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WHEN WINNERS LOSE: ON LEGAL LANGUAGE[1]

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ABSTRACT

This paper tells the story of a Palestinian village inside Israel from which the entire population of Palestinian citizens of Israel was deported and prohibited from returning. By relating the story of this village I aim to shed light on the nature and limits of legal discourse, the nature of legal reasoning itself, and the mechanism through which law conceals traces of violence. A major theme that runs through the paper is the distinction between implicit rules that lie in the background, and explicit legal moves and actions that occupy the foreground or surface of legal language and discourse. I will argue that while background rules remain hidden and unspoken, they nonetheless dictate the result of court cases, without the affected parties being given an opportunity to challenge them openly. At the same time, the paper will also show how law attempts to cover up these traces, and how maintaining an appearance of universality forces it to do some critical work and to place certain limits on power. Though the paper discusses the Israeli legal system, it does not aim to make broad statements or generalizations about this system, and the cases presented here illuminate certain aspects of legal discourse in general.

THE STORY OF EL-GHABSIYA

I want to open this paper by telling the story of the village of El-Ghabsiya in the Western Galilee, Israel. I hope that by telling this particular story I will succeed in saying something general about the nature and limits of legal discourse, as well as the fate of those who are unable to air their voices in current legal language. The story I will relay is based on the Israeli legal case reports, and all the facts are taken from decisions delivered by the Israeli Supreme Court.

The petitioners in H.C.220/51[2] had been residents of the village of El-Ghabsiya (hereafter: the village) prior to its capture in May 1948, and they brought their case to the Israeli Supreme Court against the military commander of the Galilee District (hereafter: the commander). All petitioners were Israeli citizens at the time. As a result of military actions in October 1949 they were expelled from the village by Israeli soldiers, but thereafter returned to their homes and remained there until they were expelled by the army for a second time in January 1950. From that date until the decision on the case was delivered, they lived in the neighboring village of Sheikh Danoon. At some point during September 1951 some of the petitioners attempted to go back to their homes in the village, but were prevented from doing so by the Israeli army.

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They were then expelled once again and sent back to Sheikh Danoon. It was the commander who gave the initial orders to expel them, and subsequently to prohibit them from returning to the village.

The petitioners argued that the military commander did not possess the authority to expel them in the first place, or to prohibit their return. The defendant raised several arguments. For our purposes the most important argument relied on the powers vested in the military commander by article 125 of the Mandatory Defence (Emergency) Regulations (1945), which authorized him to declare a certain area a closed military zone. According to this article, the argument proceeds, the commander issued an order on 2 August 1951 declaring twelve villages, El-Ghabsiya among them, as closed military zones; i.e. zones for which permission to enter or leave must be obtained from the military commander. In response, the petitioners argued that the order was invalid for the simple reason that it had not been published in the official gazette (*Rishomot*). They argued that as the order was of a 'legislative nature', it should have been published in the gazette, and since it was not it was therefore void. Much of the court's decision, delivered on 30 November 1951[3], deals with the question of whether or not the order did indeed have a 'legislative nature', and thus whether an obligation existed to publish it in the official gazette. The court reached the conclusion that the order did have a 'legislative nature', and consequently that there had been an obligation to publish it in the gazette. Since it was not published the order lacked validity, and the commander had not been authorized to expel the petitioners or to prohibit them from returning to their village.

We learn of the events that transpired after that date from a further court decision that contends with the aftermath of the first decision, and which was delivered by the same court several years later, in 1955 (hereafter: the second decision)[4]. From the second decision we learn that, following the decision of November 1951, the military commander, having learned a lesson, issued a new, similar order on 6 December 1951 that he published in the official gazette. Since all the villagers were living outside the village at the time, the new order only prohibited their return. However, during the week between the date on which the court's first decision was delivered (30 November 1951) and the date of the new order (6 December 1951), tens of people had managed to return to their homes in the village and resettled there (or so they argued). Henceforth I will refer to the week between these two dates as 'freedom week', for reasons that will be expounded below.

In fact, the second decision dealt with two petitions filed by two separate groups of people. The first group included those villagers who had returned to the village during 'freedom week', and who argued, in short, that since they had returned and resettled in the village, the new order, which was promulgated after their return, had no bearing on their status as it could not be applied retroactively[5]. The second group was comprised of villagers who had not gone back to the village during 'freedom week'. They argued, however, that they had been forced to leave their village illegally and against their will, and had then

illegally been denied the right to return to it by the defendant, and that some of them had in fact returned and been arrested for violating the military order. They therefore contended that the defendant should not be able to benefit from his illegal acts, or to rely on the fact that they had not returned to the village within that specific week. The argument proceeded that although they had not returned to the village, they should be treated by the court as if they had, or as if they had never left their homes in the first place[6].

The position set forth by the defendant was as follows. Regarding the second group, he denied them the right to any relief and rejected all their legal arguments. In the case of the first group, however, he conceded that those of them who were able to prove that they had returned to their homes during 'freedom week' were entitled to resettle in them. Thus the court found itself dealing with two major questions. In relation to the second group the question was legal in nature, and a matter of both principle and policy. Had their argument been accepted, then the discussion regarding the first group would have been rendered moot: if the second group of people had won their case then the first group would automatically have won their case, too. The court accepted the defendant's position with regard to the second group and rejected the legal arguments advanced by the petitioners. However, I will leave the details aside for the moment and return to them later.

