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## Beyond Walls and Fences: Exploring the Legal Geography of Gated Communities in Mixed Spaces

Manal Totry-Jubran

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**BEYOND WALLS AND FENCES:  
EXPLORING THE LEGAL GEOGRAPHY OF GATED  
COMMUNITIES IN MIXED SPACES**

*Manal Totry-Jubran\**

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*In the last three decades, a new type of physical seclusion has appeared around the world: the gating and walling of urban and suburban spatial residences. This phenomenon, led mainly by dominant socio-economic groups, is referred to as “gated communities.” This article focuses on the legal challenges that gated communities raise in ethnocratic societies that share a legacy of segregation and of unequal distribution of land. The main argument is that, due to this legacy, the legality of gated communities and walls that separate communities generate legal debates that goes beyond classic legal claims of rights violations of non-residents of the gated communities. Rather, it touches upon the historical, geographic, and legal contexts that constructed the*

*power relations between the groups. Based on the Critical Legal Geography approach, the article asserts that addressing these contexts by the court provides a more comprehensive view of the gated communities phenomenon and its implication on the creation of urban space and group relations. Gated communities are an opportunity for initiating wider change in spatial and social relations of groups.*

## INTRODUCTION

The rise of gated communities in urban spaces has created many debates pertaining to their legality, as well as the consequences of this form of living for affected groups.<sup>1</sup> The legal challenges these communities face center around the legality of closing urban streets and of imposing restrictions on the use of public spaces and resources that should be open to all city dwellers.<sup>2</sup> This debate arises out of the need to balance the property rights of private owners inside gated communities with the rights of non-owners of the surrounding communities.<sup>3</sup> These include the right to freedom of movement, the right to access to public resources, and the right to freedom of speech in public spaces.<sup>4</sup>

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\* Faculty of Law, Bar Ilan University. I would like to deeply thank the editors of the *Journal of Law and Policy*, Kristen, Zachary and Jamie for their great work on the article.

<sup>1</sup> For an excellent overview of both challenges, see generally Richard Damstra, *Don't Fence Us Out: The Municipal Power To Ban Gated Communities and the Federal Takings Clause*, 35 VAL. U.L. REV. 525, 534–43 (2001).

<sup>2</sup> See generally Josh Mulligan, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard*, 13 CORNELL J. L. & PUB. PL'Y. 533, 538 (2003). Mulligan explores the major characters of public space and their necessity. *Id.*

<sup>3</sup> See, e.g., Larry J. Smith et al., *Gated Communities: Private Solution or Public Dilemma?*, 29 URB. LAW. REV. 413, 414–417 (1997) (discussing public challenges to restrictive private HOA actions).

<sup>4</sup> See *Laguna Publ'g Co. v. Golden Rain Found. of Laguna Hills*, 131 Cal. App. 3d 816, 825, 844–45 (1982) (noting a case in which a gated community that allowed free, unsolicited delivery of its own newsletter was forced to allow free, unsolicited delivery of other papers, holding that such communities can

Residential segregation created by gated communities is heavily based on class divisions, and in some countries, such as South Africa and the United States, it correlates with other characteristics such as ethnic origin.<sup>5</sup> Moreover, studies have shown that gated communities are an illustration of contemporary concerns, cultural ambitions, and inter-group dynamics, all of which have an enduring effect both on those who reside within and outside these spaces.<sup>6</sup> Therefore gated communities have generated debates regarding the social, economic, and political implications of their utilization within cities.<sup>7</sup>

This article examines the legal and social challenges that gated communities present in Israeli mixed cities.<sup>8</sup> Examining these challenges in the Israeli context serves as a case study of how the land use policies of ethnocratic countries lead to a segregative and discriminatory land regime dominated by a hegemonic elite. Almost invariably, the fencing-off of residential spaces in urban spaces within ethnocratic countries is initiated by members of the strong, hegemonic ethnic group.<sup>9</sup> Gated communities in

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impose time, place, and manner restrictions as long as the restrictions are not imposed selectively).

<sup>5</sup> See generally KARINA LANDMAN, AN OVERVIEW OF ENCLOSED NEIGHBORHOODS IN SOUTH AFRICA 5 (Council for Scientific and Industrial Research, 2000) (noting many who favored apartheid in South Africa thought of gated communities as ways of segregating neighborhoods); Pnina Plaut, *The Characteristics and Tradeoffs of Households Choosing to Live in Gated Communities*, 38 ENV'T AND PLAN. B: PLAN. AND DESIGN 757, 760 (2011) (noting in the U.S., racial minorities are overrepresented in gated communities, and income differences between African Americans and whites are often "narrower than general communities"); Renuad Le Goix, *Gated Communities: Sprawl and Social Segregation in Southern California*, 20 HOUSING STUD. 323, 334 (2005) (noting although the most significant aspect of segregation is socioeconomic, the placement of these gated communities may result in disproportionate racial effects).

<sup>6</sup> David Kennedy, *Residential Association as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L. J. 761, 767 (1995).

<sup>7</sup> Damstra, *supra* note 1, at 535–39.

<sup>8</sup> Note that there is not extensive legal research on gated communities. See *infra* Part II.

<sup>9</sup> Damstra, *supra* note 1, at 528. Damstra notes that the developers identified the appeal of "private communities" to the American public and started marketing this form of residency. *Id.* at 525.

ethnocratic systems do not always increase social and residential segregation, but they are a tangible reflection of ethnic spatial segregation, and they can have severe repercussions on social life in the communities around them.

This article explores how the legality of gated communities and the walls that separate these communities generate legal debates that go beyond mere rights violations of non-residents. The legal challenges highlighted in this article touch upon the historical, geographic, and legal contexts that constructed the power relations between marginalized and hegemonic groups. Addressing these contexts can provide a more comprehensive understanding of the broader consequences of physical and tangible seclusion have on group relations. The physical fencing and walling of gated communities, often justified as a barrier to crime, can foster a wide range of social and economic ills. Furthermore, in the cases discussed, gated communities benefit, in separate instances, from state funding and judicial approval to curtail the access of outsiders, and the implications of these benefits requires debates regarding the spatial and social injustice policies of the state.

Focusing on the ongoing historical and structural discriminatory spatial land system in Israel, this article draws on insight from two legal petitions submitted to the magistrate and the administrative courts pertaining to the legality of the construction of gates and walls that restrict the entry of non-residents in urban spaces. These petitions were submitted on behalf of the Arab minority residents of two mixed cities, in which Arab and Jewish residents live side by side, and challenged Israeli courts to address conflicting claims of spatial delineation.<sup>10</sup> While both courts ultimately provided rulings that benefitted gated communities over the surrounding populations, these challenges represent a novel way of thinking about how public spaces are divided and how this division affects communities.

A critical reading of these petitions shows that walling and fencing off communities intensifies feelings of both isolation and subordination.<sup>11</sup> The exclusion of the Arab community by (private)

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<sup>10</sup> See *infra* Part IV.

<sup>11</sup> See *infra* Part IV. As stated by Ziv: "... Any engagement in the protection of housing rights or advocacy of housing policy in Israel entails

wealthy Jewish Israelis, is perceived by the former as part and parcel of a long-standing historical and geographic (public) policy and process.<sup>12</sup> By contrast, the main motivation for spatial exclusion and segregation of residents of gated communities is conceptualized in neutral terms as a need to provide physical protection, security, and wellbeing of the dominant group.<sup>13</sup>

Part I of this Article presents the definition of the “Ethnocracy” and “Critical Legal Geography” approach, which is the theoretical premise of exploring gated communities. Part II presents an overview of the creation of gated communities and their characteristic. Part III delves into the spatial structure of the mixed cities with a focus on Israel as a case study of the complexity of the discriminatory land regimes and its consequences on group relations in ethnocratic societies. The phenomenon of gated communities, especially within mixed urban spaces, provides a unique view on the study of ethno-spatial group relations, the production and regulation of space in these societies and the relation between the public policy and the private actions of groups and individuals.

Part IV explores the implications of the legal petitions in question with regard to communal relations in space. It will be argued that although spatial segregation between the two groups is a long-standing reality,<sup>14</sup> the physical gating and walling-off of communities in heterogeneous, urban spaces goes beyond restricting the entry of individuals to public spaces and their freedom of movement.<sup>15</sup> Building walls and fences around private compounds within mixed cities, where diverse groups reside side by side, uncovers broader issues that touch upon the long history of group relations, discrimination, public planning and housing

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contending with historical and current tensions relating to land, spatial segregation, and Jewish-Arab relations.” Neta Ziv, *Urban Renewal Amidst National Divides: Can Housing Development (Partially) Correct Past Injustice?*, GEO. J. ON POVERTY L. POL’Y 57, 67 (2015).

<sup>12</sup> See *infra* Part IV.

<sup>13</sup> See *infra* Part IV.

<sup>14</sup> See *infra* Part III (providing an overview of the spatial structure of mixed cities).

<sup>15</sup> See *infra* Part IV.

policy, segregation, and exclusion.<sup>16</sup> It highlights and intensifies the existing segregation and alienation between groups. Gated communities simultaneously thus exist as a form of segregation as well as a manifestation of a complex collaboration between the private and the public.

## I. ETHNOCRACY AND CRITICAL LEGAL GEOGRAPHY

An “ethnocracy” is a distinct regime that facilitates the domination of a hegemonic ethnic group in a multicultural society.<sup>17</sup> This domination is reflected, *inter alia*, within discriminatory land allocation policies, resulting in segregation between hegemonic and marginalized groups, such as ethnic minorities and indigenous groups.<sup>18</sup> The establishment of such a system is usually deeply incorporated within a legal ethnic property regime that relies on ethnic criteria to ensure the domination over land by the hegemonic group.<sup>19</sup>

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<sup>16</sup> See *infra* Part IV.

<sup>17</sup> The concept of ‘ethnocratic societies’ was developed by the political geographer Oren Yiftachel in the early nineties. Yiftachel shows that in such countries ethnicity, rather than citizenship, constitutes the main criterion for distribution of power and resources. Oren Yiftachel, *Ethnocracy: Land and Identity Politics in Israel/Palestine*, 36 RELIGIOUS STUD. REV. 3 (2006); Oren Yiftachel, *Extending Ethnocracy: Reflections and Suggestions*, 8 COSMOPOLITAN CIV. SOCIETIES J. 30 (2016). The concept was further developed by other academic researchers. See James Anderson, *Imperial Ethnocracy and Demography: Foundations of Ethno-National Conflict in Belfast and Jerusalem*, in LOCATING URBAN CONFLICTS; ETHNICITY, NATIONALISM AND THE EVERYDAY 195 (Windy Pullan & Britt Baillie eds., 2013); Lise Morje Howard, *The Trap of Ethnocracy*, 23 J. DEMOCRACY 155 (2012).

<sup>18</sup> These countries usually contain three major groups: founders, immigrants, and natives. Alexandre (Sandy) Kedar, *On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda*, 5 L. & GEOGRAPHY 401, 413 (2003).

<sup>19</sup> *Id.* at 413. Also on the construction of such systems, see Peter H. Russell, *High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence*, 61 SASKATCHEWAN L. REV. 247, 252 (1998). Joseph Singer provides an overview on the transfer of land in the US from American Indians to non-Indians. Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 44 (1991–1992).

