We are determined to accelerate our efforts to settle Jews in the Negev. This is necessary to protect state lands against illegal Bedouin invasions that occur daily ... For this end, the government has decided to add five more Jewish settlements. The ministry, under my leadership, will move immediately to plan and build these settlements.

(Yair Gallant, Israeli Minister for Housing and Construction, 17 November 2015)

‘Planning’ in this chapter pertains to the making, content and consequences of public plans governing urban and regional development. As such it covers a wide range of design, legal, regulative economic, ethnic and political decisions that together ‘produce’ societal space. Theorisation of urban and regional planning has advanced in leaps and bounds during the last three decades. Despite the continuing dominance of functionalist, state- and market-centric analyses, notable critical perspectives have emerged regarding the ‘darker sides’ of urban and regional policies (Flyvbjerg 1996; Yiftachel 1994), most notably the emergence of ‘Southern’ or ‘South-Eastern’ perspectives in recent years (Connell 2014; Roy 2005; Watson 2009; 2014; Yiftachel 2006).

Yet, the surge of critical writing has been (inevitably) partial. One aspect not analysed sufficiently as yet, has been the frequently oppressive consequences of the interaction between law, land and identity (for exceptions see Alfasi 2014; Blomley 2002). As the opening quotation by the Israeli housing ministry shows, planning, land and law are strongly intertwined in several illuminating ways: it is identity that largely determines the allocation of land, implemented through settlement planning. In turn, it is the interconnection between land and planning (settlement) policies that largely determines the plight of identity groups in the Israeli space. This ‘triad’ creates sets of relations that should be brought to the centre of our conceptual and empirical writing about planning.

Yet, planning and urban theory has given only scant attention to these matters, mainly because, as Watson (2009, 2014) and Connell (2014) illustrate, most planning knowledge, tools and concepts emerge from liberal democracies in which citizenship, governmental liberalism, legal (de jure) equality, human rights and the rule of law are basic norms that operate within
a hegemonic capitalist framework. To be sure, these norms are never fully observed, and are often abused, even in the global North-West. Yet the impact of concepts that ‘run against the grain’ of liberalism on planning and urban theories has been too marginal in the theoretical and historical discussion (for exceptions, see Blomley 2002; Porter 2014).

Drawing on these shortcomings, this chapter foregrounds the relations between planning, land, law and identity. It focuses in particular on the concept of ‘terra nullius’ (TN) – land deemed as ‘empty’ of rights – as key to understanding these relations. The empirical focus is on the charged context of Israel/Palestine where the settler Jewish state has extensively used legal and planning tools to seize, control and manage contested indigenous Bedouin lands.

**Terra nullius**

The concept derives from a Roman legal doctrine and evolved during the period of European imperialism to denote a legal setting in which lands are classified as emptied of sovereignty, ownership or possession rights. The concept was widely used – explicitly and implicitly – by European empires and settlers to dispossess, evict and at times genocide indigenous populations, while exploiting the resources of their lands and regions (Daes 2008; Du Plessis 2011; Fisch 1988; Macklem 2008; Wolfe 2006). While the precise conditions for classifying land as ‘empty’ vary by time and region, a common denominator emerged of annulling indigenous histories, legal systems and property rights. TN represented one of the most effective and notorious hallmarks of the racist colonial period, as noted by Judge Hollinworth of the Australian High Court in the famous 1992 Mabo case:

> Australia was declared to be *terra nullius* ... This strategy enabled the British to class their occupation as ‘peaceful settlement’ rather than invasion ... no treaties or agreements (were signed) with Indigenous leaders. No compensation or legal recognition of Indigenous property rights was made ... This legal concept enabled generations of indigenous dispossession.

* (High Court of Australia 1992)

TN is far more than a legal concept. It is a frame of mind typifying colonial and ethnocratic regimes. While the concept rests on legal foundations, its most powerful effect lies well beyond the legal – stripping indigenous peoples of their culture, histories and codes of governance. The concept endows the invading or expanding entity the power and legitimacy to define when and where land is considered ‘empty’, and hence who is a ‘rightful’ owner.

To be sure, not all legal and planning interventions are based on TN principles. In recent decades, the concept of indigenous, multicultural and democratic planning ‘from below’ have gained considerable traction in research and professional practice (see Alfasi 2014; Sandercock 2003; Yiftachel *et al.* 2016). Yet, TN has been, and still is, an important foundation over which planning and law often construct contested space, with little critical research and theorisation.