As regards the first group, and based on the position adopted by the defendant, the question was a factual one: Did each petitioner manage to prove that he or she had returned to the village during 'freedom week'? Those who were able to prove that they had returned were entitled to resettle there, while those who were not were prohibited from doing so. After conducting a factual investigation, the court eventually reached the conclusion that only two men and one woman (named Myriam Krimo) from among the petitioners had proved that they had returned and resettled in his or her home within 'freedom week'. Accordingly, the court issued an order granting these three petitioners permission to go back to 'their' village.

I want to open my discussion of the case by posing several questions: Did Myriam Krimo 'win' her case, or did she lose? In such a case does rights discourse play a liberating role or a silencing role that conceals the traces of violence? What does it mean to 'win' the case in these circumstances? And if Myriam Krimo were to go back, would she be going back to the 'same' village? Is it still to be considered 'her' village after the expulsion of her family and neighbors? These are the concrete questions of the case that will allow me to situate it within the larger context of the limits of rights discourse and legal discourse in general, in order to unearth the mechanisms of silencing within legal discourse.

RIGHTS DISCOURSE: THE BACKGROUND AND FOREGROUND

Rights have an individualistic flavor[7]. Methodologically and normatively, they presuppose the centrality of the individual. Rights are supposed to protect certain interests of the individual. Thus, to state that 'x has a right' means that, other things being equal, an aspect of x's well being (his interest) is a sufficient reason for holding some other person(s) to be under a duty' (Raz, 1984). Or alternatively, they must safeguard the individual's power to make choices, according to the choice theory of rights[8]. In both theories rights are thought to be protective or empowering of the individual. Historically, rights were established to counter the power of the state and to guarantee a 'free zone' for individual action (Locke, 1988). The basic assumption in rights discourse is the existence of a state, community, and institutions. In this scenario these entities appear as the source of the threat to individual freedom (Mill, 1997), while rights appear as a shield against the oppressive nature of the state/community, and against state power.

Two main strands of critique have emerged to challenge this image of rights. One stream might be termed a positivist one, and opposes the natural rights tradition. It aims to draw attention to the fact that it is the state that creates rights, and not the reverse. Many liberals (from Hobbes to Bentham) were already aware of the fact that the state/community is also the condition for rights: it is the background against a sphere within which rights discourse takes place, and, more importantly, within which rights are enforced. Rights are the children of the law (Bentham, 1987). The main contribution made by this tradition has been to bring to the fore what had typically remained in the background, and to demand that we focus our attention on the centrality and importance of statehood/institutions/sovereignty, which we tend to take for granted, but are in fact the very condition for the existence and enforcement of rights.

The other strand of critique has more of a communitarian/linguistic flavor. It shares with the first, positivistic critique the attempt to highlight the background conditions that are the precondition for the existence of any rights. However, while the positivist would place emphasis on the institutional/enforcement level, the second critique stresses the cultural/linguistic setting in which rights discourse takes place. This discourse sets the limits both of what is thinkable and utterable, and what is not. It sets limits on which stories can be told and which are condemned to remain hidden and silenced. Within this tradition there is a long line of critique, stretching back from Saussure's linguistics and distinction between language and speech, to Wittgenstein's 'language games' and 'forms of life', and more recent theories of discourse, including Foucault's analysis in his *The Archaeology of Knowledge* of the a priori conditions of the possibility of any discourse.

The main idea here is simple. Saussure (1959) drew a distinction between language (*langue*) and speech (*parole*). *Langue* entails all of the abstract rules of

the language, while *parole* is the particular concrete utterance that a person makes in a particular situation. He uses chess as an analogy: chess has abstract rules according to which the game is conducted. These rules can be equated to *langue*, while *parole* is akin to the concrete game that players play and to the moves they make. By its nature *langue* remains in the background, but determines which moves are permissible and which are not. *Langue* never appears in its totality, but only through the manifestation of the concrete *parole*. Yet *parole* is impossible without it. *Langue* is the condition of possibility of *parole* and is implied by it[9]. The importance of Saussure's insight lies not only in the fact that it draws our attention to the enabling conditions of *parole* — the background — but also because it allows us to analyze this background as a system that is at once structured and arbitrary. It is arbitrary in the sense that he rejected a substantive view of language that assumes the existence of direct, intrinsic relations between words and things, opting instead for a relational understanding of language. Thus 'cat' means what it means because it differentiates itself from 'mat' and 'hat', and there is no appeal from language to reality, between the word 'cat' and the animal 'cat', and no fit between the utterance and the physical entity.

Therefore the fact that a relation exists between language and the external reality 'outside' makes language a self-sustaining system that can only be studied from within itself. Each word is given its meaning according to its location within the system, and each word means what other words *do not* mean. Language is self-regulating and does not 'obey' the commands of reality. It is structured, and its structure allows certain moves and denies others; it exerts authority and power and delimits the boundaries of speech. This shift to language as a structure with its own rules that dictate what may be said in everyday *parole*/speech focuses our attention on language firstly as the background, enabling condition of speech, and secondly as a closed system with its own internal rules and mechanisms.

It is this implicit, hidden nature of discourse that Foucault (1972) tackles in *The Archeology of Knowledge.* In every period and every culture there are certain hidden, discursive rules that set the background against which discourse can take place, and allow certain moves while denying others. Thus,

> Archaeology holds that the rules of discursive formation undergo dramatic changes in different historical periods, creating fundamentally different epistemic conditions. Foucault calls these rules the 'historical *a priori*' of a given culture. The *a priori* of discourse can be understood in the Kantian sense of the conditions of possibility of discourse, with the qualification that these conditions are not universal and immutable, but rather are historical and transitory.' (Best, 1995: p. 97).