Law and courts play a cruel part in the institutionalization of these socio-spatial power structures.<sup>20</sup> Some of these societies—which share a legacy of unequal distribution of land, massive expropriations, forced segregation, displacement of residents, and unsecured tenure—include a liberal legal system, formally committed by law to the equal rights to all citizens.<sup>21</sup> Such societies include Canada, Australia, New Zealand, the United States, and Israel.<sup>22</sup> However, the ethnocratic elements of each society are diverse and defer from one country to another; depending heavily on the development of their respective legal-constitutional systems.

The Critical Legal Geography (“CLG”) approach centers on the theoretical premise of exploring gated communities in ethnocratic societies. CLG grew out of the Critical Legal Studies (“CLS”) movement, which adopted the assumption that legal rules and doctrines consist of complex, vague, and impermanent concepts, and as such, the results of their application are not predictable.<sup>23</sup> The main argument of the movement is that the law serves as a tool for the preservation of the balance of power, inequality, and the control of powerful groups in society, legitimizing the existing inequality.<sup>24</sup> This movement, which began

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<sup>20</sup> Kedar, *supra* note 18, at 413; Singer, *supra* note 19, at 44–45.

<sup>21</sup> Kedar, *supra* note 18, at 403–04.

<sup>22</sup> See *id.* at 403. Oren Yiftachel & Sandy Kedar, *On Power and Land: Israel’s Land Regime*, 16 *TEORYA U VIKORET* 67, 75–77 (2000) (in Hebrew).

<sup>23</sup> See generally Nicholas K. Blomley & Joel C. Bakan, *Spacing Out: Towards a Critical Geography of Law*, 30 *OSGOODE HALL L. J.* 661, 667, 687 (indicating the relationship between CLS and CLG); Roberto Unger, *The Critical Legal Studies Movement* (Verso ed., 2015) (providing a detailed overview on the development of the CLS movement).

<sup>24</sup> It is not possible to cover, in this footnote, even partially, the body of work about the Critical Legal Studies (CLS) movement, which shaped critical thinking in many areas of law. The following are only a few of the main contributions: MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 1 (1992); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 1 (1999); *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 666 (David Kairy ed., 1998); Robert Gordon, *Critical Legal Histories* 36 *STAN. L. REV.* 57 (1984); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *MIN. L. REV.* 265 (1978).



in the 1970s at law schools in the United States, served as an important basis for the later development of critical leftist movements including CLG.<sup>25</sup>

One contribution of CLG has been the deconstruction of the role that the law plays in producing physical and social spaces “that are otherwise ignored or taken for granted.”<sup>26</sup> Through critical analysis that focuses on legal history and the constitution of space, legal geography argues that spatial phenomena are neither natural nor neutral, but rather designed and affected by law through legal rules, doctrines, and power relations.<sup>27</sup> CLG examines the ways in which law as a system of institutions, processes, texts, and practices is influenced by the geographic aspects of social and political life.<sup>28</sup> It also points out how the geography of social and political life is designed dialectically by law and legal rules.<sup>29</sup>

CLG is the lens through which the legal claims advanced by Arab citizens and by inhabitants of the gated communities are examined, focusing on the background of historical construction of

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<sup>25</sup> Kedar, *supra* note 18, at 408. For reading on legal feminist theory that evolved from the CLS movement see, CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 3(1989). On Critical Race Theory see Jeffrey J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory Attack on the Promises of Liberalism*, 40 B. C. L. REV. 787 (1999). On Queer theory in law, see QUEER THEORY: LAW, CULTURE, AND EMPIRE (Robert Leckey & Kim Brooks eds., 2001).

<sup>26</sup> Ron Levi, *Gated Communities in Law's Gaze: Material Forms and the Production of a Social Body in Legal Adjudication*, 34 L. & SOC'Y INQUIRY 635, 640 (2009); Yishai Blank & Issi Rosen-Zvi, *The Spatial Turn in Legal Theory*, 10 HAGAR 37, 45–47 (2010).

<sup>27</sup> See generally NICHOLAS K. BLOMLEY ET AL., THE LEGAL GEOGRAPHIES READER: LAW, POWER AND SPACE 3 (2001); NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER 3 (1994); THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY (Irus Braverman et al. eds., 2014). Nicholas K. Blomley, *Landscapes of Property*, 32 L. & SOC'Y REV. 567 (1998); Nicholas K. Blomley, *Law and Geography*, 8 INT'L ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 461 (2001); Blomley & Bakan, *supra* note 23, at 661; Levi, *supra* note 26.

<sup>28</sup> Kedar, *supra* note 18, at 407–08.

<sup>29</sup> Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1846–49 (1994).

the spatial reality within Israeli mixed cities.<sup>30</sup> These heterogeneous spaces illustrate the effect of the geographic distribution of residents on Jewish-Arab relations and on the construction of different legal claims, as well as the complexity of coexistence between communities that inhabit the same current and historical space. A historical account is a mandatory step because it provides a comprehensive and a fresh review of the motives and implications of the gated communities in these spaces on power relations.

## II. THE CREATION OF GATED COMMUNITIES

Gated communities are residential spaces surrounded by walls and accessed through gates. Some gated communities employ security measures such as intercom and surveillance technologies, which control the admittance of non-members into the compound. This trend originated in the U.S. as a way for the upper class to achieve seclusion in exclusive spatial residences by physical means.<sup>31</sup> This trend would eventually be embraced by the middle class as well.<sup>32</sup> Interestingly, it appears that members of middle-class racial minorities are also choosing to live in gated communities, at potentially higher than middle-class whites.<sup>33</sup>

Inhabitants of gated communities profess that their objectives are to foster personal security and to maintain property rights of residents in the face of rising urban crime, and that these objectives are achieved by restricting the entry of individuals deemed undesirable.<sup>34</sup> While the development of gated communities accelerated rapidly in American cities throughout the 1980s,<sup>35</sup> they eventually spread to urban areas worldwide, including European

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<sup>30</sup> See *infra* Part III.

<sup>31</sup> For a comprehensive review on the creation and the topology of gated communities, see EDWARD J. BLAKELY & MARY-GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* 38–44 (1999).

<sup>32</sup> Damstra, *supra* note 1, at 528.

<sup>33</sup> Plaut, *supra* note 5, at 765.

<sup>34</sup> Karina Landman & Martin Schönteich, *Gated Communities as a Reaction to Crime*, 11 *AFRICAN SECURITY REV.* 71, 71–85 (2002).

<sup>35</sup> BLAKELY & SNYDER, *supra* note 31, at 4–5.

countries such as Russia,<sup>36</sup> England,<sup>37</sup> Germany,<sup>38</sup> and Poland.<sup>39</sup> Around the globe, countries such as Turkey,<sup>40</sup> Egypt,<sup>41</sup> Lebanon,<sup>42</sup> Israel,<sup>43</sup> China,<sup>44</sup> Indonesia,<sup>45</sup> South Africa,<sup>46</sup> Brazil,<sup>47</sup> Argentina,<sup>48</sup>

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<sup>36</sup> Sebastian Lentz, *More Gates Less Community? Guarded Houses in Russia* in PRIVATE CITIES: GLOBAL AND LOCAL PERSPECTIVES 201 (Georg Glasze et al. eds., 2006).

<sup>37</sup> Rowland Atkinson et al., *Gated Cities of Today? Barricaded Residential Development in England*, 76 TOWN PLAN. REV. 417 (2005); Sarah Blandy, *Gated Communities in England: Historical Perspectives and Current Developments*, 66 GEOJOURNAL 15 (2006).

<sup>38</sup> Nadine Marquardt et al., *Shaping the Urban Renaissance: New-build Luxury Developments in Berlin*, URB. STUD. EARLY VIEW 1 (2012).

<sup>39</sup> Anna Gasiór-Niemiec et al., *A Glimpse Over the Rising Walls: The Reflection of Post-Communist Transformation in the Polish Discourse of Gated Communities*, 23 EAST EUR. POLITICS AND SOCIETIES 244 (2009).

<sup>40</sup> Ayhan Bekleyen & İlham Yılmaz-Ay, *Are Gated Communities Indispensable for Residents?*, 27 URBANI IZZIV 149 (2016); Serife Genis, *Producing Elite Localities: The Rise of Gated Communities in Istanbul*, 44 URBAN STUDIES 771–98 (2007); Basak Tanulku, *Gated Communities as Spatial Manifestations of Moral Differentiation and Competition: An Example from Istanbul, Turkey*, J. CULTURAL GEOGRAPHY 1 (2016).

<sup>41</sup> Rana Fawziq Almatarneh & Yasser Mohamed Mansour, *The Role of Advertisements in the Marketing of Gated Communities as a New Western Suburban Lifestyle: A Case Study of the Greater Cairo Region, Egypt*, 28 J. HOUSING AND THE BUILT ENV'T 505 (2013).

<sup>42</sup> Georg Glasze & Abdallah Alkhatayal, *Gated Housing Estates in the Arab World: Case Studies in Lebanon and Riyadh, Saudi Arabia*, 29 ENV'T AND PLAN. B: PLAN. AND DESIGN 321 (2002).

<sup>43</sup> Gilad Rosen & Eran Razin, *The Rise of Gated Communities in Israel: Reflections on Changing Urban Governance in a NeoLiberal Era*, 46(8) URB. STUD. 1702 (2009) [hereinafter Rosen & Razin, *The Rise of Gated Communities in Israel*]; see generally Gilad Rosen & Eran Razin, *Gated Communities in Israel: A New Phase of Spatial Segregation*, 9 ISRAELI SOCIOLOGY 103 (2007) (in Hebrew); Amnon Lehavi, *New Residential Communities in Israel: Between Privatization and Exclusion*, 2 DIN UDVARIM LAW REVIEW 63 (2005) (in Hebrew).

<sup>44</sup> Pu Miao, *Deserted Streets in a Jammed Town: The Gated Community in Chinese Cities and its Solution*, 8 J. URB. DESIGN 45 (2010).

<sup>45</sup> Harald Leisch, *Gated Communities in Indonesia*, 19 CITIES 341 (2000).

<sup>46</sup> LANDMAN, *supra* note 5.

<sup>47</sup> TERESA CALDEIRA, *CITY OF WALLS: CRIME, SEGREGATION AND CITIZENSHIP IN SAO PAULO* 19 (2000).

and Mexico have also experienced an upsurge in numbers of gated communities.<sup>49</sup>

A variety of factors and determinants account for the rise of gated communities in the course of the last few decades. One explanation for the rise of the phenomenon of spatial fencing in the U.S. is related to an earlier process of mass immigration during the 1950s and 1960s in addition to the internal migration of African Americans.<sup>50</sup> Resentment of newcomers motivated existing residents to fortify themselves through the creation of enclaves inaccessible to certain groups.<sup>51</sup> The rise of residential gating was also coterminous with the rise in spatial overcrowding in various city centers and with the rise in the rates of crime and violence.<sup>52</sup>

Some researchers attribute this phenomenon to extensive campaigns of privatization of public spaces, which are inextricably tied to many factors.<sup>53</sup> These factors include the ascendance of the importance of individualism; the rise of neoliberal values; the

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<sup>48</sup> Nora Libertun de Duren, *Planning à la Carte: The Location Patterns of Gated Communities Around Buenos Aires in a Decentralized Planning*, 30 INT'L J. URB. AND REGIONAL RES. (2006).

