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THE RECOGNITION OF INDIGENOUS PEOPLES’ LAND: APPLICATION OF THE CUSTOMARY LAND RIGHTS MODEL ON THE BEDOUIN CASE

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Inspired by Aboriginal land recognition in Australia, this paper introduces the native title doctrine and customary law doctrine as methods for indigenous land recognition and introduces the application of these methods to the Bedouin case of land conflict. This paper argues that the legal system in Israel includes at least two options that would recognize Bedouin customary land rights. The first option is based on existing law as it appears in the legal codex of the State, and the second is based on general principles of the Israeli legal system, namely the principle of custom as a source of law. As an essential part of introducing these options, this paper will also briefly introduce Bedouin customary law.

A. Methods of Indigenous Land Recognition: The Doctrines of Native Title and Customary Law

Many scholars have showed that the recognition of Aboriginal land in Australia is considered one of the most inspiring cases for indigenous peoples on a community level, on a political level, and most importantly on a legal level. The Aborigines’ experience continues to provide a successful example for indigenous peoples and state leaders on ways and methods of land rights recognition. While some articles introduce the non-legal struggle of Aboriginal

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1 This paper is based on chapter 6 of my dissertation: The dispossession and recognition of indigenous peoples’ land rights-the case of Bedouin in Israel.
2 Although some land rights were recognized in a few states in Australia prior to Mabo (No. 2), the decision introduced for the first time judicial recognition of Aboriginal land rights. See G. Nettheim, Mabo and Legal
peoples in Australia, this paper reintroduces the legal aspects of the Aborigines’ experience and focuses on the recognition of their customary land rights through the doctrine of native title.

I. The Native Title Doctrine

The Native Title Doctrine is the major product of the Mabo (No. 2) decision. Through this doctrine, courts in Australia were able to recognize rights and interests in land that indigenous inhabitants enjoyed under their customs before the Crown acquired sovereignty.³

Mabo (No. 2) does not provide a comprehensive definition of the Native Title Doctrine but many scholars such as Peter Sutton,⁴ Janice Gray,⁵ Jessica Weir, and Peter Russell have attempted to define it. According to Jessica Weir, native title recognizes indigenous peoples’ laws, customs, and connections with their lands and waters.⁶ Native title transfers to the recognition of indigenous peoples’ rights under their traditional system so that they may be included under state law.⁷ Russell describes native title doctrine as a settler bridge to indigenous law and the recognition of the traditional connection that native peoples have to their land. Russell states that “native title” is not a concept of law in the settler common law, nor is it title to land ownership, it is only a bridge, a legal connector, through which the law recognizes the traditional connection of indigenous peoples to their land.⁸ J. Brennan explained: “Native title although recognized by the common law it is not an institution of the Common law.”⁹

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⁴ Peter H. Russell, Recognising Aboriginal Title: The Mabo Case and Indigenous Resistance to English-settler Colonialism (2006), at 257; see also Native Title Act 1993 (Cth) pt 2 (Austl.).
⁷ Native Title Act 1993 (Cth) (Austl.).
⁸ Russell, supra note 3, at 265.
⁹ Mabo v Queensland (No. 2) (1992) 175 CLR 1, 59 (Austl.).
Brennan also explained that the rules, practices, and incidents of native title are all
determined by the laws and customs of indigenous peoples.\textsuperscript{10} The content of the rights and the
identity of the beneficiaries are also determined by the traditional law or custom of the
indigenous inhabitants. According to J. Deane and J. Gaudron in \textit{Mabo (No. 2)}, “Since the title
preserves entitlement to use or enjoyment under the traditional law or custom . . . the content of
the rights and identity of those entitled to enjoy them must be ascertained by reference to the
traditional law or custom.”\textsuperscript{11} The Court explained that Aboriginal traditional laws and customs
are the soul of their land rights. As long as their traditional laws exist, their rights exist. When
they lose that traditional law and custom, they lose those rights as well.

\textbf{Customary Law as a Defining Feature for Native Title}

One of the innovations stemming from the \textit{Mabo (No. 2)} decision is the recognition of
Aboriginal customary law as a source for indigenous land rights. In \textit{Mabo (No. 2)}, the Court
acknowledged that Aboriginal customary law is a defining feature for native title and the basis
on which the Court established native title recognition. The Court stated that the fact that the
indigenous people were living on land governed by their own “system of law” at the time of
colonization constitutes a crucial defining feature of native title. As Russell illuminates, “For the
majority, the crucial defining feature of native title was an identifiable indigenous community
living on land governed by its own system of law at the time of the colonization– and
maintaining that connection ever since coming under the British rule.”\textsuperscript{12}

The continuation of indigenous people’s customary law is a prerequisite for recognition
of their native title rights, and the moment they lose their traditional law and traditional custom

\textsuperscript{10} \textit{Id.; see also} RUSSELL, \textit{supra} note 3, at 266.
\textsuperscript{11} \textit{Id.} at 58, 74; RUSSELL, \textit{supra} note 3, at 266.
\textsuperscript{12} RUSSELL, \textit{supra} note 3, at 269.
they lose their native title. The *Mabo (No. 2)* Court placed indigenous peoples’ law and custom in the center of the recognition of their land. Justice Brennan stated that indigenous peoples could lose their native title “when the tides of history have washed away any real acknowledgment of the traditional law and any read observance of traditional customs.”

The Source of Native Title

One of the essential elements for land recognition was the recognition of the source of native title land rights. In *Mabo (No. 2)*, the Court acknowledged that native society is the source for native title and that the common law relies on Aboriginal customary law to recognize their traditional land rights. The decision made clear that Aboriginal peoples’ customary law is the source of native title. The source of native title is one of the main issues discussed in *Mabo (No. 2)* and the Court recognized traditional indigenous law, society, and customs as a source of rights. The dispute between the majority and minority further defined the source of native title rights and accordingly defined their rights. While the dissenting opinion, authored by J. Dawson, claimed that imperial recognition is the source for the native rights, the majority held that native society and law are sources for indigenous rights. The majority, relying on the European classical natural law writings of de Les Casas, Hugo Grotius, and other founders of European international law to support their position, held that native peoples coming under British rule retain their customary land rights.