Our words, gestures and actions acquire their meanings from certain contexts of backgrounds that render them meaningful. With this understanding it

becomes clear that, 'The very possibility of perception, thought and action depends on the structuration of a certain meaningful field which pre-exists any factual immediacy' (Lauclau, 1993: p. 431). Within this second strand of critique the stress is laid on discourse, language games and the unconscious conditions for the production of meanings. I want to draw on both traditions, but it is primarily on this latter tradition that I want to focus in this paper.

It was probably Hanna Arendt (1979) who made the most significant effort to combine the two critiques (positivist and the linguistic). In many ways Arendt connects the loss of statehood/community to the loss of context/language/meaning. Commenting on human rights discourse during the Second World War, Arendt was very aware of the 'right to have rights', to be part of a political community, writing:

> The first loss which the right-less suffered was the loss of their homes, and this meant the loss of the entire social texture into which they were born and in which they established for themselves a distinct place in the world (1979: p. 293)[10].

> The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective. Something much more fundamental than freedom and justice … they are deprived not of the right to freedom but of the right to action; not of the right to think whatever they please but of the right to opinion. (1979: p. 296).

There can be no speech without language, no citizenship without statehood, no rights without the power of state to enforce them and protect them, no meaning without a community of meanings or a historical context, and the loss of one half of each pair threatens the loss of the other.

MANUFACTURING SUBJECTS

A reading of the second decision[11] reveals the mechanism through which the totality and the wholeness of the story of the village of El-Ghabsiya was fragmented and truncated to the point that the petitioners were rendered speechless, their story left untold, and through which they were, simultaneously and paradoxically, constructed as full subjects. The first thing to note is the process of selecting the facts that are considered relevant and those that are not; the facts that will be recorded and those that are condemned to be omitted from the record as irrelevant to the court's decision.

As regards the first group (which included Krimo), the court conducted a factual investigation into the events of 'freedom week'. Here what appears to be a complete contingency — whether the petitioners returned to their homes within that specific week — is for the court evidently the cardinal question. All other

questions related to the history of the village — the villagers' need to keep their families together, their right to their own community, the fact that they had been living together as a community for many decades, the fact that their homes remained standing in the village, etc. — are all seemingly irrelevant in legal terms. Conversely, what appears to be contingent, arbitrary and irrelevant lies at the centre and constitutes the basis of the court's decision.

The sheer arbitrariness of the basis of the decision — whether or not the petitioner managed to prove that she went back during 'freedom week' — is manifested chiefly in the following fact: until the first decision was delivered on 30 November 1950, anyone who was caught either present in the village or attempting to return to it was criminally prosecuted[11]. For the one week of 'freedom week', however, this same incriminating record becomes the very document with the power to secure the right to return to the village. Thus the rules of the game are inverted during that one week, and then reverted to once more. The 'criminal' is turned into a victim, and the victim into a 'criminal', and in neither case do they have the ability to control either their criminality or their victimhood.

THE COURT'S RHETORIC

The court's rhetoric reaches new heights when it deals with the second group, those who attempted to return but were prohibited from doing so, including those who were imprisoned for these attempts:

> A considerable amount of time passed between the first deportation of May 1948 and their return to the village (according to the findings, in the Spring of 1949), and we do not know where the petitioners spent their time, or *why it took them such a long time to go back*. But we can leave these questions aside, since in our opinion there is no way to base the petitioners' right to settle back in their village on events that took place prior to the court's decision in case 220/51: following this decision one week passed until the publication in the official gazette. During that week (from 30 November 1950 until 6 December 1950), *the villagers were free to return to their village. Some of them took advantage of this fact, but others did not*. Since during those days *they were free to move and to act*, there is no reason to go back to prior events, as if they were forced to remain outside the village. Even if the petitioners were right in that the facts of their story entitled them from the start to the right to go back to the village, *they could have realized their right within and during that week*, and the right of he who did not do so expires. (Ibid: p. 693, emphasis added)

What is of most interest in this paragraph is the construction of each petitioner as a full subject and author of the course of his or her own life. The end result of the case appears not as an imposition of the state or the military, but rather as the

outcome of the choice of each and every one of the petitioners in determining her or his own destiny. They 'brought it on themselves': there were certain neutral rules and those who played by these rules obtained a positive result, while those who failed to do so did not.

This method of the 'construction of the subject' was widely used by the Israeli Supreme Court in the early 1950s. The establishment of the state and the war that accompanied it produced a flux of hundreds of thousands of refugees who, within the space of a single day, found themselves on the other side of the border and forced to leave their homes and families behind inside the State of Israel[13]. Many Palestinian refugees tried to cross back over the new borders to make their way back to their homes and be reunited with their families (in the Israeli official language they were referred to as 'infiltrators'). Many claimed the right to remain within Israel's borders and applied for Israeli citizenship[14]. However, the Israeli authorities were reluctant to grant them any permanent status within the newly-born state, and in most cases denied them the right to an Israeli identity card or to register as citizens. Many of those who were denied the right to reunite with their families and settle back within the borders of Israel filed petitions to the Supreme Court.