<sup>49</sup> Diana Sheinbaum, *Gated Communities in Mexico City: An Historical Perspective*, 13 URB. DESIGN INT'L 241 (2008).

<sup>50</sup> At the beginning of the twentieth century, mass immigration of African American communities from the agricultural south to the industrial north was particularly prominent, and within only a few years the division of urban space between white and African American residents was changing rapidly. African American enclaves were created, which engendered wide discrepancies between the communities throughout the city. For more, see DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS*, 19–42 (1993).

<sup>51</sup> Evan McKenzie shows that most of the racial restrictions that were imposed on the spatial residency of African American citizens and which led to residential segregation were accepted in the aftermath of black south-north immigration coupled with the mass arrival of Asian immigrants to the west coast. For a general review on the rise of restrictive covenants, see EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 29–45, 95 (1994).

<sup>52</sup> BLAKELY & SNYDER, *supra* note 31, at 148.

<sup>53</sup> Rosen & Razin, *The Rise of Gated Communities in Israel*, *supra* note 43, at 1703; Setha Low, *How Private Interests Take Over Public Space: Zoning, Taxes, and Incorporation of Gated Communities in THE POLITICS OF PUBLIC SPACE* 82 (Setha Low & Neil Smith eds., 2006).

perpetuation of privacy and sanctification of the right of property over values such as equality,<sup>54</sup> and the minimization of government restriction on personal liberties, including communal liberties and practices and the decline of the welfare state.<sup>55</sup>

The rise of these values encouraged the formation of spaces defined by their inaccessibility to the general public, and a shift from the state to private organizations as the main providers of physical protection and public amenities.<sup>56</sup> Accordingly, some gated communities have begun providing “club goods” such as golf courses, private pools and fitness club, tennis courts.<sup>57</sup> Other gated communities may choose to provide public goods in addition to club goods, such as private schools, allowing them to essentially function as local, private governments.<sup>58</sup>

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<sup>54</sup> See BLAKELY & SNYDER, *supra* note 31.

<sup>55</sup> On the decline of the welfare state, see Allan Cochrane, *Modernization, Managerialism and the Culture Wars: Reshaping the Local Welfare State in England*, 30 LOC. GOV'T STUDIES 481 (2004). Cochrane provides a rather different perspective of the changing shapes of local government and local governance, and locates it within the wider framework of Britain's welfare state, as a local expression of that state. *Id.* He points to the state withdrawal from welfare policy and transferring in to the local level. *Id.*

<sup>56</sup> Barbara Coyle McCabe, *Privatizing Urban Services Through Homeowners Associations: The Potential and Practice in Phoenix*, 29 INT'L. J. PUB. ADMIN. 837, 841–43 (2006).

<sup>57</sup> Most gated communities in the U.S., China, Russia, and Central Asia include at least some of these amenities. See BLAKELY & SNYDER, *supra* note 31, at 39; Stanley Brunn, *Gated Minds and Gated Lives as Worlds of Exclusion and Fear*, 66 GEOJOURNAL 5, 7 (2006).

<sup>58</sup> See Kennedy, *supra* note 6, at 762. Damstra focuses on the negative effects that gated communities have on the surrounding community, and provides a judicial reasoning that supports the right of local governments to ban the creation of new gated communities. Damstra, *supra* note 1, at 530. It is worth noting that the creation of a new local, private government system is, for the time being, unique to the American phenomenon, and is frequently raised in the context of “Common Interest Communities” (CIC) that are governed by “Home Owners Associations” (HOA). *Id.* However, this unique issue is beyond the scope of the current article and will not be elaborated upon. For further reading see Evan McKenzie, *The Dynamics of Privatopia: Private Residential Governance in US*, PRIVATE CITIES: GLOBAL AND LOCAL PERSPECTIVES 9 (Georg Glasze et al. eds., 2006); Evan McKenzie, *Present at the Creation: The Public Administration Profession and Residential Private Government*, 71 PUBL. ADMIN. REV. 543 (2011).

Numerous real estate developers foresaw the desire individuals would have to live in private spaces, and undertook the marketing of new residential spaces identified as belonging to a “private community.”<sup>59</sup> The term “community” is used by developers to describe a concept of personal and property safety, as well as reduced traffic and noise, all manifested in a friendly environment of homogeneous neighbors.<sup>60</sup>

A fair amount of empirical research has been conducted on gated communities’ characters, motives and implications within cities in different regions.<sup>61</sup> The most detailed study conducted on gated communities was published by Blakely and Snyder two decades ago, focusing on the American context.<sup>62</sup> In their comprehensive empirical research, frequently cited and reaffirmed by scholars,<sup>63</sup> they found that individuals who live in these enclaves regard themselves as a community with a sense of belonging which shares the same values, desires, and destiny.<sup>64</sup> However, their findings show that individuals’ activities and affairs in these spaces are managed in separation and isolation from each other.<sup>65</sup> In most cases, the physical fencing-off of the community, for the purpose of promoting security, has become a byproduct of the residents’ desire to promote a sense of belonging and privacy.<sup>66</sup>

Blakely and Snyder conclude that in most gated-community compounds, there is no tangible manifestation of what is intuitively referred to as a community, despite the common desire to foster

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<sup>59</sup> In many cases, the primary motive for closing access to the space is economic; real estate entrepreneurs are interested in marketing the space as exclusive and prestigious, and wish to create an association with the idyllic image of a community, see BLAKELY & SNYDER, *supra* note 31, at 29–46. See also Damstra, *supra* note 1, at 533.

<sup>60</sup> BLAKELY & SNYDER, *supra* note 31, at 29.

<sup>61</sup> GATED COMMUNITIES: INTERNATIONAL PERSPECTIVES 39 (Rowland Atkinson and Sarah Blandy eds., 2006). See sources cited *supra* notes 36–49.

<sup>62</sup> BLAKELY & SNYDER, *supra* note 31.

<sup>63</sup> Damstra, *supra* note 1, at 528.

<sup>64</sup> BLAKELY & SNYDER, *supra* note 31, at 72.

<sup>65</sup> *Id.* at 136.

<sup>66</sup> *Id.* at 121–23.

it.<sup>67</sup> The hired guards and external agents who manage these spaces are a substitute for mutual responsibility and communal solidarity.<sup>68</sup> The goal of living in a community translates into establishing boundaries that determine group membership of who resides within the space.<sup>69</sup> As a result, gated communities have become an expression of spatial segregation and social separation between groups, and have created closed, alienated enclaves of homogenous social groups.<sup>70</sup> This trend of spatial seclusion has led to the entrenchment of spatial segregation based on ethnicity, as well as religious and racial origin, which, together with economic dimensions, has resulted in the ossification of inter-communal divisions.<sup>71</sup>

Critics who are troubled by the proliferation of gated communities state that this form of residency limits interaction between groups and thus limits social mobility of marginalized groups,<sup>72</sup> degrading their social capital.<sup>73</sup> It also intensifies the process of gentrification, defined as “the rehabilitation of working-class and derelict housing and the consequent transformation of an area into a middle-class neighborhood.”<sup>74</sup> Gentrification has been associated with modern urban ills, as it hastens the demolition of housing for impoverished populations, creates shortages in

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<sup>67</sup> *Id.* at 175–76.

<sup>68</sup> *Id.* at 163.

<sup>69</sup> Gillad Rosen & Jill Grant, *Reproducing Difference: Gated Communities in Canada and Israel*, 35 INT’L J. URB. AND REGIONAL RES. 778, 778 (2011).

<sup>70</sup> *Id.* at 779.

<sup>71</sup> BLAKELY & SNYDER, *supra* note 31, at 146–152. *See generally* Peter Marcuse, *The Ghetto of Exclusion and the fortified Enclaves: New Patterns in the United States*, 41 AM. BEHAV. SCIENTIST 311 (1997) (presenting a more comprehensive overview regarding the effects of all forms of segregation on group relations and interactions).

<sup>72</sup> Kennedy, *supra* note 6, at 777.

<sup>73</sup> *See* Robert Putnam, *The Prosperous Community: Social Capital and Public Life*, 4 AM. PROSPECT 35 (2003); PETER MASKELL, SOCIAL CAPITAL, INNOVATION, AND COMPETITIVENESS, SOCIAL CAPITAL: CRITICAL PERSPECTIVES 111–113 (Stephen Baron et al. eds., 2000).

<sup>74</sup> GENTRIFICATION OF THE CITY 1 (Neil Smith & Peter Williams eds., 1986).

affordable housing projects, and can lead to housing market failure.<sup>75</sup>

In Levi's work challenging traditional legal forms that relegate gated communities to private law, which reframes legal disputes in a wider context,<sup>76</sup> gated communities are analyzed and conceptualized in a context that goes beyond well-known violations of rights. Beyond the benefits and harms of gated communities, which are frequently discussed in scholarly research,<sup>77</sup> this mode of residential seclusion brings another dimension to spatial segregation. Ultimately, gated communities have become another mode of class and ethnic residential segregation, but what differentiates these communities from other forms is the tangible manifestation of seclusion which captures disputes over geography and landscape in a broader context of each country,<sup>78</sup> such as issues of historical and current social and economic injustice and inter-group relations.<sup>79</sup> Before delving into the Israeli legal test cases, a general overview of the historical spatial structure of urban mixed spaces in Israel is in order.

### III. SPACIAL STRUCTURE OF MIXED CITIES

Mixed cities are a common presence worldwide.<sup>80</sup> Scholarly interest in mixed cities is rooted in the "social and political theory of the nineteenth and early twentieth centuries[,] when immigrants

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<sup>75</sup> Rowland Atkinson, *The Evidence on the Impact of Gentrification: New Lessons for the Urban Renaissance?*, 4 EUR. J. HOUSING POL'Y 107, 108 (2004).

<sup>76</sup> Levi, *supra* note 26, at 637.

<sup>77</sup> Damstra provides an overview of the social and the legal harms. *See* Damstra, *supra* note 1, at Part III.

<sup>78</sup> *See generally* SETHA LOW, BEHIND THE GATES: LIFE, SECURITY, AND PURSUIT OF HAPPINESS IN FORTRESS AMERICA 1 (2003). This is an eight-year ethnographic study of the behavior of residents in gated communities that examines why people live in these enclaves. Low sets gated communities within a wider context of boundary consciousness, in which these communities provide many of the same features and benefits of non-gated suburban developments. Her conclusion is that gates are a manifestation of the outcome of the social ordering.

<sup>79</sup> *See infra* Part IV.

<sup>80</sup> *See* Erez Tzfadia, *Mixed Cities in Israel: Localities of Contentions*, 26 ISR. STUD. REV. 153, 155 (2011)



populated large European and American modern cities as a result of the industrial revolution.”<sup>81</sup> Early twentieth-century scholars have argued that social diversity and rapid changes in large cities will release individuals from group affiliations, leading to spatial separation and an increase in cultural diversity.<sup>82</sup> But mixed spaces have evolved differently, largely depending on state and local government policies concerning group relations and on the settlement patterns of various groups.<sup>83</sup> However, cities and urban areas were regarded as centers of equal opportunity for all residents to enjoy space and to dwell in the city, regardless of cultural affiliation.<sup>84</sup> Studying how different residents enjoy and dwell within gated communities is all the more challenging due to the private nature of this space.