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13 *Mabo (No. 2)*, 175 CLR at 60.
15 *Mabo (No. 2)*, 175 CLR 1; see also id.
16 “If . . . the native peoples are . . . part of the human kind then they deserve to be respected as full, rational human being. Which means that they inhere certain fundamental rights including the right to land on which they live.” RUSSELL, supra note 3, at 254 (quoting Bartolome de Les Casas).
17 Id.
John Borrows stated that “The Australian High Court has also recognized that the Common law draws on Aboriginal legal sources.” On the other hand, the Court found that the common law recognizes traditional interests such as native title within Aboriginal society.

According to McNeil’s research that was cited by the Court in *Mabo (No. 2)*, English precedent protects land rights based on custom as it protects land rights based on Crown grants.

J. Toohey also approved the view of native title articulated by Canadian Judge Jadson in *Calder* where J. Jadson stated:

> The fact is when settlers came, the Indians where here, organized in society and occupying the land as their forefather had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a personal or usufructuary right.

According to J. Toohey, the common law recognizes the survival of traditional interests in land and even operates to protect them. In support of traditional interests, J. Toohey stated that the fact that traditional ownership was different from other land rights does not mean it is less protected under the law.

In *Mabo (No. 2)*, the High Court recognized the Aboriginal traditional legal system (only in regard to their land rights) and held that other systems of law could co-exist with the Australian legal system. This coexistence led to the recognition of Aboriginal land. Yvette Trahan stated the main element of Aboriginal land recognition was “that indigenous Australians...

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20 *Mabo (No. 2)*, 175 CLR at 195.
21 Id. at 187.
22 Id.
had a *sufficient system of laws* and customs and a *relationship to the land recognizable by the common law* that had survived the acquisition of sovereignty by the Crown.”

The above shows that the *Mabo (No. 2)* decision established that the indigenous customary system of law and their traditional relation to their land are the basis for native title recognition by the common law. Most important for the following discussion regarding Bedouin land recognition is the idea that native title is a traditional interest in land that has its source in the customs of the native societies and their traditional law and also that the common law recognizes traditional interests created in native society. As articulated by Trahan and Russell the *Mabo (No. 2)* decision relied mainly on three elements that are essential for indigenous peoples land recognition: a) a customary system of law, b) connection to the land, c) that are recognizable by the state law.

II. Recognition of Indigenous Land Rights Based on Customary Law

The recognition of land rights based on the customary law approach is not limited to Australia. In fact, it became a global phenomenon, as several scholars show. Many states have adopted this approach or similar approaches to recognize indigenous peoples’ land rights. Jeremie Gilbert describes several other areas, such as Quebec and South Africa that have recognized native title or indigenous land rights based on customary law. He states “The doctrine on indigenous title is gradually becoming a global phenomenon not only limited to Canada, Australia or New Zealand.”

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25 JÉRÉMIE GILBERT, INDIGENOUS PEOPLES’ LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS (2006).
T.W. Bennett and H. Powell also indicate that despite the fact that the doctrine of Aboriginal title has been developed in common law countries, several non-common law countries have adopted the doctrine of native title as well. They argue that native title is *sui generis*; and at the same time it is not part of the English common law, as declared in Canadian and Australian courts. Therefore, they claim that “Aboriginal title lies at an intersection between indigenous laws and received systems of colonial law.”

Bennett and Powell show that the application of Aboriginal title doctrine can be found in several places such as the state of Quebec where Canadian courts applied the doctrine despite French rules of colonization. They stated that “It follows that the doctrine is applicable even in colonies, such as Quebec, which retained French law as the basic law of the land.”

**Recognition of land based on customary law in South Africa**

South Africa is another example where courts rely on indigenous peoples’ customary law to recognize customary land rights. In *The Richtersveld Community and Others v. Alexkor Limited and the Government of the Republic of South Africa*, the appellants relied on the native title doctrine to recognize their land rights. The court, however, decided to accept their appeal based on customary law interests. Even though the court refused to discuss whether it would recognize the native title doctrine in South Africa, the court relied on the doctrine and made reference to several cases dealing with the doctrine. In the end, the Court held that: “the Richtersveld community had a ‘right in land’ through a customary-law interest . . .” and stated

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27 Id. at 462.
28 *Richtersveld Community v. Alexkor Ltd.*, 2003 (2) SA 27(SCA) (S. Afr.).
29 GILBERT, supra note 25, at 67.
30 Trahan, supra note24, at 567.
that “an interest in land held under a system of indigenous law is thus expressly recognised as a ‘right in land,’ whether or not it was recognized by civil law as a legal right.” 31

As Gilbert noted, this approach is similar to the native title approach adopted by Canadian courts and the results are similar as well since they ultimately recognize the right of land ownership based on indigenous customary law interests under customary law. 32 To some extent, the “customary law interest” found in the South African case of Richtersveld is equivalent to the notion of Aboriginal native title. As the South African Court stated, these rights are also a “creature of traditional laws and customs.” 33 In Richtersveld the Court also recognized customary law as an integral part of the state law and found that “while in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law.” 34

Richtersveld was a dramatic development for indigenous peoples land recognition since it shows that other doctrines similar to the doctrine of native title can be adopted in different ways. As Gilbert stated, although land recognition in this case is the “creature of traditional laws and customs” 35 to some extent, the “customary law interest” found in this case is equivalent to the notion of Aboriginal native title. 36

Recognition of land based on customary law in Nicaragua

Mayagna Community of Awas Tingni v. Nicaragua 37 is another instance of indigenous land rights recognition based on customary law. In Awas Tingni, a landmark decision that represents the ongoing development of the indigenous land rights concept based on indigenous

31 Richtersveld, (2) SA at ¶ 9
32 GILBERT supra note 25, at 67.
33 Id.
34 Id. at 66.
35 Richtersveld, (2) SA at ¶ 8.
36 GILBERT, supra note 25, at 66.
culture, custom, and traditional legal norms, the Inter-American Court affirmed that the human right to property includes the right of all indigenous peoples to the protection of their customary land and resource tenure.\[38\]

While Article 21 of the American Convention on Human Rights\[39\] sets out the right to property only in general terms, the Court held that the right includes property held collectively by indigenous groups under customary indigenous law. In addition, the Court called upon Nicaragua to recognize indigenous land claims based on their “customary law, values, and mores.”\[40\]

*Awas Tingni* is relevant to indigenous people’s rights in states where, despite the existence of laws that protects and recognizes their rights, the state continue to deny their rights. In Nicaragua, for example, while the Constitution includes strong protections for the rights of indigenous groups, the state continued to deny their land rights.\[41\] The case of the Awas Tingni shows that written provisions alone could not protect indigenous peoples’ rights, especially land rights. Meaningful protection of the indigenous rights requires a genuine state desire to ensure fairness and equality for members of its society. The Nicaraguan Constitution and legal system recognized the rights of indigenous peoples to the lands they traditionally occupy and use in general terms.\[42\] However, in practice the state did not afford any recognition to the Awas Tingni tribe’s traditional lands.\[43\] A similar situation exists in Israel. While the Tribal Courts Regulations

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40 Mayagna Community of Awas Tingni, at ¶ 164.
42 *Id.* at 8.
and other principles of law recognize Bedouin customary land rights, the State continues to deny them.