It may come as a surprise to some that the Supreme Court accepted many of their petitions. However, here too, analysis of the Supreme Court's decisions reveals the way in which the court constructed the Palestinian as a political and legal subject, and by allowing a few to return legitimized the prohibition of the return of the vast majority of Palestinians. The court dealt with all of these cases individually, not collectively, and focused on analyzing the full factual details of each in terms of places, dates, names, etc. According to the court's ruling brothers and sisters who had lived together in the same house for their entire lives, worked on the same fields, and shared their possessions within the same family, might find themselves on opposite sides of the border for purely contingent reasons consisting of what occurred during that week, or even on a specific day within it.

The main basic distinction deployed by the court in these cases was between petitioners who had left the country 'voluntarily' and those who had been 'forced to leave'. Those who left 'voluntarily' were taken to have expressed their will not to be a part of the nascent State of Israel, and were therefore not entitled to return to within the state's borders. Those who were able to prove that they had been 'forced' to leave, however, were allowed to go back to their homes and to become Israeli citizens.

The courts defined the term 'forced to leave' very narrowly, to refer to someone who had been driven out directly and forcefully by the army. Their definition excluded those who fled for fear of military actions or after hearing reports that were circulating of the massacres that were being perpetrated in many areas[15]. The court deployed this distinction between those who left voluntarily, of their own 'free will', and those who were forcefully deported in several cases. In some of these cases the distinction formed the basis for

rejecting a petition and in others for accepting it[16]. In all cases the court dived into the minute details of the petitioners' conduct within a limited period of time, magnified its importance and made the decision hinge on it, as if the petitioner were the shaper of his or her own destiny and the absolute author of his or her own life[17]. Thus, for example, in the *Husain* case[18] the court stated that the petitioner had not been forced to leave his home but had departed to Lebanon voluntarily. The court added that, 'A person who decides according to his will to spend his time to wander between the defensive fronts of the state and the attack fronts of the enemy does not deserve the assistance or aid of the court'[19]. A similar logic was deployed in the *Badawi* case[20], in which the court investigated the petitioner's precise movements. In this case the court found the petitioner to have left the country following the fall of Nazareth into the hands of the Israeli forces without permission, and thus to have brought the consequences upon himself. It concluded that justice required it not to interfere on his behalf[21].

This fragmentation of the story, of the totality of the experience, is also revealed in many other cases in which the court atomized the petitioner, as if she were wholly isolated and inhabited a separate universe, thereby stripping her of any attachments. Thus in the *Rabah* case[22], which involved eighteen petitioners, the court again dealt with each of them as completely separate cases, delved into details of dates and events, and accepted some of the petitions while rejecting others. The same fragmentation was repeated in the *Taha* case[23], in which the court decided on a petition filed by several residents of the village Majd El-Kurum seeking the recognition of their right to permanent residence in Israel. Once again the court's decision is replete with details of times and places and narrates the story of each of the petitioners, and denies some and grants others the right to permanent residency. Similar rhetoric recurs in several other cases[24].

WHAT FACTS ARE RELEVANT?

Here two main and related points should be stressed. The first is how the court decided to establish what was considered a relevant fact to be taken into account, and what was deemed irrelevant for the purposes of deciding in the case. It is important to examine not only what the judges said and wrote down, but also what they omitted. The moves made by the judges form a part of legal discourse, an utterance or a speech within a certain language that is subject to the rules and limits thereof. Thus the hidden hand of background determines the limits of the discourse, but leaves almost no trace.

There is no established legal rule that can resolve for the judge that which is relevant and that which is irrelevant in each case, or what facts should be taken into account and what are to be left out. In our case one might wonder, for instance, why the fact that the petitioners and their families had been living together for tens and even hundreds of years goes unmentioned, as does the fact that they had developed their own lifestyle, built their own community, and cultivated their land for decades, etc. Why are none of these facts relevant, while

others — which from the petitioners' perspective are marginal and arbitrary — are magnified and indeed made to form the very basis of the court's decision? How did the judges determine relevance? Drawing on Heidegger[25], and in particular the distinction he draws between 'present-at-hand' and 'ready-to-hand', Brian Leiter argues that Heidegger implies there is no criterion that can be rendered explicit regarding the question of what the relevant facts are in a particular case; rather, these are determined by something that is implicit in the decision and decided by the background[26]. 'The phenomenological study of human experience, of the human way of being or existing in the world, reveals the existence of a background which renders the world meaningful and intelligible, yet which itself resists explicit articulation in cognitive terms[27]. Leiter himself wonders what constitutes this background, and in answering his question refers to the work of Gadamar, who understands the background in terms of 'cultural authorities', and to Bourdieu (1987), who stresses the acquisition of practical 'know-how' practices within that community that are basic to its existence. His argument also refers to Heidegger himself, who suggests what he terms 'average everydayness', which forms the background of intelligibility against which our different philosophical and ethical judgments can be understood.

All of the El-Ghabsiya cases have in common the fragmentation of the totality of the stories they contain, and the court's identification of certain facts as 'relevant', and its complete disregard for others. There is no legal rule that can help us decide to stress a certain set of facts and to ignore others. This in itself is not a legal question, though it determines the case result. This distinction is based on certain assumptions that remain implicit, and are more primordial and elemental. This process entails the atomizing of each of the petitioners, stripping them of their history and community, uprooting them from their context, and ascribing to them a certain subjectivity that implies that they chose each step in the paths of their lives. In the cases in question, each Palestinian appears as the ideal of liberal theory: a choosing subject. The happy or the tragic ending depends upon the hero alone.