As research has shown, Israeli mixed cities evolved in effect with the Zionist ideology,<sup>85</sup> and so not all mixed-city theories apply to them.<sup>86</sup> Zionist ideology underlies spatial planning policy

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<sup>81</sup> *Id.* at 155.

<sup>82</sup> See generally Robert Park, *The City: Suggestions for the Investigation of Human Behavior in the Urban Environment*, 20 AM. J. SOC. 577 (1915).

<sup>83</sup> See Tzfadia, *supra* note 80, at 157.

<sup>84</sup> See Eugene J. McCann, *Space, Citizenship, and the Right to the City: A Brief Overview*, 58 GEOJOURNAL 77, 77–78 (2002).

<sup>85</sup> The Zionism movement began in the nineteenth century in Europe as a notion that amounted to a “revolution” in the Jewish (religious) world. It entails a reformulation of Jewish identity, meaning, and politics so as to render them more attentive and adaptable to a “modern” and “secular” context. Some argue, in varying formulations, that Zionism is mainly a project of the modernization, secularization, and politicization of Judaism, so as to adapt it to the modern, dominant sociopolitical framework, namely, the Jewish nation-state. YAACOV YADGAR, SOVEREIGN JEWS: ISRAEL, ZIONISM, AND JUDAISM, PART 2 (2017). From its outset, Zionism facilitated the nation building project of Israel as a national home for all Jews and sought to gather together in one country those individuals from around the world who consider themselves Jewish by religion or ancestry. For general reading on the Zionist movement and its particular effect on space. See BARUCH KIMMERLING, ZIONISM AND TERRITORY: THE SOCIO-TERRITORIAL DIMENSIONS OF ZIONIST POLITICS (1983); Lesley Gill, *Ethnography at its Edges: Compulsory Zionism, Free Speech, and Anthropology*, 43 AM. ETHNOLOGIST 555, 555–59 (2016); Alexandre Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948-1967*, 33 N.Y.U. J. INT’L L. & POL. 923, 943–44 (2001).

<sup>86</sup> Tzfadia, *supra* note 80, at 154–55.

in Israel and contributed heavily to spatial development in the early days of the state.<sup>87</sup> The implementation of this ideology resulted, *inter alia*, in spatial segregation in ethnic lines and control over the land by the dominant Jewish citizens.<sup>88</sup> This was made possible due to the fact that 93 percent of the land in Israel was owned by the state or one of its agencies, who remain in charge of land allocation.<sup>89</sup> The following section provides an overview of the legal claims of Arab petitioners challenging the legality of the gated communities, which leans heavily on historical arguments.

### A. *Spatial Dynamics in Historically Mixed Cities*

Israel's population of approximately eight million contains a diverse population, comprised of 74.7 percent Jews, 20.8 percent Arab Palestinians, and 4.5 percent "others" as defined by the Israeli Central Bureau of Statistics (ICBS).<sup>90</sup> There is a distinct spatial segregation between Arabs and Jews in rural localities, but these populations do live side by side in eight urban-mixed cities, recognized as such by ICBS.<sup>91</sup>

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<sup>87</sup> ARIEH SHARON, *PHYSICAL PLANNING IN ISRAEL* (Government Printing Press and Survey of Israel, 1951); Haim Yacobi & Erez Tzfadia, *Multiculturalism, Nationalism, and the Politics of the Israeli City*, 41 INT'L J. MIDDLE EAST STUD. 289, 292 (2009).

<sup>88</sup> EREZ TZFADIA AND HAIM YACOBI, *RETHINKING ISRAELI SPACE: PERIPHERY AND IDENTITY* 1–7, 83–100 (2011).

<sup>89</sup> See Amnon Lehavi, *Residential Communities in a Heterogeneous Society: The Case of Israel*, 95, 96–98 in *PRIVATE COMMUNITIES AND URBAN GOVERNANCE: THEORETICAL AND COMPARATIVE PERSPECTIVES* (Amnon Lehavi ed. 2016).

<sup>90</sup> "Others" refers to non-Arab Christians, members of other religions, and persons not classified by religion in the Population Registry. CENTRAL BUREAU OF STATISTICS, STATE OF ISRAEL, *ON THE EVE OF ISRAEL'S 69TH INDEPENDENCE DAY—8.7 MILLION RESIDENTS IN THE STATE OF ISRAEL* (2017), [http://www.cbs.gov.il/www/hodaot2017n/11\\_17\\_113e.pdf](http://www.cbs.gov.il/www/hodaot2017n/11_17_113e.pdf).

<sup>91</sup> According to ICBS data, the term "mixed cities" describes localities in which there is a significant (national) minority that reaches up to 10 percent of the population. According to this classification, there are eight mixed cities in Israel: Acre, Haifa, Tel Aviv-Jaffa, Ramleh, Lod, Ma'alot-Tarshiha, Jerusalem, and Natzeret Illit, CENTRAL BUREAU OF STATISTICS, STATE OF ISRAEL, *INTRODUCTION—EXPLANATORY NOTES, DEFINITIONS AND SOURCES, POPULATION SUMMARY TABLES* (2017), <http://www.cbs.gov.il/shnaton68/down>

However, the Arab residents of mixed cities in Israel are not homogenous in their geographic origins. Historically mixed cities are those where many inhabitants are natives of the city, and can trace their ancestors to a time before the establishment of the State.<sup>92</sup> In emerged mixed cities, the Arab residents largely migrated from the surrounding Arab villages in the past few decades to Jewish cities.<sup>93</sup> This is an important distinction, because there are typically significant defining and differentiating characteristics between the native Arab residents, who range from lower-middle to upper-middle class, and the more affluent Arab immigrants.<sup>94</sup>

Statistical research indicates that in comparison to the Jewish community, there is a high rate of crime in the Arab community.<sup>95</sup> In accordance with these differences, in mixed cities where Arab residents are native to the area, the land regime evolved differently.<sup>96</sup> This is why, to date, gated communities appear in

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load/st\_eng02.doc. Over the course of the last few years, additional mixed cities have formed as a result of a process of migration of Arab families from the surrounding Arab villages and cities to Jewish cities. But because the Arab residents in these cities amount to less than 10 percent of the total population, these localities are not classified by the ICBS as “mixed cities”. AMNON BEERI-SULITZEANU & URI GOPHER, *MIXED CITIES AND REGIONS: THE FUTURE FACE OF ISRAEL* 5–6, 9 (2009) (in Hebrew).

<sup>92</sup> Dan Rabinowitz & Daniel Monterescu, *Reconfiguring the “Mixed Town”*: *Urban Transformations of Ethnonational Relations in Palestine and Israel*, 40 INT. J. MIDDLE EAST STUD. 195, 199 (2008).

<sup>93</sup> Ghazi Falah, *Living Together Apart: Residential Segregation in Mixed Arab-Jewish Cities in Israel*, 33 URB. STUD. 823, 829 (1996).

<sup>94</sup> This distinction is not apparent in the academic literature on Israeli mixed cities and it is suggested for the first time in this article. However, in his book, Yacobi provides a rough typology of Israeli mixed cities with regard to researches that focus on these spaces. HAIM YACOBI, *THE JEWISH-ARAB CITY: SPATIO-POLITICS IN A MIXED COMMUNITY* 1, 6 (2009) [hereinafter YACOBI, *THE JEWISH-ARAB CITY*]. See also BEERI-SULITZEANU & GOPHER, *supra* note 91, at 6.

<sup>95</sup> See DATA ON THE RATE OF CRIME IN THE ARAB COMMUNITY IN ISRAEL, THE KNESSET RESEARCH CENTER (2010) (in Hebrew).

<sup>96</sup> For further theoretical reading on the historical evolution of mixed cities in Israel, see generally ADAM LEBOR, *CITY OF ORANGES: AN INTIMATE HISTORY OF ARABS AND JEWS IN JAFFA* 3 (2006); DAPHNA SHARFMAN ET AL., *THE SECRET OF COEXISTENCE: JEWS AND ARABS IN HAIFA DURING THE BRITISH*

historically mixed cities and not in emerged mixed cities.<sup>97</sup> Gated communities in mixed cities are largely populated by Jewish residents who seek to seclude themselves from the typically Arab, poor neighborhoods associated with high crime rates.<sup>98</sup>

There are no precise statistics on the number of Arab and Jewish residents in historically mixed cities before 1948, but researchers overwhelmingly agree that the number of Arab residents in them declined dramatically after the War of 1948, which established the State of Israel.<sup>99</sup> Before the war, the estimated proportion of Arab residents in the mixed cities ranged from 70 to 80 percent,<sup>100</sup> whereas today it ranges between 10 percent and 30 percent.<sup>101</sup> In contrast to the decline in the number of Arab residents in the first years of the State, the number of Jewish residents rose significantly from 1948 to 1950, becoming the majority in most of the mixed cities.<sup>102</sup>

Following the departure of British forces in 1948,<sup>103</sup> Israeli authorities transferred the remaining Arab residents in various mixed cities to single-ethnicity neighborhoods, granting them

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MANDATE IN PALESTINE, 1920-1948 1 (2007); YACOBI, THE JEWISH-ARAB CITY, *supra* note 94, at 1; Rabinowitz & Monterescu, *supra* note 92, at 195 (2008). This scholarly research present a unique vision of the Jewish-Arab conflict in Israel, and its roots and motivations as manifested in the urban scale of Israeli society. For a comprehensive review on these sources see Tzfadia, *supra* note 80.

<sup>97</sup> See *infra* Section III.B.

<sup>98</sup> See *infra* Part IV (discussing the legal claims evoked by the residents of the gated (Jewish) communities).

<sup>99</sup> Falah, *supra* note 93, at 829 and the table at 830.

<sup>100</sup> *Id.*

<sup>101</sup> With the exception of Tel Aviv-Jaffa, where the Arab population constitutes less than 5 percent, but which is still classified as a mixed city. BEERI-SULITZEANU & GOPHER, *supra* note 91, at 8.

<sup>102</sup> Ziv, *supra* note 11, at 67–68.

<sup>103</sup> The British Mandate for Palestine was established by the League of Nations and was appointed following the breakup of the Ottoman Empire after the end of the First World War. The Mandate was terminated on May 14, 1948 when the state of Israel was established. However, both the Ottoman and British Mandate periods effected the creation of the land regime in Israel, and still effect the property rights regime. See Kedar, *supra* note 85, at 943; see also *id.* at 936–39.

Israeli citizenship in the process.<sup>104</sup> It also imposed a military administration that prohibited their entry and exit without proper authorization.<sup>105</sup> In rare cases, and with special permission, a limited number of Arab families were allowed to reside outside the Arab zone, as delineated by the military authorities.<sup>106</sup> Military rule in the historically mixed cities ended in 1954, and freedom of movement was reinstated, along with the freedoms to work and to choose one's place of residence.<sup>107</sup> A substantial segment of Arab residents had become impoverished due to the loss of their assets as a consequence of the 1948 war and the military rule imposed on them afterwards.<sup>108</sup>

Jewish residents who were born prior to the establishment of the State, or who arrived in Mandatory Palestine during World War I, established residential neighborhoods separating them from their Arab neighbors,<sup>109</sup> which were sometimes called urban housing cooperatives.<sup>110</sup> These projects were carried out by various workers' organizations and were intended to be inhabited by their members only.<sup>111</sup> The establishment of these urban housing cooperatives served the purpose of creating geographically isolated social and residential units.<sup>112</sup> These complexes served to preserve urban land exclusively in the hands of a local union (Histadrut) dominated by national and sectorial identity.<sup>113</sup> Members who were accepted into these cooperative societies were those who belonged to the Histadrut and were predominantly Ashkenazi Jews

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<sup>104</sup> Falah, *supra* note 93, at 829, 837.