In recent decades, serious challenges and indigenous mobilisation have eroded the use and applicability of TN (see Altman 2014; McAulsan 2013; Macklem 2008; Sandercock 2003). It was famously declared null and void in Australia following the 1992 Mabo decision (Porter 2014). The case of Australia has become a symbol for a counter-movement, in which indigenous and other marginalised groups strengthen their resistance to the hegemonic order, using their indigeneity and human rights norms as important tools in the struggle for land and planning rights (see Stavenhagen and Amara 2013; Yiftachel *et al.* 2016).
Importantly, the TN concept is often used implicitly by policy makers, through the discourses, narratives, norms and practices of hegemonic groups that attempt to seize and control ethnic and racial minorities. Moreover, TN is not limited to reconstruction of the legal past and present, as it also reconstructs the future, mainly through land allocation and urban and regional planning. The conceptual framework of ‘empty land’ has been vital for the imagination, practices and abuses of redeveloping land, both in Israel/Palestine and elsewhere. This has led many (though of course not all) planning professionals to often treat development sites as ‘tabula rasa’. In such a manner, TN (explicitly or implicitly) has been vital for the colonisation and planning of contested lands in colonial and postcolonial eras, and must be exposed and unpacked in order to offer better understanding of the use and abuse of this concept, as well as articulate ways to resist and overcome its consequences.

Land, law and planning in southern Israel/Palestine

Let us move to an analysis of a telling case study of the struggle over the Negev region (in Arabic, Naqab) lying at the southern half of Israel/Palestine. The region has been inhabited for centuries by Bedouin Arabs until being taken over by Israel in 1948, and consequently thoroughly Judaised. In previous centuries, semi-nomadic Bedouin Arabs gradually settled into permanent localities, combining agriculture with pastoral grazing (Bailey 1980; Falah 1983; Meir 1997). The historic Bedouin region was governed by well-established codes of ownership, partition, sales and conflict resolution (for details see Abu-Sitta 2009; Amara et al. 2013; Frantzman et al. 2012; Nasasa et al. 2014; Yiftachel et al. 2012, 2016).

Historically, the legal challenge facing the settling Jewish group was more complex than most other settler societies, because modern land laws were already established by the previous imperial Ottoman and British rulers. Hence, in order to gain statutory control over contested lands, it was necessary for the legal system to construct new ‘truths’ that erased previous possession, ownership and development rights, already recognised by modern imperial regimes. In the Negev, the state approach has been termed ‘the dead Negev doctrine’ which became the Israeli version of TN (Yiftachel et al. 2012).

The doctrine relied, and manipulated, the Islamic tradition where ‘dead’ (mewat) land was coded into the 1858 Ottoman Land Law as deserted, unpossessed, unused lands, lying at least 2.5 km from the edge of a locality (OLC 1858: Clauses 6, 103). Importantly, and contrary to the use of this concept by Israel more than a century later, the Islamic and Ottoman law sought to encourage development and cultivation, even without prior government approval. It enabled the population to gain property rights through ‘vivification’ and development of unpossessed, uncultivated, lands.

British rule over Palestine, beginning in 1917, brought several changes to the legal geography of land, some of which under Zionist pressure (Abu-Sitta 2009; Essaid 2013). Notable among the changes was the 1921 ‘dead land ordinance’, which prohibited ‘vivification’ of deserted land without government approval (Essaid 2013). The new ordinance required possessors of mewat lands to register the land within a two-month period, ending on 16 April 1921. However, the move proved a failure, as reported by the Abramson Land Settlement Commission in late 1921 (Abramson Commission 1921), as only 4.4 per cent of the land in Mandatory Palestine was registered, almost entirely in the urban areas, and only negligible portion as a result of the mewat ordinance (Abramson Commission 1921; Bunton 2007).

The failure prompted the British to launch a comprehensive land registration effort, culminating in a new Settlement of Title Ordinance (1928), which to date forms the legal basis for land settlement between Jordan and Mediterranean Sea. Under the ordinance, registration progressed professionally, mainly along the Mediterranean coast and northern valleys, where Jews
held significant tracts of land. The process moved slowly, and by British departure in 1948, only
20 per cent of Mandatory Palestine was surveyed and registered (Forman 2002).