B. Recognition of Land based on Customary Law: the Bedouin Case

Several scholars show that both domestic and international legal systems failed to recognize Bedouin land rights. On the national level, the legal system in Israel does not recognize Bedouin land and therefore does not protect such rights. On the international level, international law could not offer a meaningful protection for Bedouin land rights because of the limited application of relevant international law in Israel.

Meanwhile, the increasing number of successful examples of recognition of indigenous peoples’ land rights in many states around the world continues to inform the Bedouin about the potential of such methods, and encourages them to continue their struggle in a similar way.

This section argues that the experience of indigenous peoples in which they achieved land recognition based on customary law is applicable to the Bedouin land case in Israel. In order to illustrate its application, this paper will first introduce the elements necessary for recognition and their application to the Bedouin land case. These elements include the existence of customary law (an indigenous legal system) that recognizes indigenous/Bedouin land rights and the existence of legal recognition for such customary system within the State’s legal system.

I. The Existence of Bedouin Customary Law

Bedouin customary law is Bedouin tribal law that emerged to serve the tribe’s needs. It is a “system of rules” that governs tribes in different places.\textsuperscript{45} Bedouin tribal law is only one example of tribal law systems.\textsuperscript{46} Tribal law existed for thousands of years in many places around the world and it organized and governed the affairs of tribal societies in activities ranging from simple transactions to major crimes. Tribal law can be found on almost every region, including Africa, Asia, Europe, the Americas, and the Middle East. Similar to other customary law systems around the world, tribal law emerged to serve the needs of tribal societies in the absence of other law.\textsuperscript{47} Later it continued to survive in places lacking sufficient state power to rule and enforce order, security, and law, especially in remote places like deserts.

Bedouin Tribal Law

Bedouin tribal law is the tribal law of Arab tribes in the Middle East and North Africa. In Arabic, Bedouin tribal law is called \textit{alu’rf wala’adah} meaning “that which is known and customary,” or \textit{alhaq} meaning “justice.”\textsuperscript{48} According to Clinton Bailey, Bedouin law is “a system of rules that emerged in the deserts of the Middle East to serve the needs and provide a protection to individuals and nomadic society alike.”\textsuperscript{49}

Bedouin tribal law predates \textit{Sharia} law (Islamic Law) that began in the sixth century.\textsuperscript{50} It existed for hundreds of years before the emergence of Islam,\textsuperscript{51} making it one of the oldest legal systems in the Middle East. The origins of the system come from the Bedouin tribes in the Arab

\textsuperscript{45} CLINTON BAILEY, BEDOUIN LAW FROM SINAI AND THE NEGEV: JUSTICE WITHOUT GOVERNMENT, 1 (2009).
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} MOHAMMAD SADIQ AL. SADR, FIQH AL-’ASHA’IR [TRIBAL JURISPRUDENCE] (2008) (dealing with the reconciliation of tribal and religious law, and many Iraqi Shi’a have surely been influenced by his teachings to view the two as compatible).
\textsuperscript{51} Id.
Peninsula. With the emergence of Islam in the sixth century, Bedouin law was reshaped; however, some elements remained despite Islamic influence.52

In his book *Bedoin Law from Sinai and the Negev*, Bailey describes Bedouin tribal law as a complete system of law that exists in trans-border areas in the Middle East and Africa, and can be found in Palestine, Israel, Egypt, Jordan, Saudi Arabia, Iraq, Syria, Lebanon, and many other countries. Bailey describes Bedouin law as a legal system that has been in the desert for more than 2,000 years.53 His book asserts that Bedouin law does exist, that it is a comprehensive system, and that it is still in practice. In addition, he argues that this system is not an isolated system but part of the Bedouin culture and legal system that has been in the desert for thousands of years and hundreds of years before the Islam.54 For generations, Bedouin lived in places which lacked governmental authority, or in places where the central government was too weak to enforce order. Therefore, there has always been a need for a legal system to fill this vacuum of central authority to regulate their affairs and enforce order in the desert.55

Many scholars have recognized the existence and acknowledged the value of Bedouin tribal law.56 The Bedouin legal system is described in many occasions as a complete and perfect legal system that includes every element needed to answer Bedouin’s legal needs.57 Scholars from the Arab world58 as well as Western scholars like Frank Stewart and Clinton Bailey,59 have

52 Id.
53 Bailey, supra note 45.
54 Id.
55 Id.
57 Id.; Bailey, supra note 45.
58 Muhammad Abu Hassan, Alaqaadaa End Alashaer Alurdonea [The Bedouin Legal Heritage] (1974); Al Abadi, supra note 56; Arif Al-Arif, Al-Qada’ Bayn Al-Badu [Law Among the Bedouin] (1933).
59 See generally Bailey, supra note 45.
described Bedouin law in detail. In addition, many Israeli scholars such as Ben David, Abu-Rabia, and others have studied Bedouin law and described its origins and main elements.

Stewart describes numerous studies that detail the Bedouin tribal justice system in the Arab world, leaving no doubt as to the existence of Bedouin law.

Although some have criticized aspects of the Bedouin system, such as gender rights, no researcher has claimed that Bedouin law does not exist or that its existence is questionable. On the contrary, the overwhelming majority of researchers indicate the completeness of Bedouin law, its inclusion of the basic principles of justice that are adequate for Bedouin life. In several countries in the Middle East and Africa, official law recognizes Bedouin law or at least elements of it. In some states, the state’s judicial system recognizes tribal law decisions and even enforces tribal decisions. In some legal systems, such as the Islamic Sharia law, Bedouin law is recognized as part of Alorf principle, the custom principle, which constitutes a source of law in Sharia law.