<sup>105</sup> *See id.* at 837, 854.

<sup>106</sup> *Id.* at 837–38.

<sup>107</sup> *Id.* at 837, 854.

<sup>108</sup> The war of 1948 had substantial consequences for the Arab community, as hundreds of thousands of Arabs were displaced from their homes. For further elaboration, see Ziv, *supra* note 11, at 67–69.

<sup>109</sup> Rabinowitz & Monterescu, *supra* note 92, at 203.

<sup>110</sup> DAN RABINOWITZ, THE FORGOTTEN OPTION: MUNICIPAL HOUSING COOPERATIVE IN SPACE, LAND AND HOME 125 (Yehuda Shenhav ed., 2003) (in Hebrew). *See also* Lehavi, *supra* note 89, at 97.

<sup>111</sup> RABINOWITZ, *supra* note 110, at 125–26.

<sup>112</sup> *Id.* at 123–129.

<sup>113</sup> *Id.* at 131–34.

(Jews of Eastern European origins).<sup>114</sup> Jewish immigrants who arrived from Arab countries in the 1950s and 1960s were not members of the union, and could not dwell in these urban cooperatives.<sup>115</sup> As a result, throughout much of the history of the state, important urban spaces did not include Arab residents or Jewish immigrants from Arab countries, but only Ashkenazi Jews who were owners of condos in these complexes.<sup>116</sup> The rights that accrued with property ownership gave this group the power to exclude unwelcomed groups.<sup>117</sup>

Arab neighborhoods continued to evolve separately from their Jewish counterparts, and the gaps between them have remained prominent.<sup>118</sup> Overcrowded Arab neighborhoods lack open spaces, have considerably inferior levels of maintenance, and have a lesser allocation of public amenities than their Jewish counterparts.<sup>119</sup> Moreover, a national comprehensive survey conducted in 2014 revealed that more than 65 years after the establishment of the State, the socioeconomic status of Arabs in mixed cities is both lower than that of their surrounding Jewish neighbors and that of Arabs in the non-mixed Arab cities and villages.<sup>120</sup>

The disparity between the two types of neighborhoods demonstrates a correlation between the national ethnic identity of residents of the neighborhoods and their socio-economic status. This may indicate that in historically mixed cities in Israel, similar to other places around the world, spatial segregation particularly when the state is involved in its genesis, created or intensified socio-economic disparities.<sup>121</sup> It isolates minority groups from amenities, opportunities, and resources that affect social and economic well-being.<sup>122</sup>

Historically mixed cities are characterized by segregation between neighborhoods on the basis of ethnic and national

<sup>114</sup> *Id.* at 135–36.

<sup>115</sup> *Id.* at 134–37.

<sup>116</sup> *Id.* at 134.

<sup>117</sup> *Id.* at 137–38.

<sup>118</sup> BEERI-SULITZEANU & GOPHER, *supra* note 91, at 17.

<sup>119</sup> *Id.* at 17–18.

<sup>120</sup> *Id.* at 10.

<sup>121</sup> Falah, *supra* note 93, at 824.

<sup>122</sup> *Id.* at 826.

origin.<sup>123</sup> Notwithstanding this segregation, mixed cities are the primary urban spaces where members from the two communities meet and interact in joint public urban spaces such as parks, open spaces, and shopping area.<sup>124</sup> However, this segregation continues to change. Akin to “empowered” minorities elsewhere around the world, members of the established middle class of ethnic minorities in Israeli cities have been migrating to more prestigious and spacious, traditionally Jewish parts of the city.<sup>125</sup> Many of these established families have been able to purchase residential units at comparatively high prices.<sup>126</sup> This process is yet another illustration of the flexibility and dynamism of urban spaces, which can create integrative not only segregative spaces.

However, alongside these changes, Jewish residents have used another tactic to enforce separation in the mixed cities: the use of fences, gates, and guards to reinforce the Jewish spaces and control who enters them. The following sections elaborate on that phenomenon.

### *B. Residential Fencing in Israeli Mixed Cities*

There are three types of gated or enclosed enclaves that have developed in Israel throughout the years.<sup>127</sup> The first type includes traditional ethno-cultural communities, mainly ultra-Orthodox

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<sup>123</sup> *Id.* at 830.

<sup>124</sup> BEERI-SULITZEANU & GOPHER, *supra* note 91, at 8.

<sup>125</sup> A similar process occurred in the United States with regard to middle-class African American citizens relocating from neglected and overcrowded neighborhoods to those inhabited by whites. See RACHAEL WOLDROFF, *WHITE FLIGHT/BLACK FLIGHT: THE DYNAMICS OF RACIAL CHANGE IN AN AMERICAN NEIGHBORHOOD* 135–76 (2011) (examining the phenomenon of African American in-migration to a formerly white neighborhood); see also Falah, *supra* note 93, at 829.

<sup>126</sup> Joshua Mitnick, *For Palestinian Citizens of Israel, No Place is Quite Home*, CHRISTIAN SCI. MONITOR (January 31, 2016), <https://www.csmonitor.com/World/Middle-East/2016/0131/For-Palestinian-citizens-of-Israel-no-place-is-quite-home>.

<sup>127</sup> Gilad Rosen & Eran Razin, *Enclosed Residential Neighborhoods in Israel: From Landscapes of Heritage and Frontier Enclaves to New Gated Communities*, 40 ENV'T AND PLAN. 2895, 2898 (2008) [hereinafter, Rosen & Razin, *Enclosed Residential Neighborhoods in Israel*].

Jewish communities and Bedouin localities,<sup>128</sup> where the enclosure “protects unique cultural values, lifestyles, and social cohesion.”<sup>129</sup> Second, there are gated communities in the form of frontier Jewish enclaves established for the purpose of implementing the Zionist vision and socialist ideology (the motivation for such communities).<sup>130</sup> These include Kibbutzim (communal settlements), Moshavim (collective settlements), and Community Settlements inside Israel and in the occupied territories, developed primarily in rural locations.<sup>131</sup>

Third, there are the new gated communities, which are identified as “a product of market conditions under neoliberalism.”<sup>132</sup> This category reflects a class-based desire for lifestyle and prestige.<sup>133</sup> The spaces in these localities are restricted to non-residents by gates.<sup>134</sup> Types and variations of these communities appear in urban areas as well as in the suburbs of large cities.<sup>135</sup> This article explores the latter type and analyzes the legal claims that challenge the closing of residential spaces in mixed cities and which touch upon the unique dynamics of ethnic relations in space.

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<sup>128</sup> *Id.* at 2898. “The Bedouin population in Israel is a semi-nomadic traditional patriarchal society . . . they are a subgroup within the Muslim Arab population in Israel, with unique cultural, historical, and social traits. Most of them live in the southern part of the country.” Wasef Na’amni et al., *Prevalence of Consanguineous Marriages and Associated Factors Among Israeli Bedouins*, 5 J. COMMUNITY GENETICS 395, 395 (2014). For elaboration on the consequences of their unique traits in the Israeli legal context, see Ronen Shamir, *Suspended in Space: Bedouins Under the Law of Israel*, 30 L. & SOC’Y 231 (1996). For further reading see, Wasef Na’amni et al., *supra* note 128; INDIGENOUS (IN)JUSTICE: HUMAN RIGHTS LAW AND BEDOUIN ARABS IN THE NAQAB/NEGEV I (Ahmad Amara et al. eds., 2012).

<sup>129</sup> Rosen & Razin, *Enclosed Residential Neighborhoods in Israel*, *supra* note 127, at 2898.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 2898, 2902, 2904.

<sup>132</sup> Rosen & Grant, *supra* note 69, at 781; *see id.* at 2898.

<sup>133</sup> Rosen & Razin, *Enclosed Residential Neighborhoods in Israel*, *supra* note 127, at 2898.

<sup>134</sup> *Id.* at 2907–09.

<sup>135</sup> *See id.* at 2906.



Notwithstanding current and historical spatial segregation, the addition of gated communities to mixed cities fostered public and legal debate on their origins and legality and on the land regime itself. Critical analysis of this debate shows that this global trend has raised challenges to the legality of the local, historical public policy of the state. Gated communities exist at a junction of public and legal debate over the origin of spatial segregation and spatial disparities between residential spaces as a creation of legal, social, and political innovations instead of a static reality. Gated communities are an opportunity through which we can rethink current spatial and social reality and its historical production.

As previously stated, spatial separation between Jews and Arabs has existed in various mixed cities since the establishment of the State. The *physical* fencing off of neighborhoods to create closed and fortified zones is a relatively recent phenomenon in the history of urban space in Israel.<sup>136</sup> There are two categories of urban gated communities in Israeli mixed cities:<sup>137</sup> gated communities with single entry points that may or may not be protected by armed guards, a feature of three Israeli mixed cities;<sup>138</sup> and communities that reside behind a wall, where entrance is entirely restricted to residents. There are two such walls in Israel that share a common characteristic: they were built between Arab and Jewish residential spaces within the city and thus separate Jewish residents from their Arab neighbors.<sup>139</sup>

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<sup>136</sup> Rosen & Razin, *The Rise of Gated Communities in Israel*, *supra* note 43, at 1707.

<sup>137</sup> Rosen and Razin suggest another categorization of urban closed enclaves of “fortified towns and neighborhoods” and “new gated communities and private neighborhoods”. Rosen and Razin, *Enclosed Residential Neighborhoods in Israel*, *supra* note 127, at 2906–07. For the purpose of this article, which focuses on mixed spaces, I suggest a different categorization.

<sup>138</sup> “Andromeda Hill,” was built in a lavish area of Tel Aviv-Jaffa in 1998. *About Us*, ANDROMEDA HILL, <http://www.andromeda.co.il/submenupage.aspx?menuid=9> (last visited Dec. 13, 2017). In 2009, The Acre neighborhood of Na’ot Yam became a gated residential space for families of the military and of the state security forces. Yaffa Baranes, *Stationing of Barriers at the Entrance to Military Neighborhood is Approved*, MYNET (June 23, 2010), <http://www.mynet.co.il/articles/0,7340,L-3909147,00.html>.