A full analysis of the key role played by the British imperial authorities in the Negev must
await another paper (see also Nasasra et al. 2014; Kark and Frantzman 2012). Suffice it to say
here that the legal framework created by the British authorities proved vital for later Zionist
colonisation and the dispossession of the indigenous. The British themselves, however, explic-
itly protected indigenous Palestinian rights and customs (particularly in the Negev), and even
appointed tribal courts to preside over conflicts in the region. Yet, their early legislative steps
were used and manipulated years later by the Israeli state. Hence, echoes of global TN were
imported by the British to Palestine, and formed the foundation for the Israeli version of TN in
the region, and later in the occupied West Bank (see B’tselem 2012).

Following independence in 1948, Israel adopted the Mandate land settlement legislation
almost unchanged. However, its interpretation changed radically, borrowing selectively and
manipulatively from a range of past legislation. This resulted in the listing of unattainable condi-
tions for proof of ownership by the Bedouins. This interpretation became the main axis for the
prolonged land planning conflict in the region.

At the same time, Israel progressed with land registration, reaching the Negev by the early
1970s. The Bedouins filed 220 tribal land claims, covering 1.5 million dunam (roughly a
seventh of the Negev region). Hopes among the indigenous population were high, given the
recognition of previous regimes, and by the pervasive legalised pre-1948 Jewish land pur-
chase from the Bedouins, amounting to over 160,000 dunams (Kark 2002; Fischbach 2003).
Even major Zionist organisations such as the Jewish National Fund (JNF) and the Palestine
Development Fund recognised Bedouin ownership by purchasing from them vast tracts of
their lands, after registering the land as belonging to the Bedouins before its purchase (Kark
2002). This obvious confirmation of indigenous land ownership was later deemed by Israeli

![Figure 19.1](Image)

Figure 19.1  A customary Bedouin land sale document (‘sanad’) dated 1911, displayed by
head of one of the Araqib tribes.

Source: author.
courts as “documentation of transactions” and hence a series of non-binding cases, whose legal logic was “unclear” (see also Kedar et al. in press 2017; Supreme Court 2015; see Figure 19.1).

In parallel, Israel has attempted for decades to coerce the Bedouins to urbanise into newly created Bedouin towns. It was steadfast, until the late 1990s, in its refusal to recognise the 46 unrecognised Bedouin-Arab localities, now hosting close to 100,000 people. This refusal, in turn, rests on the denial of any Bedouin property rights on lands inherited from their ancestors of many generations. This denial is achieved by ‘emptying’ the land of its history, belongings and past legal conventions. This results not only in refusing to recognise their land rights, but denying these communities most basic services, such as roads, public transport, water, electricity, education or health facilities. In recent years, Bedouins also face the highest levels of house demolitions ever recorded in the state’s history, reaching 945 demolitions in 2014 – five times higher than in the occupied West Bank (Negev Coexistence Forum 2015). Hence, TN in the Negev bridges past and future, and aggressively impedes the ability of Bedouin communities to subsist, let alone develop and prosper in their traditional localities.

**Denial and erasure**

The legal basis of the denial is Israel’s total refusal to recognise the validity of a pre-state indigenous land system. History, however, tells a different story, in which a well-established indigenous system operated for generations. In 1903, for example, the Ottomans also appointed tribal courts in Beersheba, thereby sanctioning Bedouin indigenous frameworks of authority and justice (Ben-David et al. 1991). Capitalist commercialisation began to take effect in the region, and was augmented by the Ottoman ‘Tansimat’ (government reforms and reorganisation), part of which spawned the abovementioned 1858 Land Code. Under these circumstances, Bedouin agriculture developed rapidly. While Israel denies the existence of pre-Mandate Bedouin agriculture (which means the land was not ‘dead’ and awards significant rights under the Ottoman system), plenty of evidence shows otherwise (a full account appears in Yiftachel et al. 2016). For example, British geologist Edward Hull noted in 1883 on the Negev landscape: “The district is extensively cultivated by the Terabin Arabs . . . The extent of the ground which is cultivated . . . , is immense, and the crops are wheat, barley, and maize must vastly exceed the requirements of the population” (Hull 1886: 138–139).