FROM GRAMSCI TO FOUCAULT[28]

This 'manufacturing of the subject' shares some features with concepts we encounter in the literature of many critical writers, from Gramsci's (1999) notion of hegemony and the manufacturing of consent, and Althusser's (2001) double meaning of the 'subject', as elucidated in his essay 'Ideology and Ideological State Apparatuses'[29], to Foucault's (1979) take on making subjects in *Discipline and Punish.* Gramsci's ideas are scattered throughout his prison notebooks and are not easy to pin down. However, one current theme surfaces in the notes on the importance of the political sphere and its relative independence. Politics is not the shadow of the economy (*contra* Marx), and within the political exists a site of struggle over ideals, conceptions, ideas and attitudes. The ruling classes

want to obtain the consent of the whole of society to its rule, and do so via hegemony; that is, by generating consent among the people through education, the church, moulding public opinion, and other techniques aimed at securing their acceptance of their situation and their station in life[30].

With Althusser (2001) the picture becomes even clearer. He is aware of the double meaning contained within the 'subject': the subject who is subjugated and stands against the sovereign, and the subject according to the other positive meaning of the word as she who possesses a will and is an author. In the latter case the subject stands against and is differentiated from an object, which is lifeless and has no agency. This merging of the double meaning of the subject reflects a certain reality that in turn itself reveals the nature of ideology: a situation in which one is being subjugated while believing oneself to be free and the true author of one's own life.

With Foucault (1979), this line of argument reaches new heights. For Foucault, the entire modern criminal system aims to control the people by imposing discipline and developing techniques and mechanisms with which to manage them. This management is facilitated by working on the 'soul' (1979: p. 102). The idea of the soul becomes a factor that facilitates the submission of the body. The subject internalizes certain ideas and rules and works on herself, disciplining herself in order to comply with them. The pressure is no longer external in origin but rather comes from within; it is not imposed but adopted and willed. In this way docile bodies are produced who can will their own subjugation. However, for that structure to be complete and effective we require the image of the positive subject who possesses a soul: the author.

The argument that I want to make in this regard is not as strong as could be implied by Foucault. I do not argue that the court was hoping to make the Palestinians in the aforementioned cases believe that they had brought the result upon themselves and were fully responsible for their own tragic fate, though I do not rule out this possibility. However, it is reasonable to assume that the court wished to portray the decision in this manner to itself, to the Jewish public in Israel, and to the international community at large. Thus it is an ideological move that is targeted not necessarily at the victim, but at least in part at the perpetrator of the action (the newly-born state), which holds a certain enlightened self-image of itself[31], and at the larger international audience. While it is implausible that the court aimed to convince the Palestinian audience of the justness of the result, it is by no means far-fetched to assume that such a construction of the case may allow it to fit neatly within the court's narrative of itself, and allow the Jewish majority to reconcile itself with the harsh and tragic results of the case[31].

TWO TYPES OF ORDER, OR THE POLITICS OF CLASSIFICATION: WHERE DID THE VIOLENCE DISAPPEAR TO?

In a situation of disorder or chaos there are two ways of establishing order; in other words, there can be thought to be two types of disorder and two corresponding types of order. One type of disorder is that which one confronts when reading a confusing article, or during a meeting in which people talk at cross purposes without focus, jumping from one topic to another. Further examples are that of a friend who is in a deep crisis and left disoriented, unsure of the right thing to do, or the imposition of a sentence of twenty years' imprisonment on one person convicted of attempted murder, and the imposition of a sentence of just ten years' imprisonment on someone else who has been convicted of murder.

Now compare that sort of disorder with a situation in an elementary school class for which the teacher is late, and where all of the pupils are swapping around where they sit, or in a police department where some of the officers do not obey their superior, or during a demonstration that becomes disorderly, or the more extreme case of a civil war.

I hope it is clear that the first sort of disorder is a conceptual disorder of sorts. This disorder may also be a normative/ethical disorder, a situation in which we feel a lack of orientation or some inability to make sound judgments, to apply universal criteria in a concrete case, or to distinguish case A from case B on a rational basis. The enemy of order in these cases is confusion and skepticism, but even more so an arbitrariness and lack of logic or coherence in the way in which things are presented, put together and dealt with.

The solution to this kind of disorder is none other than reason itself. Reason has the power to create categories and classifications, to gather similar things together, distinguish them from other things and afford them different treatment, thus making 'sense' of things and introducing a 'form' or structure into shapeless, chaotic and undifferentiated 'matter'. Crimes committed against bodily integrity are more serious than those committed against property, and crimes that cause more harm to the body than others are more serious and should therefore be punished more severely. Similarly, crimes that cause death are more serious than those that do not. We can thus furnish a 'reason' as to why some offences are punished more harshly than others by introducing certain classifications. It is therefore unsurprising that the word 'reason' is used in two different senses: 'reason' as a capacity or faculty, and 'reason' in the sense of giving 'reasons': to reason and to give reasons are related actions. This is very much the project of the Kantian Critical Philosophy[33].