<sup>139</sup> The first is a separation wall built in 1997 in Ramleh between the Arab neighborhood of Jawarish and the Jewish neighborhood Ganei-Dan; another

Similar to the claim that underlies the establishment of gated communities elsewhere, the declared objective of gated communities in Israel is to maintain the security of the residents against theft and other criminal elements. For example, the claim that underpins the fencing off of Na'ot Yam, which was constructed in the eastern part of Acre and marketed as a unique "community" for the families of military and state security forces. In response to opposition over the stationing of barriers around the neighborhood, a member of the neighborhood committee explained: "We are talking about the character of the neighborhood and its security. The real purpose of the barriers is to prevent the entrance and movement of foreigners to the neighborhood."<sup>140</sup> The city engineer vehemently opposed the erection of barriers and stated that there had previously never been anything there to distinguish it from other neighborhoods, and that there was therefore no reason for separating it from other neighborhoods in the city by an electronic barrier.<sup>141</sup> She warned that,

"[a]pproving the barriers would open the floodgates to additional requests [by communities] to be differentiated from their natural environments and to erect more gates. There is no unique criterion for differentiating one neighborhood from another. The principle of equality obligates us to answer similar requests submitted by other neighborhoods, and the result will be highly undesirable: isolation and alienation."<sup>142</sup>

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wall was erected in 2003 between the Lod neighborhood of Pardes Snir, bordering the Jewish Moshav Nir Tzvi. There is also an earth embankment, 1-1.5 kilometers long and 4 meters high, that was constructed in 2002 between Caesarea and the Arab settlement of Jisr Az-zarqa. This wall separates between two localities: a very poor Arab and a very wealthy Jewish one. Arab Association for Human Rights, *Behind the Walls: Separation Walls between Arabs and Jews in Mixed Cities in Israel*, ELECTRONIC INTIFADA (June 15, 2006), <https://electronicintifada.net/content/behind-walls-separation-walls-between-arabs-and-jews-mixed-cities-israel/2428>.

<sup>140</sup> Baranes, *supra* note 138.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

Despite the determined opposition of the city engineer, the local planning committee of Acre approved the stationing of the barriers.<sup>143</sup>

In his analysis on the proliferation of private urban communities in Israel, including gated communities, Lehavi has found that their emergence reflects market preferences for exclusive consumer residential club amenities.<sup>144</sup> Tzfadia, by contrast, has presented a different analysis of the phenomenon.<sup>145</sup> He emphasized the significant role of formal and informal action of governmental institutions and of national-territorial ideologies in producing spatial “ethnicization”, ethnic exclusion and segregation, and ethno-class stratification.<sup>146</sup>

Razin and Rosen have suggested yet another approach by focusing on the interactions between the public and the private, as well as on the role NGOs play in the creation of gated communities.<sup>147</sup> Their analysis shows that gated communities were developed and regulated through private-public partnerships, including private non-profit organizations that promote public interests.<sup>148</sup> Moreover, Rosen and Razin have noted that the motivations and mechanisms for enclosure described in rural frontier settlements are different from the category of fortified towns.<sup>149</sup> The motives of enclosure of the latter form are a mixture of several elements. These include fear of crime, alienation between groups resulting from long ethno-national conflict, and an expression of status- and class-based desire for segregation. They also point to the practices of agents that are involved in the

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<sup>143</sup> *Id.*

<sup>144</sup> Lehavi, *supra* note 43, at 100–105.

<sup>145</sup> Erez Tzfadia, *Response: Privatization and Communitarity: A Critical Viewpoint on Liberal Discourse on New Housing- Communities in Israel*, 2 DIN UDVARIM L. REV. 141, 142 (2005) (in Hebrew).

<sup>146</sup> *Id.* at 144.

<sup>147</sup> Rosen & Razin, *The Rise of Gated Communities in Israel*, *supra* note 43, at 1704.

<sup>148</sup> *Id.* at 1719.

<sup>149</sup> Rosen & Razin, *Enclosed Residential Neighborhoods in Israel*, *supra* note 127, at 2907.

construction of fortified enclaves, such as governmental, NGOs, and private entities.<sup>150</sup>

The fencing-off of residences is not only an expression of market conditions or of neoliberal values, nor does it solely maintain ethnic segregation through public and private cooperation. Rather, it is a combination of all of the above. The formation and evolution of gated communities are affected by all types of public institutions, such as courts and planning institutions, as well as by private institutions, such as NGOs, residents and non-residents of gated communities;<sup>151</sup> each promote different approaches to gated communities.

The next section provides the first critical analysis of the legal petitions that challenged the legality of walling and fencing off non-residents in mixed cities.

#### IV. GATING AND WALLING IN LEGAL PROCEDURES

Intense dialogues and debates have taken place between political theoreticians on the rights of individuals and communities to exclude others within a liberal legal system to protect their individual-liberal or collective-group right to exist separately.<sup>152</sup> These debates highlight the tension between theories of liberalism and multicultural approaches.<sup>153</sup> Liberalism is committed to

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<sup>150</sup> *Id.*

<sup>151</sup> See *infra* Section IV.A, B.

<sup>152</sup> For general overview, see Charles Taylor, *The Politics of Recognition*, MULTICULTURALISM 25 (Amy Gutmann ed., 1994); CHARLES TAYLOR, SOURCES OF THE SELF 3 (1989); Charles Taylor, *Two Theories of Modernity*, PUBLIC CULTURE 11, 153 (1999); MICHAEL WALZER, SPHERES OF JUSTICE 1 (1983); ANTHONY APPIAH, RACE, CULTURE, IDENTITY: MISUNDERSTOOD CONNECTIONS in COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 30 (1996); MULTICULTURALISM: THE POLITICS OF RECOGNITION (Amy Gutmann ed., 1992); MULTICULTURAL STATES: RETHINKING DIFFERENCE AND IDENTITY 27 (David Bennett ed., 1998); NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 7 (2003).

<sup>153</sup> In his guiding book, Brian Barry provides a comprehensive overview on liberal criticism of multiculturalism and the contradicting aspects of applying a multicultural perspective in a liberal system. See BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 11–16 (2001).

advancing equality through a color-blind system, whereas multiculturalism demands advancing a color-conscious system which maximizes group needs.<sup>154</sup> In many cases, a color-conscious system is the key for repairing past injustices and rights violations committed against individuals due to their group identity.<sup>155</sup> However, advancing such a system might violate liberal values such as equality, autonomy and freedom of movement.<sup>156</sup> Some have also claimed that multiculturalism entrenches segregation and perpetuates discrimination against members of vulnerable groups.<sup>157</sup>

The legality of spatial segregation of communities in residential spaces becomes even more challenging in the context of gated communities within liberal ethnocratic and conflicted multicultural societies, where spatial segregation usually leads to the creation of an underclass.<sup>158</sup> In contrast with other forms of spatial segregation, gated communities are a tangible form of historical segregation and a manifestation of ethnic inferiority and supremacy.<sup>159</sup> The physical fencing and walling-off of gated communities often justified as a form of protection from crime tends to promote a wide range of social and economic ills. Therefore, they are more likely to inspire debate on the legality of the ethnocratic system and its implications. In this sense, the global trend can set legal changes in motion, especially since this trend involves many state and private actors, such as planning institutions, courts, NGOs, and private security companies.

The two legal petitions<sup>160</sup> that will be introduced in the following sections challenge the legality of gated communities not

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<sup>154</sup> *Id.* at 32–40, 317–28.

<sup>155</sup> Color-conscious policy is known as “affirmative action.” It has created a wide debate regarding its legality following the Bakke case. *See Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>156</sup> BARRY, *supra* note 153, at 3–8.

<sup>157</sup> RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 53–55 (2005).

<sup>158</sup> MASSEY & DENTON, *supra* note 50, at 115–47.

<sup>159</sup> LOW, *supra* note 78.

<sup>160</sup> Searching for petitions that challenge the legality of all sorts of gated communities leads to the conclusion that, with the exception of the two cases presented on the following section, all separation barriers in Israel were built

only through liberal claims but also through the lenses of Critical Legal Geography. Although eventually some of the claims were rejected or disregarded, these are pioneering legal petitions submitted to the court of law and which incorporate a historical and geographic context of Arab-Jewish relations in mixed cities and the production of the land regime as part of a legal defense.

*A. History and Segregation: Pardes Snir and Nir Tzvi*

The Arab neighborhood of Pardes Snir has long been neglected by the State in terms of urban planning.<sup>161</sup> Many of its buildings fail to meet the basic needs of its 3,000 residents, most of whom live in poverty.<sup>162</sup> As a result, and due to the growing needs of the population, Pardes Snir has developed without any planning and appropriate infrastructure,<sup>163</sup> and most of the construction in this neighborhood from the past few decades is considered unlawful.<sup>164</sup> Pardes Snir borders Moshav Nir Tzvi, a type of cooperative agriculture settlement of individual farms, pioneered by Labor Zionists who arrived during the second wave of immigration to Mandatory Palestine.<sup>165</sup> Today Nir Tzvi is a prestigious,

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without legal challenge. This is an interesting conclusion in comparison to the American context where, according to Levi, by the year 2009, there were about 50 legal cases brought by non-residents challenging access to gated communities. Levi, *supra* note 26, at 641–42.

<sup>161</sup> HAGIT NAALI-YOSEF & YANON GEVAA, MAPPING AND PLANNING WITH THE COMMUNITY OF PARDES SNIR 3 (2014); Ina Friedman, *Grim Face in the Mirror*, JERUSALEM REPORT 10, 11 (2005).

<sup>162</sup> Friedman, *supra* note 161; Judith Sudilovsky, *Honor in the City*, JERUSALEM REPORT, 10, 13 (2011).

<sup>163</sup> Friedman, *supra* note 161, at 10–11.

<sup>164</sup> NAALI-YOSEF & GEVAA, *supra* note 161, at 6.

<sup>165</sup> TAREK IBRAHIM, THE ARAB ASSOCIATION FOR HUMAN RIGHTS, BEHIND THE WALLS: WALLS AND SEPARATION FENCES BETWEEN ARABS AND JEWS WITHIN MIXED CITIES AND NEIGHBORHOODS IN ISRAEL (2005) (in Hebrew), <http://uri.mitkadem.co.il/wall/ArabHRA.Fence.Wall.Report.Edited.html>. See generally Rosen & Razin, *Enclosed Residential Neighborhoods in Israel*, *supra* note 127, at 2902–04 (explaining that Labor Zionism established the Kibbutz and Moshav, communal rural settlements in Israel based on the values of collectivism and socialism, but that these ideological enclaves have experienced radical institutional and ideological transformations since the late 1980s, following the fall of the Labor Party in the 1977 elections).

prosperous, and well-maintained community whose Jewish residents are from the middle and upper classes.<sup>166</sup>

Following complaints from the Jewish residents of Nir Tzvi regarding burglaries and crime from the residents of neighboring Pardes Snir, the Moshav's council demanded the planning institutions to build a wall between it and the Arab neighborhood.<sup>167</sup> The Nir Tzvi council claimed that the wall was necessary to prevent theft by criminal elements infiltrating from the neighboring Pardes Snir.<sup>168</sup> Their demand was approved by the regional planning committee, which prepared a planning scheme in order to execute the building of the wall.<sup>169</sup>

The erection of the wall was funded by the Ministry of Transportation and the Ministry of Housing, by order of the Israeli government.<sup>170</sup> By contrast, all fences and walls surrounding gated communities in mixed cities are approved by public planning institutions, but built with private funding from the local residents.<sup>171</sup> The government's funding of the wall, not typical in gated communities elsewhere, demonstrated that the ethnocentric system was still intact and fostering ethnic segregation. It demonstrated that the upper- and middle-class residents of Nir Tzvi could enjoy certain benefits, such as government-funded self-segregation, that other populations could not expect.

The plan was challenged by the Arab residents of Pardes Snir, who appealed to the National Council Committee for Planning and Construction<sup>172</sup> and challenged the legality of the wall.<sup>173</sup> They

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<sup>166</sup> IBRAHIM, *supra* note 165.