Against this history and geography, Israel developed ‘the Dead Negev Doctrine’ (DND) as a sophisticated way to claim indigenous lands. The doctrine puts great emphasis on formal dates, rather than actual history and geography. It represents a highly formalistic interpretation of Ottoman and British legislation, opposed to the recognition granted by these regimes to Bedouin land rights and possession. This was reinforced in 1935, in the answer of the British High Commissioner to Zionist claims of receiving land for settlement in the Negev in 1935: “The cultivable land in the Beersheba sub-district is regarded as belonging to the Bedouin tribes by virtue of possession from time immemorial” (Government of Palestine 1937).

From all accounts, the British land settlement process routinely registered cultivated lands in the names of their holders, if neighbouring land owners approved (Hilleli 1983). It is highly likely that if the British land registration would have arrived at the Negev, at least all cultivated and inhabited lands would be registered on the names of their holders, as was done in all other regions registered by the British (see Forman 2002; Forman and Kedar 2003).

Yet, Israeli courts continued to rule according to the DND, which made it all but impossible for the Bedouins to prove in court their land ownership rights. The doctrine has in effect emptied the land backward, that is, it asserts (with no systematic evidence) that land and settlement rights
based on their own reconfiguration of events and practices in the distant past. By accepting the doctrine, the courts have in effect been telling the Bedouins: “your parents and grandparents did not know, nor were they told by previous regimes, but now we are telling you – they were trespassers, and so are you!”.

Consistent court ruling against Bedouin land claims relies on the most important precedent of Hawashleh, where the Supreme Court ruled in 1984 that the claimed land was neither settled permanently (because clusters of tents were considered ‘encampments’ and not ‘settlements’), nor systematically cultivated during the nineteenth century. They also nailed down the decision by noting that once the last date for registration had passed (1921), there would be no reprieve. Even if the Bedouins continued to live on their ancestors’ land and bequeath it from generation to generation, they would be considered trespassers, and the land should be registered as state property. In the absence of a constitution or any other legal recourse, the Hawashleh Supreme Court ruling became a binding precedent, in effect ‘emptying’ the entire Bedouin living areas from previous ownership.

In the decades that followed, the courts continued to fully rely on the Hawashleh precedent. This allowed them to systematically ignore a growing body of evidence about pre-state years; Bedouin legal representation was weak, unorganised and seriously lacking research. Many tribes also decided to ban what they considered to be biased courts. By the end of 2014 the state had won about 205 land claim cases, while the Bedouins had won none (Negev Coexistence Forum 2015).

As noted, the customary land system formed the baseline foundation for the Ottoman and British determination of land ownership. Plenty of internal indigenous documentation and verbal testimony demonstrates once more the existence of an active and fully functioning indigenous land system. However, these indigenous documents were deemed by Israeli courts as “lacking legal relevance towards the state... the source of rights [on which they draw] is flawed, and the documented land transferred have no relevance for the law, lacking any legal value” (Al-Uqbi et al. vs. State of Israel 2012, clause 7).

Naturally, the Israeli TN version has had profound planning implications. By and large, during the last seven decades Negev planning was premised on the ‘emptying’ of indigenous ownership or residential rights. Within this setting, urban and regional planning became a major player, by establishing 110 Jewish settlements (towns, villages, farms) in the region. During the same period, the state denied, through planning means, any recognition of Bedouin Arab localities; those existing prior to 1948 and those settled by the state in new locations as ‘temporary solutions’ during the 1950s and 1960s.

The consequences have been grave, as the unrecognised Bedouin localities evolved into slum-like sprawling semi-urbanised developments, lacking basic services such as roads, schools, electricity, water and health clinics. All Bedouin localities are placed at the lowest socioeconomic decile in Israel, and suffer constant state oppression, most notably over unauthorised building. Given the lack of municipal status or outline plans, about 70,000 unauthorised structures exist, and house demolition has become the main ‘language’ in which the state ‘speaks’ to its Bedouin citizens (Negev Coexistence Forum 2015).