Finally, among Bedouin of the Negev, Bedouin law is still in use and it continues to determine the norms of behavior of Bedouin individuals and groups in most areas of life. Many Bedouin turn to Bedouin law in many matters to resolve internal conflicts, and their system

61 BAILEY, supra note 45.
64 BAILEY, supra note 45; AL ABADI, supra note 56.
65 See id.
continues to answer their needs. It solves their problems and defines their rights and obligations in many areas of Bedouin life.\textsuperscript{68}

The Bedouin legal system is well structured both procedurally and substantively. On the procedural level, it includes advanced legal procedures, such as warnings and notifications, initiation of legal actions, determination of the place of the trial, nomination of judges, determination of dates for hearings, and nomination of the courts of appeals.\textsuperscript{69} In addition, the system distinguishes between criminal and civil legal procedures. It also includes some components that do not exist in the modern legal systems, such as the opportunity to select judges and oppose the appointment of judges, which grants special advantages to the Bedouin system. In addition, the system offers courts designated for special issues, courts specializing in certain matters, and even \textit{ad hoc} courts for urgent matters. On the substantive level, the system includes well developed law principles both in civil and criminal matters. These principles are based on Bedouin tradition, Islamic Law, and basic values of justice and natural law.\textsuperscript{70}

Bedouin tribal law has also exercised mediation and reconciliation procedures for hundreds of years. At the beginning of each trial, the parties present their arguments, then before starting the formal trial, the judge, the representatives, and the tribal elders and other selected individuals, intervene and push for a compromise. The system employs tools that include discussions of tribal and individual elements of honor; explanations of the risks and probability for success in the case; discussions of the potential gains and losses of each party, with emphasis

\textsuperscript{68} BAILEY, \textit{supra} note 45, at 1-3.
\textsuperscript{69} See generally \textit{id.}; ABU HASSAN, \textit{supra} note 58; ALABADI, \textit{supra} note 66.
\textsuperscript{70} See generally BAILEY, \textit{supra} note 45, at ch. 1.
on the social components; and other elements and techniques to reach a compromise without trial.\footnote{See JOSEPH GINAT, BLOOD REVENGE: FAMILY HONOR, MEDITATION AND OUTCASTING (1997). (discussing mediation and reconciliation among Bedouin).}

The hard life in the desert and lack of official authority and security shaped Bedouin law and dictated some very harsh rules and principles that do not fit every society, such as collective responsibility, severe punishments, honor killings, and forced evictions. Collective responsibility is one of the main elements that distinguishes the Bedouin legal system from modern systems. The collective responsibility principle has several objectives ranging from the common interest of the parties to resolve the matter, the claimant’s or victim’s interest in receiving proper relief, the interests of the defendant to pay minimum damages, and the interests of the tribe as a whole. The responsibility of the tribe to its members is also a collective responsibility. These elements are a product of the hard realities of life in the desert, culture, and lack of central government that come with Bedouin lifestyle.\footnote{BAILEY, supra note 45, ch. 3.}

Implementation and enforcement of judgments and judicial decisions in the Bedouin legal system is another element that differs from modern legal systems.\footnote{See generally id., at ch. 2, 3, & 4.} Because there are no police or other official enforcement authorities, over the centuries Bedouins have developed a unique but effective enforcement mechanism. Individuals and tribal leaders are responsible for the enforcement of judicial decisions. Judgments are usually respected and enforced, but when they are not there are several alternative ways to enforce them. If an individual fails to respect and implement the decision, then the plaintiff and the tribe will implement the decision, first by negotiation and, only if they fail, then by force.\footnote{See GINAT, supra note 71.}
Some people even go farther to claim that, in some matters, Bedouin law is more effective than the state law. In many countries, such as Israel, Jordan, and Egypt, Bedouin law defends life and property and deters violence among the Bedouins. It also recognizes rights in areas where states do not, such as Bedouin land rights.\(^{75}\) In other matters, Bedouin law protects matters where the official law does not or provides inadequate remedies. For example, Israeli law is unable to protect Bedouin land rights because it does not recognize Bedouin law. By contrast, Bedouin law recognizes these rights and has effective and efficient tools that protect them.\(^{76}\)

Another example from the social level is domestic violence within Bedouin families. Israel usually handles these issues under State law that is based on Western, modern ideas that do not fit the Bedouin culture. Therefore, resolution usually leads to negative results. Instead of protecting the victim, they harm the Bedouin family unit. As a result, many Bedouin women refrain from submitting complaints to the police. Another example can be found in the field of security and public order where the Bedouin law determines public order and determines the basic norms of private and collective behavior among the Bedouin population. It provides security and peace among individuals and tribes.\(^{77}\)

In some places, where the state’s authority is weak, tribal law gains tremendous strength that exceeds state power and official law. In such instances, Bedouin law could pose a threat, or could be perceived as posing a threat, to state law and authority. One recent example of this involved the Palestinian Authority. During the occupation of Palestine, Israeli authorities destroyed the Palestinian judicial system and prevented its establishment for almost sixty years.\(^{78}\)

\(^{75}\) Al Abadi, supra note 66; Bailey, supra note 45.
\(^{76}\) See infra Chapter III (It argues that the state recognizes some of Bedouin land rights such as possession and rights of use but does not protect these rights either).
\(^{77}\) Bailey, supra note 45.
As a result, Bedouin tribal law provided the only available legal system to solve disputes and serve the people's legal needs. As more people relied on the system, Bedouin tribal law was strengthened within Palestinian society. Research completed by Birzeit University discovered that the status of Bedouin law among Palestinians is so strong that it poses a threat to the State official law and impedes its improvement since many Palestinians continue to resort to Bedouin law to solve their problems.\textsuperscript{79}

\textbf{II. Recognition of Bedouin Law during the Ottoman and the British Mandate Rules}

The status of Bedouin customary law in Israel relies on laws and legal principles from the Ottoman and British mandate periods. Therefore, in order to enable a better understanding of the status of Bedouin law in Israel, this section will first introduce the recognition of Bedouin law during the Ottomans and the British Mandate periods.