<sup>167</sup> NAALI-YOSEF & GEVAA, *supra* note 161, at 7; Sudilovsky, *supra* note 162, at 7.

<sup>168</sup> AD (TA) 1253/05, *Moharev v. The National Council for Planning and Construction* (4.5.2006), Nevo Electronic Database (Isr.) 3 (in Hebrew).

<sup>169</sup> *Id.* at 3.

<sup>170</sup> IBRAHIM, *supra* note 165, at 14.

<sup>171</sup> *Id.*

<sup>172</sup> The National Council for Planning and Building is the highest planning institution in the hierarchy of the Planning and Building Law. It advises the government on the general guidelines for implementing planning and building laws. The agency is also responsible for drafting national master plans that regulate the general spatial policy of the state and drafting procedures for appealing the regional planning committee's decisions.

<sup>173</sup> AD (TA) 1253/05, *Moharev* at sec. 13.

claimed that the plan was part of a wider phenomenon of pushing Arab residents into ghettos, and that the act would exacerbate feelings of personal and collective isolation and rejection among residents of the neighborhood.<sup>174</sup> This was the first time that such “social” claims were raised in planning process that challenged the legality and legitimacy of a planning act.<sup>175</sup> Typical planning claims are usually tangible and regard damages that can be measured in financial value.

The National Council for Planning and Building denied the appeal, accepting the rationale of advocates of the wall and finding that the residents of Nir Tzvi had a right to protect themselves by means of a separation fence, which superseded the Arab residents’ interest.<sup>176</sup> The residents of Pardes Snir challenged the legality of the wall once more, this time in the Administrative court of Tel Aviv-Jaffa.<sup>177</sup> The petitioners restated their claim, which they had presented to the National Council for Planning and Building, and argued that spatial planning includes innate political, social, and cultural obligations that need to be taken into account when evaluating the physical environment.<sup>178</sup> The residents also argued that crime and violence were a passing phenomenon, which could be mitigated in ways other than the establishment of a wall.<sup>179</sup> The residents claimed that the wall was nothing more than an

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<sup>174</sup> *Id.* at sec. 19.

<sup>175</sup> ARZA CHURCHMAN & EMILY SILVERMAN, SOCIAL CONSIDERATIONS IN SPATIAL PLANNING 13 (2012) (in Hebrew).

<sup>176</sup> AD (TA) 1253/05, *Moharev* at sec. 13.

<sup>177</sup> *Id.* at sec. 17.

<sup>178</sup> *Id.* at sec. 20.

<sup>179</sup> The petitioners attached a professional report penned by the organization Bimkom. “Bimkom - Planners for Planning Rights” is a non-profit Israeli organization formed in 1999 by a group of planners and architects to strengthen democracy and human rights in the field of planning. *Bimkom-Planners for Planning Rights*, BIMKOM, <http://bimkom.org/eng/> (last visited Dec. 13, 2017). The report also mentioned that the master plan was intended as a response to long-term needs rather than addressing periodic problems such as those that have been raised, and which can be solved by other, less dramatic means, with fewer consequences. See GD/475/24, Separation Wall Between Pardes Snir and Nir Tzvi—Opinion, 3 (2007).



instrument meant to guarantee spatial separation between the Jewish and Arab community.<sup>180</sup>

Jewish advocates of the wall raised two arguments. The first was that there was an urgent need to build the wall for their safety and protection.<sup>181</sup> The second was that they led a different and distinguished “spatial lifestyle” from the bordering Arab neighborhoods, which in turn legitimized spatial segregation between them.<sup>182</sup> They included a professional report which stated that “[c]lose proximity between two different localities, which have dissimilar lifestyles, cultures, religious, and social values justifies the use of means that minimize gaps, both visible and not visible, between two communities and the friction that they create.”<sup>183</sup> This stance was in line with the legal doctrine put forth by the Israeli Supreme Court, known as the doctrine of a “minority with a unique lifestyle.”<sup>184</sup>

This doctrine functions in the Israeli context as the legal mechanism for communities to exclude non-members as long as such communities are categorized as (a) a minority group that (b) shares a “unique” lifestyle.<sup>185</sup> According to this doctrine, segregation strengthens individuals within a minority group, maintains their group identity, and protects their communal practices.<sup>186</sup> This doctrine is the outgrowth of the “liberal multiculturalism” approach developed by the political theorist William Kymlicka,<sup>187</sup> which grew out of the need to accommodate group minority rights within liberal systems. In this case, the

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<sup>180</sup> AD (TA) 1253/05, *Moharev* at sec. 19 of the ruling.

<sup>181</sup> *Id.* at sec. 3–4.

<sup>182</sup> This claim appeared in the professional report of Prof. Soffer, sec. 3, attached to the response to the petition. According to the petitioners the desire of Nir Zvi residents to be separated from the Arab neighborhood Pardes Snir is the main reason for building the wall (and nothing else). *Id.* at sec. 4, 19, 20 of the ruling.

<sup>183</sup> ARNON SOFFER, PROFESSIONAL PLANNING URBAN REPORT ON GD/475/24 SCHEME sec. 3 (2007).

<sup>184</sup> HCJ 528/88, *Avitan vs. Israel Land Authority*, PD 22(4) 297 (1989) (in Hebrew).

<sup>185</sup> *Id.* at 300, sec. 5.

<sup>186</sup> Lehavi, *supra* note 89, at 103.

<sup>187</sup> WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 26–33, 84–93 (1995).

validity of the Jewish advocates' claim that segregation would benefit their needs is questionable and legally problematic, since it does not fit the Israeli legal doctrine on this issue nor the theoretical approach of accommodating minorities. This may be why the court did not regard this claim at all.<sup>188</sup>

The Tel Aviv-Jaffa Administrative Court ruled that the planning authorities—particularly the National Council for Planning and Construction—would have to address the social matters and the claims of the petitioners regarding discrimination, racism, deprivation, and exclusion on the basis of ethnicity and nationality within the planning process.<sup>189</sup> The judge stated, “The feelings of neighborhood residents that the wall causes them to feel ghettoized, ‘should be regarded as a planning consideration’ and it is not essentially different from claims of nuisances, of deprivation of light and air, or other necessities that are not being provided.”<sup>190</sup>

In practice, this ruling means that when institutions prepare plans or are approached by citizens who claim they will be affected by the planning process, they should address social matters and regard them as an integral part of planning concerns. However, the court did not take a stand regarding whether the claims were justified in light of the appropriate balance between the rights of the residents of Nir Tzvi versus those of Pardes Snir.<sup>191</sup> It returned the file to the National Council for Planning and Building committee to decide upon this issue with regard to other planning

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<sup>188</sup> The court ignored and disregarded this claim in its seventeen-page ruling. *See* AD (TA) 1253/05, *Moharev v. The National Council for Planning and Construction* (4.5.2006), Nevo Electronic Database (Isr.) (in Hebrew).

<sup>189</sup> Additionally, the court directed the DC to base its judgment on the notion that at the heart of the planning and construction law is a wider environmental approach that takes into account social and economic factors as well as the quality of life in the city and the village (Sec. 24). Therefore, the claims of the petitioners should be given a wider frame of reference. *Id.*

<sup>190</sup> Judge Gadot stated: Planning and construction laws are not exhausted by matters pertaining solely to the use of land, but by ecological and environmental factors such as society, the economy, and the quality of life in the city and the village. Planning law has significant dimensions that take priority, such as addressing the needs of the disabled and of marginalized groups. *Id.* at sec. 23.

<sup>191</sup> In section 28, the judge stated that the issue should be returned to the national planning committee so it could decide on the claims. *Id.* at sec. 28.

considerations.<sup>192</sup> The National Council for Planning and Building committee rejected the petitioner's claims concerning discrimination and deprivation in favor of the requirement to provide protection to the residents of Nir Tzvi and the wall was erected.<sup>193</sup> To date, the wall is still standing, although it was reported in 2013 that a section of it was destroyed by "unknown parties,"<sup>194</sup> an act that reflects the fragility of spatial reality and especially of segregation.

This case is an illustration of the discrepancy between the approaches of the planning institutions and of the court. Although the court did not give the petitioners a favorable ruling, it did take the first step towards a change by acknowledging the potential implication of erecting a separation wall between the two communities. The planning institution, which is a state actor, advanced an ethnocentric, segregative approach, that not only maintained spatial segregation but also prevented any possible future connection between the two groups.<sup>195</sup> This approach demonstrated a lack of civic solidarity on the part of the Jewish residents towards the Arab residents.

With this case, the court emphasized the state's role as a protector of the public interest and its obligation to promote social and political life.<sup>196</sup> Although it did not address historical and political power relations of different groups, it did come a long way by addressing such broad issues that are beyond the legal reasoning of balancing the rights of residents and non-residents. This case represents an important junction in the planning and building legal landscape because it was the first to recognize the centrality of social, political and historical context in the planning process.

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<sup>192</sup> *Id.*

<sup>193</sup> *Behind the Walls: Separation Walls Between Arabs and Jews in Mixed Cities in Israel*, *supra* note 139.

<sup>194</sup> See Daniel Monterescu, *The Ghettoization of Israel's 'Mixed Cities'*, +972 MAGAZINE (Dec. 5, 2015), <https://972mag.com/the-ghettoization-of-israels-mixed-cities/114536/>.

<sup>195</sup> Aryeh Dayan, *Wall-Eyed*, HAARETZ (July 22, 2003), <https://www.haaretz.com/print-edition/features/wall-eyed-1.94906>.

<sup>196</sup> Levi, *supra* note 26, at 649.

*B. Public Access, and Private Policing: Andromeda Hill and Ajami*

Andromeda Hill is a private housing complex on a hill between the seashore and the Arab neighborhood of Ajami, built in 2000 with the cooperation of private entrepreneurs and the owner of the land, the Greek Orthodox Church.<sup>197</sup> The Arab residents of Jaffa objected to its construction, opposing its location in the heart of the old city, and claiming that it would have had an immensely negative social impact on the community.<sup>198</sup> Construction was completed despite this intense resistance, and it is now a wealthy Jewish enclave.<sup>199</sup>

The planning scheme for Andromeda Hill included a provision guaranteeing the right of the public to cross the property to reach the sea.<sup>200</sup> Despite that, entrance to the fenced-in compound that led to the seashore was allowed only through a main gateway and subject to a security check.<sup>201</sup> In 2007, two local NGOs submitted a petition to the Tel Aviv-Jaffa Administrative Court challenging the complex's lack of a free public thoroughway as discriminatory and unnecessarily restrictive.<sup>202</sup>

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<sup>197</sup> The complex features an indoor, private swimming pool, fitness room, laundry facilities, business center, children's auditorium, and spa. Its website describes the complex as a city within a city, surrounded by a wall and guarded around the clock. It is a project that provides all of the services needed by a modern and exclusive neighborhood. *About Us*, ANDROMEDA HILL, *supra* note 138.

<sup>198</sup> Aryeh Dayan, *Andromeda Hill is a Gated Community and Jaffa's Arab Will be left Outside the Wall*, HAARETZ (Nov. 6, 2005), <http://www.haaretz.com/print-edition/features/andromeda-hill-is-a-gated-community-and-jaffa-s-arabs-will-be-left-outside-the-wall-1.173368>.