Bedouin towns and villages around Beersheba have thus evolved into ‘gray space’, alluding to people, developments, lands and transaction that are neither equally integrated into citizenship, membership or plans, nor evicted or destroyed. ‘Gray spacing’ is a common process in colonial and neo-colonial settings, as well as in the hyper capitalist metropolis of the twenty-first century. It typically results in a systemic and long-lasting denial or rights and in stratified system of citizenship, leading to a regime described as ‘creeping urban apartheid’ (Tzfadia 2013; Yiftachel 2009).
Figure 19.2 Planning as terra nullius: Bedouin localities invisible in Beersheba’s Metropolitan Plan

Policy changes and Bedouin resistance

The massive gray spacing of Bedouin development at the outskirts of Beersheba, coupled with persistent and often increasingly organised Bedouin resistance ‘from below’ caused a rare compromise by the Israeli planning and land systems. During the decade from the mid-1990s, 11 previously unauthorised localities hosting some 30,000 residents were recognised, and the authorities began to create outline plans that would make their future development fully legal. The compromising line reached a peak a decade ago, with the appointment of a special commission of inquiry, known as the Goldberg Commission, which recommended to “recognise the Bedouin localities and give them legal status” (2008: preface). The Goldberg report was met with severe criticism from hard-line Jewish circles, and some scepticism from their Arab counterparts. It was never adopted by the government, nor implemented.

However, the period of compromise was overridden by a new hard-line approach prevalent since 2009. During this phase the authorities returned to rejectionist policy, refusing to recognise the remaining 35 unrecognised Bedouin localities hosting some 70,000–75,000 Bedouins. In parallel, a new legal assault was launched, in which the state places ‘counter claims’ against Bedouin land claims. More than 45 years after the launching of the original claims and nearly 70 years since independence, the state has ‘remembered’ to claim the unregistered Bedouin lands (see Figure 19.2; Amara 2013; Negev Coexistence Forum 2015).

The legal assault is central to the enforcement of a TN concept, given the new research and many challenges emerging from the communities (e.g. Amara et al. 2013; Nasasra et al. 2014; Yiftachel et al. 2016). In addition, state attorneys are well aware of the Hawashleh precedent outlined above and are able to fully exploit it. Given the lack of state constitution, and the reliance of the Israeli legal system on precedents, the state is confident to continue and win all cases brought to the courts (Sheehan 2013).

The main new government policy known as the ‘Prawer Plan’, was released in 2012, with a concerted effort to totally reorganise and urbanise Bedouin indigenous space. The main effort focused on passing new legislation that would offer Bedouins land and housing packages in the existing towns or partially recognised localities. The Prawer plan offered to ‘resolve’ Bedouin land claims with the allocation of 15–20 per cent of claimed land to the Bedouins (Azmon 2015). The plan thus threatens the vast majority of Bedouins with massive dispossession, in return for receiving suburban style residential blocks and small compensation in unknown quantity and quality, at unspecified locations (Prawer Report 2012).

The Prawer bill and plan, with a new policy document composed by Benny Begin (the responsible minister until 2014) were adopted by the government in February 2013. It encountered widespread opposition from local communities, human rights organisations and international bodies, including the European Union and the United Nations. This caused Yair Shamir, the responsible minister and Begin’s successor, to temporarily shelve it. A new minister was appointed in 2015 – Uri Ariel, a renowned leader of West Bank settlers, who voiced a desire to reintroduce the Prawer plan in the near future.

It is beyond the limits of this chapter to describe the many ways in which Bedouins have resisted government plans, although it is worth mentioning that despite their marginality, the Bedouins have managed to stage a serious challenge to the authorities. The various stages of this growing resistance are documented elsewhere (see Amara and Yiftachel 2014; Karplus and Meir 2013; Meir 2005; Nasasra 2012; Shmueli and Khamaissi 2014; Yiftachel et al. 2016).

A notable act of resistance was the preparation by the Regional Council of Unrecognised Villages (RCUV) of an alternative master plan for the Bedouin region. This act of counter-planning produced a 350-page document with in-depth analysis and proposals. It demonstrated
in professional and legal terms the viability and desirability of fully recognising all Bedouin communities and their possession of traditional land holdings (RCUV 2013). The alternative plan has become a major tool in the generation-long struggle of communities to hang on to their indigenous lands and lifestyle, and resist their urbanisation (Livnat 2011).