\textit{Bedouin Law under Ottoman Rule}

Both the general and the specific structures of the Ottoman Empire’s system indicate that the Empire recognized Bedouin tribal law in the Negev.\textsuperscript{80} On the general level, tribal laws were part of the Ottoman system. Since the establishment of the Ottoman Empire in the thirteen century, the legal system incorporated both Islamic \textit{Sharia} law and tribal law and the two coexisted successfully. On the one hand, the Ottoman state practiced Islamic \textit{Sharia} law, as it was the continuation of the Islamic State, and on the other hand it continued to embrace tribal...\textsuperscript{80}

\textsuperscript{79} The Palestinian Authority complains that people tend to rely on tribal law and trust it over the state official courts. \textit{Id.}

\textsuperscript{80} Oren Yiftachel et al., \textit{Re-Examining the ‘Dead Negev Doctrine’: Property Rights in the Bedouin-Arab Space}, 14 \textit{Mishpat Ummishal} 7, 101 (2012).
law as part of the tribal system that supported the first Ottoman Sultans that enabled them to acquire power.81

Furthermore, the Ottoman system recognized different models of local jurisprudence that supported other local systems. Lauren Benton explains that when empires expand they often streamline their legal systems.82 This is what happened in the Ottoman Empire too. During its expansion, the Ottoman Empire, at some stage, was a state with non-Muslim majority ruled by a Muslim minority. Therefore, the Empire had to encourage integration and assimilation of other groups to hold it together. As part of this policy it offered exemptions to these assimilating groups in order to ease their integration into the Empire. These exemptions included exemptions from state legal jurisdiction,83 and enabled the Ottomans to recognize several systems of local jurisprudence, such as the Millet system, which gave religious groups a certain level of autonomy to manage themselves.84

In addition, Ottoman power revolved around the administration of a land system called the Timar system, which was another factor that preserved indigenous social order. This system kept administration of the land system in the hands of the local people to collect the Ottoman taxes, and allowed them to maintain their traditional legal systems.85

Therefore, the general framework of the Ottoman regime revolved around diversity. It gave cultural and religious groups limited forms of autonomy to maintain their “cultural independence.” Local jurisprudence and the Millet system accorded non-Muslim communities the right to manage their personal affairs according to their religion and cultural laws.”86

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82 LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400-1900 109 (2001).
83 Id.
84 Id. at 109–10.
85 Id. at 109.
Thus, the recognition of tribal law was an integral part of the system during the first years of Ottoman rule. The Ottomans also recognized local jurisprudences through the *Millet* systems and preserved the local and traditional legal systems as part of the *Timar* system. These factors can leave no doubt that the Ottomans recognized local legal systems, including Bedouin tribal law, and successfully allowed them to operate within the Ottoman system.

**Ottoman Recognition of the Bedouin Tribal Council**

On the specific level, the Ottomans directly recognized Bedouin tribal law.87 They established the Tribal Council for Bedouin tribes of Beer Shiva, a city in the Negev, and nominated Bedouin *Sheikhs* (tribal chiefs) along with state officers to adjudicate disputes in the district of Beer Shiva.88 According to a Birzeit University report, although there is no direct evidence that any Ottoman law was issued to formally legislate the practice of tribal law,89 there is evidence showing an administrative management council which comprised of Ottoman officers and Bedouin tribal *Sheikhs* that specialized in adjudicating conflicts in the district of Beer Shiva.90 Helen Chapin Metz supports these findings and states that, although the Ottomans enforced *Sharia* law in towns and settled the countryside, they recognized customary tribal law in the desert.91 In a recent article on Bedouin land rights in Israel, Oren Yiftachel, Alexander Kedar, and Ahmad Amara stated that Ottoman rule recognized Bedouin tribal law. They stated that “Until the beginning of the 20th century, the Ottomans granted broad autonomy to the

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88 BIRZEIT UNIVERSITY, supra note 78.
89 Id. at 31.
90 AL-ARIF, supra note 58, at 12.
Negev Bedouin... Ottoman authorities referred to the Bedouins, like many other groups, with an approach that allowed them to practice their customary law...”

In conclusion, evidence shows that the Ottoman system generally recognized local legal systems, which would include Bedouin tribal law, as part of its overall policy, but also specifically recognized Bedouin tribal law through the establishment of the Bedouin Tribal Council in the Negev.

**Bedouin Tribal Law during the British Mandate (1917-1947)**

The British Mandate in Palestine that ruled from 1922 to 1947 explicitly recognized Bedouin tribal law.\(^93\) The British Mandate continued to recognize the law of the Ottomans as the relevant law in Palestine\(^94\) therefore recognizing Bedouin tribal law. Moreover, the British Mandate legislations and its courts decisions also supported the recognition of tribal law by establishing tribal courts in Beer Shiva and nominated Bedouin Sheikhs to serve as judges.\(^95\)

The British Mandate explicitly recognized Bedouin tribal law in their official state law and enacted legislation that applied Bedouin tribal law among Bedouin in the Beer Shiva district (the Negev). Section 45 of the Palestine Order in Council established tribal courts in the District of Beer-Shiva.\(^96\) The section, titled Tribal Courts, stated: “The High Commissioner may by order establish such separate Courts for the district of Beersheba and for such other tribal areas as he may think fit.”\(^97\) The second part of Section 45 explicitly recognizes tribal law, it states:

\(^{92}\) Yiftachel et al., *supra* note 80, at 101.
\(^{93}\) BENTON, *supra* note 82, at 10.
\(^{95}\) AL-ARIF, *supra* note 58.
“Such courts may apply tribal custom, so far as it is not repugnant to natural justice or morality.”

Clearly the British Mandate recognized tribal custom as applicable law in tribal courts. Section 45 led to the enactment of the Tribal Court Regulation of 1937 that recognized Bedouin tribal law. The Regulation established the Tribal Courts in the Negev and authorized the Courts to adjudicate according to Bedouin law.

During the British mandate, Bedouin tribal courts were established de facto and authorized to adjudicate several subjects including Bedouin land rights, except land ownership registered in the Tabo (land registry). However, in cases where land rights were not registered in the Tabo, such as the Bedouin land rights in the Negev, the British Supreme Court gave jurisdiction to the Tribal Court. This Tribal Court jurisdiction indicates that the British intended for Bedouin land rights to be adjudicated by Bedouin tribal courts according to their customary law. The only reason for such jurisdiction is that Bedouin land ownership in the Negev is ownership of traditional land that has never been registered in the Tabo. Not one Bedouin tribe ever registered their land in the Ottoman or British Tabo.