<sup>199</sup> This project was a part of a broad planning initiative and public policy investment by the local government in infrastructure and services "intended to attract middle and upper-class Jews to [the neighborhood.]" Ziv, *supra* note 11, at 71.

<sup>200</sup> Detailed plan 2527A "Andromeda Hill" sec. 10.5.

<sup>201</sup> Lehavi, *supra* note 43, at 104.

<sup>202</sup> ORG SMNS 200681/04, *Jaffa Association for Civil Rights v. Givat Andromeda Management Ltd.* (1.8.2007), Nevo Electronic Database (by subscription) (Isr.), sec. 5 (in Hebrew).

The petitioners argued that preventing public access to the sea violated the provisions of the plan, which was supposed to preserve the residents' fundamental right to freedom of movement, and prevent class discrimination and appropriation of public space.<sup>203</sup> This petition was unique in that it included a historical chapter on Jaffa and the governmental land policies that led to the creation of the crowded Arab neighborhood of Ajami.<sup>204</sup> The petition stressed the abhorrent situation of the City's Arab neighborhoods as a key aspect of the community's history, including its over-crowdedness, its neglect, and the low socioeconomic standing of the Arab neighborhood.<sup>205</sup> The petitioners claimed that the establishment of such an exclusive project for an affluent population in the heart of an impoverished neighborhood was a harmful act of gentrification against the neighborhood, and would have extensive social consequences.<sup>206</sup>

The petition made a novel connection between the historically poor treatment and living conditions of the Arab community and what they considered an unjust obstruction of land for a private housing development, presenting the clash as less of a financial issue than a public policy one with immense implications. The petitioners' challenge to this act of segregation could be considered the first application of the theory of critical legal geography to a traditional legal claim, focusing as it does on a perceived spatial and historical wrong. If successful, this claim could potentially lead to future applications of the CLG approach in the legal realm.

The Andromeda Hill residents claimed they had not violated the public's right to access the seashore as they had not unequivocally blocked access, but rather, merely required those passing through to submit to a security check.<sup>207</sup> They also claimed that having an armed guard carry out security checks was a necessity for maintaining the safety of the complex residents.<sup>208</sup> Some claimed that the gating-off of the compound was needed for

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<sup>203</sup> *Id.* sec. 5.

<sup>204</sup> *Id.* at (statement of response) sec. 2, 9–21.

<sup>205</sup> *Id.* at sec. 15–18.

<sup>206</sup> *Id.* at sec. 19–21.

<sup>207</sup> *See* Dayan, *supra* note 198.

<sup>208</sup> ORG SMNS 200681/04, *Jaffa Association for Civil Rights* at sec. 7.

maintaining a sense of community.<sup>209</sup> Indeed, Andromeda Hill is also marketed as a “city within a city,”<sup>210</sup> a separate complex that is located inside the city but is autonomous, inhabited by a private community.<sup>211</sup>

Contrary to the case of Pardes Snir, where the demand for security and the erection of the wall was based on ethnic claims of protection from the criminal and dangerous Arab neighborhood, here, the complex residents did not voice a fear of crime from any ethnic group, but rather voiced that fear in general terms.

The Court ruled that the complex effectively barred the general public from accessing the neighborhood, which constituted a violation of the initial terms of the plan.<sup>212</sup> The Court did not regard the social claims and harms raised by the petitioners, but focused on the violations of the public’s right of free access through the complex. It noted that “[t]he current reality obligates strict adherence to the personal security of every citizen, even if this necessitates a measure of annoyance or harassment toward the residents.”<sup>213</sup> The Court declined to limit the security checks and ruled that entry to the neighborhood through the two main gates would be allowed between the hours of 8:00 A.M. and 10:00 P.M. only.<sup>214</sup> All entrants would continue to be subjected to a mandatory security check employed by the complex.<sup>215</sup>

This ruling demonstrated that a claim founded on a general fear of crime, rather than a fear based on a specific ethnicity, would have a better chance of success. It also showed that the court was

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<sup>209</sup> Lehari, *supra* note 43, at 101. For fascinating research on the connection between separation and the sense of community see, Miriam Billing & Arza Churchman *Building Walls of Brick and Breaching Walls of Separation*, 35(2) ENV’T AND BEHAV. 227 (2003). In their research they conclude that physical separation between the new and the old buildings improved satisfaction with housing among both population groups. *Id.* Whereas, in the absence of physical separation, dissatisfaction, disengagement, and indications of ethnic tension were more likely to be found. *Id.*

<sup>210</sup> *See About Us*, ANDROMEDA HILL, *supra* note 138.

<sup>211</sup> *See id.*

<sup>212</sup> ORG SMNS 200681/04, *Jaffa Association for Civil Rights* at sec. 11.

<sup>213</sup> *Id.* at sec. 17.

<sup>214</sup> *Id.* at sec. 22.

<sup>215</sup> *Id.*

willing to consider the general “reality” as a part of the totality of the circumstances. The petitioners might have been better served had the community been more explicit about who they hoped to keep out. The legality of gated communities will likely continue to be debated along such lines, and it remains to be seen which claims will be successful and which will fail in the future. In any event, courts should address the overall historical, political and social context of the communities involved. The legal justification of gated communities should not be restricted solely to a balancing of rights of the two sides, but should also take history and society into account as well. At least one American court hastaken a step towards acknowledging the value of taking these factors into account and considering their affects on society.<sup>216</sup>

The court’s ruling confirmed that a private property right may trump the public’s right of free movement, as it approved restricting the entry of non-members, and gave a stamp of approval to private gatekeepers. However, to prevent future claims of security from being used as cover stories for problematic motives, such as the illegal exclusion of persons on the bases of their ethnic identity courts should examine the validity of security claims and of the need to gate the compound at all, possibly by consulting empirical studies on the security of gated communities.<sup>217</sup> Some studies have shown that gated neighborhoods do not actually enjoy higher levels of physical protection, and that fencing does not solve the problems of crime and violence.<sup>218</sup> On the other hand, a recently published study shows that housing units in gated communities experience less burglary than their non-gated counterparts.<sup>219</sup> Courts should balance this type of information against the perceived motives of the communities doing the

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<sup>216</sup> See *Mulligan v. Panther Valley Property Owners Ass’n*, 766 A.2d 1186 (N.J. Super. Ct. App. Div. 2001).

<sup>217</sup> Lynn A. Addington & Callie Marie Rennison, *Keeping the Barbarians Outside the Gate? Comparing Burglary Victimization in Gated and Non-Gated Communities*, 32 JUST. QUARTERLY 168, 172 (2015).

<sup>218</sup> Gregory Breetzke & Ellen G. Cohn, *Burglary in Gated Communities: An Empirical Analysis Using Routine Activities Theory*, 23 INT’L CRIM. JUST. REV. 56, 64-67 (2013).

<sup>219</sup> Addington & Rennison, *supra* note 217, at 184.

excluding, as well as historical and social context, in order to make fully informed rulings in future cases.

The conflicting results suggest that there is more than one answer to the question of whether walling and fencing provide more secure living spaces. This leads to the conclusion that gated communities' claims to the right of protection and security may potentially be used as a cover for another motive: promoting spatial exclusion against unwelcomed non-members of ethnic minority groups. Neutral, general claims of security and protection against crime that is not conceptualized in ethnic terms of exclusion—particularly in mixed cities—can in practice screen off and isolate the neighboring ethnic communities. These claims, that are not directed towards a specific group, can actually violate antidiscrimination acts, but are problematic to challenge in the legal context because they are not apparent and explicit and are thus harder to prove.

Rather than fund the construction of walls and fences, the state could employ alternatives to empower poor neighborhoods; this could ultimately be a more productive and less restrictive way to promote security and defeat crime. These include building community centers for rehabilitation, improving schools,<sup>220</sup> and urban renewal projects to renovate apartments and update critical infrastructure.<sup>221</sup>

Marginalized groups in ethnocratic societies have suffered greatly as a result of unequal allocation of land and public resources. The commonly-cited factors that led to the establishment of gated communities—crime and insecurity—cannot be regarded just as the problem of the wealthy and hegemonic ethnic group; such a narrow view encouraged only a temporary solution to a wide social problem.<sup>222</sup> As history has

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<sup>220</sup> See generally Bill Dixon, *Development, Crime Prevention and Social Policy in Post-Apartheid South Africa*, 26 CRITICAL SOC. POL'Y 169, 172 (2006) (focusing on the South African experience, Dixon provides an excellent presentation of the bodies of work on crime prevention and social policy).

<sup>221</sup> Tony Roshan Samara, *Policing Development: Urban Renewal As Neo-Liberal Security Strategy*, 47 URB. STUD. 197, 199 (2010).

<sup>222</sup> See generally Damstra, *supra* note 1, at 537 (noting that the separation of gated communities is not necessarily illegal, but not without “ill social effects” to economic and social opportunities).



shown us around the world, gated communities can lead to diminished civic participation and apathy towards solving the problems of the greater community.<sup>223</sup> Courts would do well to consider the arguments posed in the cases above in considering whether the harms inflicted on marginalized populations by gated communities are truly outweighed by security concerns.

## CONCLUSION

The meaning of the built environment is not fixed: “[It] is always a political act . . . space can facilitate the activities and purposes of political, economic and social life.”<sup>224</sup> Research repeatedly shows that when gated communities engage in racial, ethnic, and other forms of collective identity discrimination against non-members, they delineate social life.<sup>225</sup> Social and architectural critics have long recognized the problem and have argued vigorously for the preservation of civic life in cities, which gated communities seek to reconstruct as divided private spaces for the exclusive use of different groups.<sup>226</sup> However, as demonstrated in the cases above, it is apparent that some courts are not yet ready to fully embrace a legal argument against segregation that demands an examination of historical, societal, and political factors.

Exploring the legal challenges that arise when gated communities are formed in ethnocentric societies can provide insight into how best to mitigate the harms that communities suffer when they are divided by walls. When gated communities erect fences or restrict access to ostensibly public spaces, these actions fuel outside groups’ already-present sense of alienation and discrimination.<sup>227</sup> Therefore, challenges posed by non-residents against private gated communities touch upon the essence of the ethnocentric system, and the social injustice inherent in daily urban life. These challenges might be more successful if petitioners

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<sup>223</sup> *Id.* at 539.

<sup>224</sup> Rosen & Grant, *supra* note 69, at 778.

<sup>225</sup> See BLAKELY & SNYDER, *supra* note 31, at 1–3.

<sup>226</sup> Damstra, *supra* note 1, at 525, 538–39.

<sup>227</sup> See Lior Greenbaum, *Arabs in the Mixed Cities: Strangers in their Own Homes*, GLOBES (Jan. 31, 2002), <http://www.globes.co.il/news/article.aspx?did=553145> (in Hebrew).

would argue, and courts would listen, to arguments that incorporated historical, social, and empirical themes. Petitioners might also attempt to state claims that are in line with the philosophy of critical legal geography, as this might better demonstrate the effects of gating and walling communities.

An analysis of the legal challenges to gated communities in Israel demonstrates the consequences that spatial segregation and fencing-off has on marginalized groups worldwide. The two Israeli cases highlighted here potentially represent a new frontier in these types of challenges, and the reasoning employed may be applicable in other ethnocratic multicultural nations in which some groups are clearly marginalized at the expense of others. These arguments should be carefully considered, as they may ultimately have a direct effect on how cities look, interact, and self-segregate in the future.