Overall, the structural tensions between, on the one hand, an ethnocratic state regime keen to expand its control and develop the region mainly for Jews; and, on the other, the persistence of indigenous Bedouins keen to protect their land and localities, have suspended Bedouin space and society in limbo (see Shamir 2000; Yiftachel 2009). The long-term ‘gray-spacing’ and ‘creeping urban apartheid’ bears in the second decade of the twenty-first century the strong imprint of the colonial TN approach.

A non-final word

As we have seen, TN has been a key tool – used explicitly and implicitly – in the colonisation of contested lands and massive resources from indigenous and minority groups, particularly in the global South-East. More recently, post- and neo-colonial regimes have applied TN approaches, paving the road to spatialising new visions of development as if space and society were ‘tabula rasa’ to be radically remoulded.

The case of the Negev/Naqab has illustrated this process in some detail. The Bedouins (the traditional Arab owners of southern Palestine) were classified – through a manipulative Israeli legal procedure – as trespassers on their ancestors’ lands. Their homeland regions became subject to a radical transformation through Judaisation and privatisation. The DND has been used to dispossess traditional owners from most of their lands, leaving them in impoverished, seriously underdeveloped localities, subject to repeated waves of house demolition and criminalisation. This plight, growing research shows, is rather typical for informally urbanising populations in ethnocratic states of the global South-East (Yiftachel 2006; Watson 2013).

TN has thus fundamentally influenced the planning of space in the majority of world societies. Yet, it is largely absent from leading urban, regional and planning theories, as noted by scholars such as Roy (2009), Watson (2009, 2014), Robinson (2006), Porter (2014) and Yiftachel (2006, 2009). This chapter reinforces their call for a readjustment of the ‘camera angle’ in planning and urban theories. Instead of universalising theories designated to explain and guide cities and regions of the developed liberal world, theorists should dare and theorise from the South-East, in order to de-colonise planning thought, and – more importantly – actual cities and regions. Scholars should thus analyse and conceptualise prevalent processes occurring in (the very diverse) sites of the ‘non-West’ and use them – where and when relevant – to explain and de-colonise spatial processes in comparable settings. In such an endeavour, the role of land, law and identity in general, and the concept of TN in particular, should become leading topics.

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Oren Yiftachel


The intent to reside
Residence in the auto-constructed city

Gautam Bhan, Amlanjyoti Goswami and Aromar Revi

In the uncertainty that still surrounds notions of what, if anything, a ‘city of the global South’ is or could be, one empirical reality holds up to a fair amount of scrutiny. If we take planning to mean deliberate attempts by the state to shape the built environment using law, plans and policy, then many cities of the South have been built in some tension with this notion of planning. Put quite simply: for many reasons, large parts of these cities simply neither look like their plans nor do they fit into neat categories of law, especially in the latter’s understanding of ownership and property. Here, the ‘large’ is significant. Variations from planning are not a Southern phenomenon and certainly evidence of variation is to be found in all cities. The claim that there could be something Southern about a mode of urbanisation is then partly about the extent of the disjuncture and how fundamental or not it is to understand urbanisation itself.

Drawing from a range of cities from São Paulo to Istanbul, Mexico City to New Delhi, Teresa Caldeira has recently offered a “a characterization of modes of the production of space that are different from those that generated the cities of the North Atlantic” (Caldeira 2016: 2). She argues that significant parts of cities of the South are built by residents themselves. These are done in incremental and particular temporalities and, most importantly, with “transversal engagements with official logics of legal property, formal labor, colonial dominance, state regulation, and market capitalism” (Caldeira 2014). She terms this “auto-construction”, the basis of a mode of the production of space she describes as “peripheral urbanization” (Caldeira, 2016). One part of her argument is particularly important for us here. Caldeira argues that while “peripheral urbanization unfolds in quite different ways” in different cities, it “is remarkably pervasive, occurring in many cities of the south, regardless of their different histories of urbanization and political specificities” (2016: 2). It is this sense of being “pervasive” that Southern urban theory has sought to examine and possibly build from. Caldeira reminds us that this does not mean an argument that denies variation within the South, but one that suggests that there are still theoretical claims that can be made, which “articulate general features while remaining open and provisional to account for the ways in which the modes of operation [they] characterize vary and constantly transform” (2016: 3).

What does auto-construction mean for planning in cities of the global South? Southern urban theorists have taken different routes to understand auto-construction and its disjunctures with