Next let us turn to the second mode of disorder. Here what we experience is largely a lack of an enforcing power, or of the finality of the will of a sovereign capable of enforcing his decisions. Here we look to authority/government to create order. Hobbes (2001) is perhaps paradigmatic of this form of order, and it

is the role of the Leviathan to establish it. For Hobbes, the state of nature is not only a state of political disorder but also a place devoid of justice and objective values (2001: p. 37)[34]. This amounts to a denial of realist ethics and an assertion that what lies at the root of all of our disputes is a conflict between private judgments and beliefs which there is no clear, settled, objective way of settling. We all have to surrender our right to make these private judgments, erect a sovereign, and accept his judgments as if they were our own. Only in this way can we escape the state of nature, which is a state of war between different private judgments[35]. In this regard there is a certain structural and functional homology between the Kantian 'form' (and reason is a form)/Critical Philosophy, and the Hobbesian sovereign/Leviathan. In their own way both create order where there was disorder, and both establish unity behind difference.

What, then, is the relationship between these two senses of order? It is the role of numerous political theories and ideologies to convince us that the second type of order is based on the first, and that the sovereign is merely enforcing the demands of reason itself. Thus we can justify the power, authority and violence of the sovereign. Take this 'base' — the first type of order — and what one has is sheer arbitrary violence inflicted on citizens[36]. The first type of order bestows justificatory power on the second, and superimposes a smile on the unsightly face of the sheer violence of the sovereign. Reason helps violence appear mandated and necessary[37].

Let us return at this juncture to the cases discussed above, all of which dealt with the right of Palestinians to be somewhere, to return to their villages, to reunite with their families. The days in question were days of armed conflict in which massacres, indeed no less than ethnic cleansing, were perpetrated (Pappe, 2006; Morris, 2004), and during which the borders or the state were not delineated by an agree-upon principle but simply the frontiers of power (military and political). The distinction between villages whose inhabitants were deported and those whose inhabitants were not was completely arbitrary. The same situation was also replayed within single villages: the identities of those villagers who left and those who did not, and of those who returned and those who did not was a matter of pure luck, accident and contingency. *The order of things* (to borrow the title of Foucault's book) was simply shaped by the outcomes of war and the military actions taken by Israel[37].

The court rulings in these cases replace one sort of order with another. What appeared as sheer, arbitrary violence now appears to be mandated by the voice of reason itself. The classifications separating those who returned during 'freedom week' from those who did not, and those who left 'voluntarily' from those who did not (in the case of 'infiltrators'), creates a categorization that lays the foundation for different treatment, thereby justifying the end result and concealing the traces of violence. It is not the will of the sovereign that dictates such a decision, but rather the will of the reason/law. Classifications and

categorizations make what is in fact constructed and manmade appear natural and something to be taken for granted[38].

Here one needs to avoid a classical Marxist analysis that views law merely as the shadow of politics[40], and according to which law is no more than a mechanism aimed at masking violence, or a tool in the hands of the ruling class that is merely reflective of relations in the 'base'[41]. The problem with this sort of analysis is obvious and has been noted by many Marxists, including Gramsci (Gordon, 1998). If law is to play a role in veiling power or to adopt the function of a mask, then it cannot be completely transparent: if it were transparent then it would be unable to hide anything. For law to act as a mask it therefore needs to possess some shape, some color. If the face of violence is ugly, then in order for law to conceal that face, to refine it and improve its appearance, it needs a degree of beauty[42]. Thus if law is to conspire with and serve power, it must do some critical work itself: it must on occasion be subversive.

To revert once again to our cases, violence marked out dividing lines between one village and another, between certain groups of people and others, and arbitrarily introduced certain categories. In order for law to perform as I have described, it must avoid two extremes. Firstly, it cannot simply replicate the same distinctions and categories created by the authorities or the army, and cannot reproduce the same logic. Were it to do so, it would cease to be a mask. It does not use the first concept of order as the basis for the second. A total congruence in demarcating the lines would be detrimental both to law and to power. Law must create categories that somehow make sense; the voice of reason mandates the replacement of arbitrary categories with more reasonable ones. The lines between these categories must therefore be different, and the court needs to create distinctions to allow it to accept some petitions while rejecting others.

On the other hand, law and the courts must reject some (or most?) cases in order to win the loyalty of the system which allows it to be critical at other times. To be subversive law must show loyalty to power first, and to be in the service of power, law must be a little subversive.

CONCLUSION

This paper is about the limits of legal discourse and rights discourse. It is not a call to relinquish these discourses, but rather seeks to reveal their limitations and their dark side. The paper unearthed some of the hidden assumptions that underlie the court's reasoning, assumptions that are barely articulated and yet impose themselves on the participants in the discourse. I used the case of El-Ghabsiya and others to illustrate this mechanism, but the mechanism itself can be deployed in any other case. The paper has illuminated the implicit, obfuscated way in which the court chose to stress certain facts while disregarding others. It has also shown how this mechanism, which always remains hidden, dictates the basis on which the court creates the categories and

classifications that render what is arbitrary and violent as apparently natural and normative. Thus the paper is part of the literature that attempts to uncover the legitimating ideological power of legal language. It has further argued that for the violence of the law to shroud itself, and for law to demonstrate that it is not merely the shadow of politics/power/violence, it must stand against power from time to time, and stand up for the universal aspirations it claims to champion. Whether this opening, between the promise and the performance of law, is enough to save its victims, or whether it is just an illusion, is a question for other papers to explore.

NOTES

1 This paper was completed thanks to the financial support of the German Israeli Foundation (GIF) through the year 2008–2009 and of the Haifa Law School.