This point is very important for the legal status of Bedouin land rights, their tribal courts, and their customary law. Although tribal courts had no jurisdiction over land ownership

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98 Id.
99 Section 45 of the Palestine Order in Council is still valid in Israel; the law has never been abolished, although it is not applied in courts.
100 The court authority was limited to land use only. Cf. Tribal Court Regulation of 5715, 1937, KT 483, 123 (Isr.) (tribal courts refrained from discussing matters of land ownership).
101 During a dispute in a land possession case between the Tribal Court and Land Court in Jerusalem, the Supreme Court decided that the Tribal Court has the appropriate jurisdiction over that matter. Further, regarding land matters, the court stated that “given the fact that there is no land documentation in the Beer Shiva region, and according to the obligation to produce title deed according to article 24 of the Magistrate Act, in this kind of lawsuits tribal law should be applied according to article 45 of the Palestine Constitution.” AL-ARIF, supra note 58, at 72 (author’s translation).
102 Id.
103 See id.; see also Yiftachel et al., supra note 80, at 7–10.
104 HUMAN RIGHTS WATCH, supra note 43, at 15.
according to the Tribal Court Regulation of 1937, the Supreme Court of the British Mandate interpreted the law so that it did not apply to Bedouin tribal land where lands were not registered in the Tabo. According to this interpretation, the Supreme Court recognized Bedouin customary land rights and acknowledged its special status. The Court considered the tribal courts the “appropriate forum” and Bedouin law as the appropriate law to adjudicate the case.

According to Mansour Nsasra, the British Mandate recognized the Bedouin inter-territorial tribunals as “tribal courts” and treated them as the Ottomans had handled them. The British Mandate government acknowledged cultural differences and the difficulties of judging the Bedouin according to the British law, and preferred to allow Bedouin practice their tribal law.

Cited in Nsasra, Lord Oxford who served as Assistant District Commissioner in Beer Shiva during the British Mandate, stated: “Sometimes, it was extremely difficult to judge cases by the British legal system and the Bedouin did not accept this. Bedouin asked us to take their laws in advance in order to accept the final decisions.”

Nsasra explains that according to the British Report “The[se] inter-territorial tribunals would be recognised by the British in order to maintain peace, order and good government for the tribes:

Under Article 17 of the Palestine Order in Council, 1922 . . . ordinance may be made for the “peace order, and good government of Palestine”, and there would not appear to be any objection in principle to an ordinance providing for the enforcement in Palestine of the judgement or orders of these inter-territorial tribunals (whether given in Palestine, Trans-Jordan or Sinai) in so far as they affect tribes in Palestine or their property there.”

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105 Tribal Court Regulation of 5715, 1937, KT 483, 123 (Isr.).
106 BIRZEIT UNIVERSITY, supra note 78, at 32.
108 Id. at 85.
109 Id.
110 According to this report found in the Public Record Office at Kew, the Mandate government was willing to understand how the Bedouin tribunal system worked in order to avoid clashes between the British and the Bedouin. Id.
This approach is not different from the British common law approach during colonization. British administration was based on the concept of indirect rule that allowed native chiefs to perform most executive and judicial functions.\textsuperscript{111} According to Neville Rubin, “Indirect rule was standard practice . . . and it appealed to the British both because it appeared to respect native traditions and because it economized on money and manpower.”\textsuperscript{112} On the legal level, the British colonial legal system followed a two-track legal system, one for Europeans who were subject to the laws of the mother country, and the other for “natives” who were subject to local customary law.\textsuperscript{113}

In terms of customary land rights, as mentioned earlier in the \textit{Mabo (No. 2)} case, the British colonial system recognized customary land rights as part of the general structure of the colonial system. Relying on the decisions of the Judicial Committee of the Privy Council involving South Rhodesia in 1919 \textsuperscript{114} and Southern Nigeria where the Council stated “A mere change of sovereignty is not to be presumed as meant to disturb rights of private owners,”\textsuperscript{115} and citing Lord Denning’s decision from 1957 in which he identified a “guiding principle” of colonial constitutional law according to which pre-existing property rights of inhabitants are to be “fully respected,”\textsuperscript{116} the court decided that the British colonial system recognized indigenous peoples’ customary land rights.

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\textsuperscript{112} Neville N. Rubin, \textit{Cameroon: An African Federation} 74 (1971).
\textsuperscript{114} In re Southern Rhodesia [1919] A.C. 211, 233 (P.C.).
\textsuperscript{115} Amodu Tijani v. Secretary of Southern Nigeria, [1921] AC 399, 407 (P.C.).
\textsuperscript{116} Id.
\end{flushleft}
Such findings show that the British Mandate in Palestine recognized Bedouin customary law as their traditional tribal law, established the Bedouin tribal courts in Beer Shiva, nominated tribal judges, and associated the tribal system with the state system.\footnote{\textit{See} \textsc{Birzeit University,} supra note 78, at 32, 39–44.}

III. The Status of Bedouin Customary law in Israel and Options for Recognition

The status of Bedouin law in Israel is not easy to define. On the one hand, the legal system in Israel recognizes Bedouin tribal law; but on the other hand, the State does not apply that law. This bizarre, but common, contradiction between the reality of rights and the theoretical legal situation is not unique to the Bedouin in Israel. It can be found in many places around the world where indigenous rights were denied \textit{de facto} despite the recognition of their rights by the law. In the case of Australia’s Aborigines, for example, the common law recognized their rights to land prior to the establishment of the colonies according to their customary law; However, for about 200 years courts refused to recognize such rights. A similar situation existed in Nicaragua prior to the \textit{Awas Tingni} decision.

