeal</u>:

The appeal was presented systematically and convincingly by attorney Michael Sfard, supported by attorney Adar Graevsky, Prof. Oren Yiftachel and Dr. Sandi Kedar. Sfard opened by comparing Israel's legal approach in the Negev to the notorious 'terra nullius' doctrine, used by European states to dispossess indigenous land in other cases around the world, and noted the important role of the judiciary in annulling this colonial legal concept.

Based on the research findings of Yiftachel, Amara and Kedar, Sfard then began to challenge the state's doctrine step by step, focusing on its questionable and distorted assumptions such as: the lack of Ottoman rule over the Bedouins in the C19th; the dynamic (rather than frozen) nature of the Ottoman Land Code and hence the irrelevance of the situation in 1858; the content and legal standing of the 1921

mewat Ordinance; and the nature of the land settlement procedure launched by the British, for which Israel is obliged to legal continuity.

The appeal also outlined a vast amount of evidence **for recognition of the Bedouin land and settlement system by the Ottoman and British regimes**. The Bedouins operated with a great deal of sanctioned autonomy based on an infrastructure of tribal courts in and around Beersheba.

Sfard then presented geographical evidence of settlement and cultivation (Bedouin style) mostly before the British Mandate in the Northern Negev , and the development of the indigenous land system. Sfard spent considerable time on the vast **land purchases conducted by Jewish organizations** and individuals in the Negev, on which 11 thriving kibbutzim were built and exist until this very day. Ironically, offsprings of Bedouins who sold the land are often declared to be trespassers. These sales necessitated the registration of Bedouin land by the Ottoman and the British, thereby clearly debunking the DND.

The appeal also stressed that contrary to state assertions about the validity of the mewat Ordinance, **the Ottomans or British have never appropriated even one acre of land on the basis of this legislation**. Therefore, the appeal shows that the DND not only distorts the legal setup and denies rights for the most marginalized groups, it is also based on shaky factual grounds. This related to the deep contradictions made by Prof. Kark in her testimony to the District court, and functioned as the main factual foundation for the claim that the land was 'dead'. Attorney Sfard exposed Kark's submission as misguided, unprofessional, biased and disingenuous.

The response by the two state attorneys, Moshe Golan and Havatzelet Yahel, was rather disjointed and unconvincing. The response steered away from matters of principle and focused on details. They argued vehemently that the Bedouins never 'received autonomy' from previous regimes and hence all legislation was valid for the Negev. They described in detail the state doctrine not as oppressive but rather as **generous** "allocating to the nomadic Bedouins lands for which they have no rights".

The attorneys spent considerable time arguing that the **Bedouins are not indigenous** to the Negev, but supposedly 'invaders' from the C18th, and requested private, rather than indigenous-collective titles to the lands. The UN declaration on indigenous peoples, the state claimed, has no customary standing, and as such is not binding.

Despite repeated requests by the judges, the state attorneys could not produce an explanation for the widespread purchases and registration of land from Bedouin owners during the Ottoman and British time. They also had no answer to the

existence of tribal courts which demonstrate the relevance of Bedouin land law and had no explanation to the claims that the mewat Ordinance was never used by the British in the Negev.

The Judges' Response:

During the presentations the judges intervened only rarely, focusing on procedural matters such as the validity of the expropriation 'for development purposes' of the land in question after sixty years of it continued to lie empty; the authority of the tribal courts; the power of the Ottoman and British in the Negev, and the details of the Bedouin land system. Hayot initially voiced the opinion that the 1951 expropriation overrules all other considerations, but later appears to have changed her mind.

Towards the end the judges began to voice their disquiet to the state's foot dragging of Bedouin claims more than forty years after their submission, and sixty years after the Bedouin eviction. They proposed, and later strongly recommended, a **mediation process that could reach an acceptable solution** for this painful problem. The Uqbis agreed, the state requested a month to consider, and the court awarded a fortnight. If the state declines, the judges hinted they would not rule on the case immediately, but allocate a time period for further negotiation between the sides to reach a compromise.

In overview, it is notable that for the first time, to the best our knowledge, the Supreme Court was exposed and listened attentively to the vast evidence in favor of Bedouin land rights and against the dispossession dictated by the DND. It was also noteworthy that the Court expressed criticism of the state's handling of the land settlement process, and did not accept a-priori the state's arguments, which are based on this court's previous rulings. **The court also pressed for a new way to reach "a fair solution" indicating that previous solutions were not fair**. Although the interim decision does not provide a significant breakthrough, it is possible that some cracks were opened for the first time in the Dead Negev Doctrine.

Beyond legalities, there is hope that the long sufferings of the evicted al-Uqbis tribe, which continues to live in appalling conditions in an unrecognized village, may be nearing a respectable solution.

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[i] http://www.haaretz.com/opinion/.premium-1.566357