2 H.C. (High Court) 220/51, PD (5) 1480.

3 H.C. (High Court) 220/51, PD (5) 1480 at 487.

4 H.C. 288/51 and H.C. 33/52, PD (9) 689.

5 The petitioners in H.C. 288/51.

6 The petitioners in H.C. 33/52.

7 For a critique of the individualistic nature of rights, see, e.g., Glendon (1991). One needs to distinguish between two different conversations or critiques of the language of rights as individualistic. One might be propounded by left-wing socialists, and in this critique the individualistic nature stands in tension with the duties of solidarity that one would hope to see within society. The classic example of this approach is Marx's (1843) critique of the language of rights, as set forth in *The Jewish Question*, in which he describes the right bearer as being withdrawn unto himself. The second critique is more communitarian and accuses rights discourses of being unresponsive to the existence of the community, and of its language and culture, both as a whole and as a condition for the wellbeing of the individual. Here the classic text is probably Edmund Burke's interpretation of the French Revolution. For a more contemporary view, see Sandel (1998). These two critiques have much in common, and one can argue that in order to have duties of solidarity, the welfare state, etc., the members of the community must feel connected to one another and that they have something in common; otherwise people would not be prepared to come to each other's aid. This argument connects the two strands together, but I want to keep them analytically separate. For an interesting discussion of the nature of rights and their necessary relation to individualism, and of the at times excessive critique of rights as individualist, see Waldron (1998a), where he deals with the communitarian critique and Waldron (1998b).

8 See Hart (1998), where he develops a choice theory of rights.

9 For a short introduction to structuralism in language, see Hawkes (1977).

10 Arendt was in many ways a pioneer in articulating the need for another sort of discourse not based solely on rules and norms, and she indicated the importance of narration early on, before 'law and literature' scholars, well aware of the limits of what might be said within the legal discourse (see Disch, 1996:

Chapter One; Kristeva, 2001). For Arendt's treatment of the question of statelessness and the right to have rights, see Benhabib (1997).

11 H.C. 288/51 and H.C. 33/52, PD (9) 689.

12 The court itself noted the fact that a number of people who tried to return to the village were captured, brought before the courts and imprisoned. See H.C. 33/52, PD (9) at 690, 692.

13 On the birth of the refugee problem, see, in general, Morris (2004). For a Palestinian perspective on the issue, see Aruri (2001); Khalidi (1992).

14 This fact will be clear to anyone who reviews the Supreme Court's reports published throughout the 1950s. The issues of citizenship, permanent residence and identity cards constitute a substantive part of the court's decisions related to Palestinians in Israel.

15 See H.C. 125/51, *Muhamed Husain v. The Minister of the Interior*, P.D. (5) 1387, at 1392.

16 For cases in which such a distinction was employed, see, e.g., H.C. 51/177, *Badawi v. The Minister of the Interior*, PD (5) 1241, H.C. 54/145, *Sabri Abu Ras v. The Police Commander et al.*, PD (8) 1473, and H.C. 130/54, *Hasan Naamneh v. The Police Commander et al.*, PD (8) 1439. For cases in which the court deployed the distinction as the basis for accepting a petition, see, e.g., H.C. 53/155, *Kiwan v. The Minister of Security*, PD (8) 301, H.C. 51/196, *Hassan Abu Ras v. The Minister of the Interior*, PD (7) 1081, H.C. 52/14, *Saleh Abed El-Hadi v. The Minister of the Interior,* PD (6) 163, H.C. 51/155, *Mustafa Khalidi v. The Minister of the Interior,* PD (6) 52, H.C. 51/157, *Kasem Abed v. The Minister of the Interior*, PD (5) 1680, and H.C. 51/153, *Husain Hamood v. The Minister of the Interior,* PD (5) 1641.

17 Here a caveat is mandated. Every agent under any circumstances is simultaneously free and constrained. Of course, anyone who left the country during the war was in some sense free not to leave, having had several possible options from which he or she chose. The question is not therefore one of absolute freedom or constraint, but, given all the circumstances, of how much freedom and how much constraint shaped the agent's action, and whether one can justifiably ascribe to the agent what was ascribed to him by the court. I find the court's conclusion that the fact that he chose to leave during the war means that he chose to abandon his country permanently and to no longer be one of its citizens problematic.

18 See note 15.

19 Idem at 1392.

20 See note 16.

21 Idem at 1242.

22 H.C. 51/237, PD (7) 488.

23 H.C. 138/51, PD (7) 160.

24 See, e.g., H.C. 303/52, *Faaor v. The Police Commander,* PD (7) 724, and H.C. 236/51, *Kais v. The Minister of the Interior,* PD (8) 617. See also H.C. 3/50, *Kaawar v. The Custodian of Absentee Property*, PD (4) 654. In this case the court largely based its decision on the fact that the petitioners had travelled from one city to another (for instance from Haifa to Acre), something that Palestinians did on a daily basis and was never considered of any significance.