In Israel, evidence shows that the law recognizes Bedouin tribal law both directly and indirectly. Directly the law recognizes Bedouin tribal law through the Tribal Court Regulations of 1937 and Article 45 of The Palestine Council of Order of 1922. Indirectly the law can recognize Bedouin tribal law through general legal principles that recognize customary laws and rights that were recognized by custom principle.
Direct Recognition

The legal system in Israel, like many legal systems, includes components of a colonial period that continue to apply and shape many aspects of the modern legal system determining peoples’ rights.\textsuperscript{118} Even today there are legal institutions and legal fields that represent this heritage, and many areas of law are still rooted in that mandatory legislation.\textsuperscript{119} The Tribal Courts Regulations of 1937 are one example of components of the colonial system that continue to exist in the State’s codex of laws.\textsuperscript{120} The Tribal Courts Regulations were adopted by the legal system, and they have never been abolished. Theoretically, as Eliakim Rubenstein argued, according to Section 9 of the Regulations, Tribal Courts can convene in Beer Shiva, discuss and adjudicate certain civil and criminal matters, and apply the Bedouin customary law.\textsuperscript{121} This “preservation of traditional legal concepts, which were used in Palestine before the establishment of the state”\textsuperscript{122} meant to preserve the old order, and to preserve people’s rights and obligations under that order.

Comparatively, this situation is similar to that of the Aborigines in Australia and the Natives in Canada where common law doctrines recognized the rights of indigenous people before the establishment of British sovereignty,\textsuperscript{123} but it took the courts centuries to recognize these doctrines.\textsuperscript{124}

Based on the Tribal Courts Regulations, Bedouins should demand the establishment of their tribal courts and the adjudication of their relevant matters based on their customary law.

\textsuperscript{118} Eliakim Rubinstein, From the Ancient East to the Middle East: legal dimensions of belonging and distinction between Israel and the neighboring countries, http://www.lifshiz.macam.ac.il/nl/pages/m0581/m0581194a.html (last visited October 16, 2012).
\textsuperscript{119} Id.
\textsuperscript{120} See Tribal Court Regulation of 5715, 1937, KT 483, 123 (Isr.).
\textsuperscript{121} In practice Israel has never applied the law, has never established any Bedouin tribal courts, and has never applied or recognized Bedouin tribal law. However, this law continues to be valid since Israel has never revoked it.
\textsuperscript{122} Rubenstein, supra note 118.
\textsuperscript{124} RUSSELL, supra note 3.
The first step for the Bedouin would be to petition the Minister of Justice and demand the application of the Tribal Courts Regulations which included the establishment of their tribal courts, the nomination of Bedouin judges, and the application of their tribal law. In the second step, they could bring their land dispute to be adjudicated in the tribal court which would apply their tribal law, and recognize customary land rights. In the third step, Bedouin would ask to bring all their land cases only before the tribal court, which would have an exclusive jurisdiction over Bedouin tribal land issues, as mentioned by the British Land Court.

**Indirect Recognition: General legal principles, the custom principle**

The second option for recognition of Bedouin law is based on general principles of law, namely, the principle of custom as a source of law. This option argues that under the specific rules of custom principle courts in Israel can recognize some rights and obligation based on peoples’ customs.

For many years custom constituted one of the main sources for legislation. In some periods, it was considered a main component of the state’s binding law. However, in modern state systems where laws are codified, the status of the custom principle has been significantly decreased and in some places it has ceased to be a part of the state’s law. In *Shatz v. Minister of Justice et al*, Justice Cheshin stated:

> In ancient times, custom constituted an important source for creating law. In such primitive societies, countries, or quasi-countries of those days the regime was decentralized, transportation was difficult, people were illiterate, and the cumulative weight of these factors - and with other factors - led to . . . custom as an independent source of binding law.\(^{126}\)

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\(^{125}\) DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW ix (2010).

\(^{126}\) HJC 849/00 Shatz v. Minster of Justice 56(V) P.D. 571[2000] (Isr.).
Although its power has been decreased, the principle of custom continues to constitute a main source for legislation in many states.\textsuperscript{127}

Some scholars continue to claim that it is not disputed that custom continue to be a good way to make law.\textsuperscript{128} Customary international law is an exemplary example of how custom can become binding law. Customary international law “consists of rules of law derived from the consistent conduct of states acting out of the belief that the law required them to act that way.”\textsuperscript{129} On the national level, consistent conduct by a group could lead to the recognition of such conduct as binding legal norms that could be enforced by law.\textsuperscript{130}

During the Ottoman Rule, custom was a very important source for laws enacted by the Ottoman Sultans. The recognition of custom continued to apply during the Ottoman Empire even after the reforms of the 19\textsuperscript{th} century (\textit{Tanzimat}) and that recognition was documented in the \textit{Mejelleh}\textsuperscript{131} during the 19\textsuperscript{th} century reforms. Sections 36 through 45 of the \textit{Mejelleh} recognize custom as part of the state’s law.\textsuperscript{132} Professor Ruth Gavison states that the Ottoman \textit{Mejelleh} establishes custom as a binding legal source in the private field of law.\textsuperscript{133} Gavison, relying on Sections 36 through 45 of the Ottoman \textit{Mejelleh} that recognizes custom, claims that during the Ottoman rule, custom had the same legal power as written law.\textsuperscript{134} Section 45 of the \textit{Mejelleh} states that “whatever is stated by custom as stated by written,” meaning whatever is stated by custom is considered as stated by written law.\textsuperscript{135}

\begin{footnotesize}
\textsuperscript{127} See generally Bederman, supra note 125; Gavison, supra note 96 (outlining custom principles in the Israeli legal system).

\textsuperscript{128} Gavison, supra note 96.

\textsuperscript{129} Shabtai Rosenne, Practice and Methods of International Law 55 (1984).

\textsuperscript{130} See generally G. S. Narwani, Tribal Law in India (2003); Bederman, supra note 125.

\textsuperscript{131} Mejelleh is the civil code of the Ottoman Empire during the late 19th and early 20th century and can be written as Majallah or Mecelle.

\textsuperscript{132} Gavison, supra note 96.

\textsuperscript{133} Id. at 347.

\textsuperscript{134} Id.

\textsuperscript{135} Id.
\end{footnotesize}
In Israel, custom is a binding legal principle and courts continue to rely on it by virtue of Sections 36 through 45 of the Ottoman Mejelleh. During the establishment of the State of Israel, it adopted Ottoman law. As part of that adoption it also adopted the above-mentioned principle of custom as a source of law.

During its first years, Israel’s legal system continued to recognize custom according to the Mejelleh. In 1984, Israel abolished the Ottoman Mejelleh, including Sections 36 through 45 that recognized custom as a source of law. However, that abolition did not abolish the principle of custom as source of law in the Israeli system because, as noted by former Chief Justice Aharon Barak, custom has been already integrated into Israeli law and has become part of it. He stated: “Custom is a deeply rooted source of law and the dismissal of the Mejelleh cannot deny the power of this source.”

Despite custom continuing to apply in Israel and Israeli law providing custom as a binding legal source, the weight of the principle has been considerably decreased. Courts today give the custom principle a lesser role and weight than in past days. Justice Cheshin noticed that custom is not fully defunct in the Israeli law though its power is marginal. In Shatz, Justice Cheshin stated

Custom’s greatness fell down; its areas of existence are narrowed to academic research of legal jurisprudence. . . . As experienced [Judges], we shall not say hasty that the customs of days long are already dead. . . . But we know that its power . . . finds its expression in the margin.

But despite its lowered status, custom continue to have the ability to establish and produce law.

J. Cheshin cites two cases to support this perspective where a State’s common practice

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137 Id. See also Gavison, supra note 96; Gad Tedeschi, Hamenhag bamishpatino hanahug wehaatidi [Custom in our Law, Practice, and the Future], 5 MISHPATIM 9 (1972).
138 HCJ 849/00 Shatz v. Minster of Justice 56(V) PD 571[2000] (Isr.).
has become a binding law that determines legal rights and obligations. The first is *Kamyar* 139 where the court recognized a governmental practice where the government would approve international treaties without the required approval of the Knesset, the Israeli parliament. The second case is *Bahmutzki* where Cheshin cited Justice Cohen’s holding that the custom of making plea bargains in criminal cases is so common that it can be defined as law that binds the State. 140

Therefore, courts have the legal tools to examine Bedouin land rights based on custom principle. The main issue a court must examine is whether the Bedouin practice falls under the category of custom principle that could be recognized as a binding law. According to Gavison, a binding custom has to include a combination of a factual practice, the fact that people regularly repeat a certain behavior, and a feeling of obligation to follow such practice. 141 This means that the court must determine whether a custom of owning or acquiring land rights based on their custom, i.e. whether there is “a combination of a factual practice and a feeling of obligation to follow such practice” with regard to Bedouin land rights.

Recognition of components of Bedouin culture and Customs

In addition to the above-mentioned routes for recognition, there are other secondary matters that recognize or acknowledge the basic components of Bedouin law, mainly the recognition of Bedouin culture. The Supreme Court, for example, recognized components of Bedouin culture on several occasions, including recognition of Bedouin customs and the uniqueness characteristics of the Bedouin population. 142 Other Courts have also recognized legal

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140 CA 537/71 Bahmutzki v. State of Israel 26(1) PD 543 [1971] (Isr.).
aspects of Bedouin law, such as the concept of Sulha reconciliation. High Court Justice Salim Jubran said:

The customary-cultural argument, which holds that courts should take into account, in the sentence phase, the process of reconciliation (Sulha) between the parties, has been accepted in principle by this court . . . as part of recognizing the principle of restorative justice in criminal law . . . as well as part of the recognition of cultural considerations within the criminal justice system, due to the centrality of the institution of “Solha” in Arab society.  

Although this argument does not recognize Bedouin tribal law, it does illustrate the recognition of the Bedouin as a distinguished cultural group, which is an essential element for the recognition of their different culture and different legal system.

Recognition of Bedouin as a Separate Cultural Group

In addition, several decisions by the Israeli Supreme Court support the recognition of Bedouin as a separate cultural group, similar to the way the Ottomans and the British dealt with the Bedouin. In practice, courts in the Negev indirectly recognize the Sulha institute in several matters, especially in inter-tribe conflicts and disputes. In the Islamist Sharia courts in particular Bedouin customs receive better acknowledgment. This practice is more prominent in the attitude of governmental institutions toward Bedouins. Almost all the governmental institutions in Beer Shiva, especially those that deal with Bedouin matters like land, security, and public order, are aware of Bedouin customs, culture, and law. When they deal with Bedouin matters they take their culture into consideration, especially their tribal law. As part of the State

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145 See Nasasra, supra note 107, at 30-34.
recognition of Bedouin cultural distinctions it established separate institutions and governmental offices to deal with Bedouins matters, such as the Bedouin Educational Authority, and the Bedouin Land Development Authority. Moreover, governmental offices deal with Bedouins as a separate cultural group. Often government officials, such as police commanders, work with tribal leaders (Sheikhs) to reach a truce and to make peace between tribes while relying on tribal law. In many incidents, authority figures like policemen or officers from interior ministries use tribal customs to settle conflicts. They ask tribal leaders to accompany them to help reach Atwah, a truce, according to the Bedouin customs.  

**Summary and Conclusions**

Based on the Australian experience, this paper introduces the idea of recognizing Bedouin land rights based on the recognition of their customary law. To illustrate this idea, this paper introduces the recognition of Aboriginal land in Australia and then applies the Australian model on the Bedouin case in Israeli.

As introduced, the recognition of Aboriginal land rights in Australia relies mainly on the existence of three elements. The first is the existence of a system of law, such as Aboriginal customary law; the second is the existence of a connection to land, which means the existence of traditional land rights system; the third element is the existence a legal recognition option for these elements in the state legal system, such option is the native title doctrine in Australia. This last element constitutes a bridge that connects the indigenous peoples’ customary law with the state law and enables the state to recognize indigenous peoples’ customary law and their rights under their customary system.

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147 See Artzi Halfon, *Harog ve 11 p’tzoeem baekvot kray yeriot ben bedouim* [One Killed and 11 Wounded after Shootout between Bedouin], YNET.CO.IL (Nov. 14, 2002), http://www.ynet.co.il/articles/0,7340,L-2247833,00.html (police turn to Bedouin Shieks to calm things down).
The second part of this paper addresses Bedouin land recognition. This part applies the Australian model of land recognition on the Bedouin case. It mainly shows the existence of the three elements for recognition in the Bedouin land case in Israel. First it demonstrates the existence of Bedouin traditional system of law, second the existence of Bedouin connection to the land; and then it introduces the third element which is the recognition option or the “bridge,” that demonstrates how the Israeli legal system includes two options that could work as a connection to Bedouin customary law. The first bridge option is through Tribal Courts Regulations and the second is the principle of custom as a source of law.

In conclusion, similar to Australia and other countries that have recognized indigenous land rights, the legal system in Israel includes sufficient legal elements that can lead to the recognition of Bedouin traditional law that would inevitably bring to the recognition of their traditional land rights.