25 See Leiter (1996).

26 Leiter offers the following example to illustrate Heidegger's distinction: I make a list of the things in my study room (chair, desk, lamp, computer, pencil, etc.). By creating this catalogue of things I have changed my relation to them. In making the list I have individuated the items, not as things to be used, but as items in a list. As such they are items viewed with detachment. In this situation the items are 'present-at-hand'. However, each of these items has a more basic purpose: the chair is there in order for me to sit on it, the lamp for me to illuminate the room with, the pencil for me to write with, etc. In all these cases the thing is 'ready-to-hand': the thing exists in order to do something, to be used by me without there being any mediating cognitive aspect to the activity. This 'readiness-to-hand' is not a matter of theoretical knowledge; rather, it is practical relationship that is even more primordial. Things appear to us first as 'ready-to-hand', in their immediate use, and it is only when something goes wrong that one steps back and conceives of them as 'present-at-hand', through some theoretical knowledge (see Leiter, 1996).

27 I must add that I am using the distinction in a different way from Leiter. Leiter deploys the distinction in order to show us the problems that we face in deciding what is to be considered a relevant fact when we are about to refer to a legal precedent, and we ask in what sense is one case similar to another and in what sense different. This process entails deciding which facts are relevant for the comparison and which are not. My deployment is different, although both rely on the distinction drawn by Heidegger.

28 For an excellent survey of the development and vicissitudes of the concept of ideology, see Eagleton (1991), in particular Chapters 4 and 5.

29 See in particular his view of the relation between ideology and the subject, at pp. 115–120.

30 See Gramsci (1999), pp. 5–14 for a discussion of the role of intellectuals in producing hegemony; pp. 55–60 for a discussion of the role of political leadership and its relation to hegemony; pp. 159–173 where he argues against 'economism' and stresses the power of popular beliefs as part of the material forces that make up society; pp. 192–195, where he discusses the role of elites in producing consent; and pp. 257–264, where he anticipates much of Althusser's insights into the role of the state, the school and the court: 'Every state is ethical in as much as one of its most important functions is to raise the great mass of the population to a particular cultural and moral level, a level (or type) which corresponds to the needs of the productive forces for development, and hence to the interests of the ruling classes. The school as a positive educative function and the courts as a repressive and negative educative function are the most important state activities in this sense' (1999: p. 258). Eagleton defines hegemony, following Gramsci, as, 'a whole range practical strategies by which a dominant power elicits consent to its rule from those it subjugates', (Althusser, 2001: pp. 115–116).

31 The founders of the state of Israel always stressed the fact that Israel is not only a Jewish state but also a democratic state, and this commitment expressed itself in the Declaration of Independence. The question is not whether Israel managed to fulfill the promise of equality and democracy to its Palestinian citizen, but that Israel always wanted to portray itself as such and the image of being democratic is very dear to its founders.

32 Here an important note is mandated: toward the end of its decision the court made it clear that, despite the fact that the petition was basically rejected, the authorities nevertheless were obliged to find a suitable solution for the petitioners' tragic situation. See H.C. 33/52, PD (9), at 696.

33 For the image of reason as creating order, see Saner (1973); Pippin (1982). Whether in theoretical or political philosophy, 'form' stands above 'matter' and gives order and shape to its endless, chaotic flow.

34 See also Chapter 5, where Hobbes deals with the role of reason, limiting it to a role of reckoning and making calculations, which gives us at most rules of prudence (at pp. 32–33), and Chapter 6, where he discusses the question of good and evil, telling us, 'for these words of "good" and "evil" and "contemptible" are ever used with relation to the person that useth them: there being nothing simply and absolutely so, nor any common rule for good and evil' (2001: p. 39).

35 Here I am adopting Richard Tuck's (2001) reading, which I find very convincing in this regard. See p. xxv, regarding the impossibility of realist ethics, p. xxvii, regarding all conflicts at the base being conflicts of private judgments, and p. xxxiii, on the role of the sovereign in replacing private judgments with his, and our acceptance of his judgments as our own.

36 Of course there is the important caveat that in the Leviathan Hobbes suggests that any sovereign is preferable to any state of nature. Thus although the sovereign's decisions may appear arbitrary from one perspective they can be defended from another: We all are equally subject to the same sovereign.

37 For the reliance of law on violence on the one hand, and the attempt to obscure the traces of this reliance see Sarat and Kerans (1993).

38 On the situation of the Palestinians in Israel during and immediately after the war, see Segev (1986); Lustick (1980) provides a discussion of the ensuing years. See also Schechla (2001).

39 For the importance of classification in general (and in private law in particular), see Feinman (1989). For the power of law to categorize, classify and rationalize, see also Bourdieu (1987).

40 See mainly Marx (1978: p. 154): 'The production of ideas, of conceptions, of consciousness, is at first directly interwoven with the material activity and material intercourse of men, the language of real life. Conceiving, thinking the mental intercourse of men, appear at this stage as the direct efflux of their material behavior. The same applies to mental production as expressed in the language of politics, laws, morality religion, metaphysics, etc. of a people'. See also his treatment of the relation of state and law to property at pp. 186–188. For a general overview, see Cohen (1978) on the relation of law to the economic base. In fact, one can find evidence that Marx thought the relation between the two to be far more complicated, but this was the dominant view at least in later Marxism.

41 I am using 'base' here in the classical Marxist terminology that distinguishes between the economic 'base' and the legal cultural ideological 'superstructure'.

42 See some of the new Marxist writings on the role of law. E.P. Thompson (1975), for example, uses Gramsci's insight and views the law as a site of struggle. Law must do its best to appear universal. This attempt to gain legitimacy forces it to make promises to all, and these promises must be

fulfilled from time to time. This need for legitimacy forces the legal system to appear universal, and this need is what allows other classes (other minorities, in our case) to use the system against itself. See also Howard and Klare (1972).

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