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Taking Community Seriously: Lessons from the Israeli Disengagement Plan

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Eminent domain, or the expropriation of private property, is among the most controversial of legal arrangements. The challenges and threats that it poses to private property make it the subject of debate and dispute. Surprisingly, however, most Western jurisdictions embrace a similar formula to address expropriation, both in terms of the purposes that justify such action and the compensation that should be awarded to property owners.

This article challenges the prevailing eminent domain formula, according to which, regardless of the circumstances of the expropriation, compensation to the property owner is determined by reference to the market value of the property. By exploring the case of Israel's 2005 disengagement plan, as a result of which 21 residential communities were uprooted by expropriation, this article argues that loss of communality should be taken into account in expropriations that uproot entire communities. However, in order for the legal arrangement to be efficient, fair and, of no less importance, to reflect the values embodied in the right to property, it should be constituted within a normative infrastructure that takes into account the values that the society wishes to endorse, and the inner meaning of these values.

Keywords: residential communities, eminent domain, disengagement, property, compensation

1. Introduction

Eminent domain, or the expropriation of private property, is among the most controversial of legal arrangements. The challenges and threats that it poses to private property make it the subject of debate and dispute. Surprisingly, however, most Western jurisdictions embrace a similar formula to address expropriation, both in terms of the purposes that justify such action and the compensation that should be awarded to property owners.[1] As for the formula, while the interpretation of the public use requirement has changed over the years,[2] there seems to be a consensus in most Western jurisdictions that compensation should be based in part, if not

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[1] For a comprehensive comparative overview, see AJ van der Walt, *Constitutional Property Clauses: A Comparative Analysis* (Kluwer Law International 1999). See also Gregory S Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (University of Chicago Press 2006).

[2] See, eg, Errol E Meidinger, 'The "Public Uses" of Eminent Domain: History and Policy' (1980–81) 11 *Environmental Law* 1; Lawrence Berger, 'The Public Use Requirement in Eminent Domain' (1977–78) 57 *Oregon Law Review* 203; Charles E Cohen, 'Eminent Domain after Kelo v. City of New London: An Argument for Banning Economic Development Takings' (2005–06) 29 *Harvard Journal of Law and Public Policy* 491.

exclusively, on the market value of the property.[3] This consensus, however, should be open to dispute.[4]

This article challenges the prevailing eminent domain formula, according to which, regardless of the circumstances of the expropriation, compensation for the property owner is determined according to the market value of the property. Specifically, the article questions the appropriateness of market value compensation in cases where expropriation directly or indirectly uproots an entire residential community. The focus on residential communities does not imply that geographic proximity in itself justifies different legal treatment in property law.[5] However, as Hillery's quest for the definition of community reveals, geographic proximity still plays a significant role in enabling people to maintain a complex social relationship, which consists of cooperation, interdependency and shared conceptions of the good.[6] As I demonstrate below, making the distinction between communities that use geographic proximity for the realisation of such values and those that do not should guide the legal treatment to that which they deserve. My argument, therefore, is that when 'community' represents a group of individuals who happen to live in close geographic proximity, it does not justify deviating from the current laws of expropriation. However, when geographic proximity serves as an instrument for the realisation of community values, then the current laws of expropriation are inadequate as they ignore a major loss suffered by property owners: the loss of communality.[7]

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[3] In the United States, the courts interpreted the constitutional requirement of 'just compensation' as the market value of the property: see *United States v 564.54 Acres of Land* 441 US 506, 510–11 (1979); *Almota Farmers Elevator & Warehouse Co v US* 409 US 470, 473 (1973); *United States v Miller et al* 317 US 369, 374 (1943). However, as a response to the US Supreme Court decision in *Kelo v City of New London* 545 US 469 (2005), several states have made changes to their takings laws, determining the rate of compensation at above the market value: see, eg, Michigan (Michigan Constitution, art X, s 2 (amended in 2006)) and Connecticut (SB 167 (2007)), which require payment of 'not less than 125 percent of that property's fair market value, in addition to any other reimbursement allowed by law'; Indiana (HB 1010 (2006)) which requires payment of compensation where the property condemned is the person's primary residence at a rate equal to 150% of fair market value, and Kansas (SB 323 (2006)), which increases the level of compensation to landowners whose property is condemned to 200% of the average appraised value of the property. In other Western jurisdictions, expropriation laws recognise the 'market value' criterion as the cornerstone for calculating compensation for expropriation: see, eg, van der Walt (n 1) 58–60 (Australia), 150 (Germany) and 343–48 (South Africa).

[4] See, eg, Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press 1985) 183–84; James E Krier and Christopher Serkin, 'Public Ruses' (2004) *Michigan State Law Review* 859, 867; Abraham Bell and Gideon Parchomovsky, 'Taking Compensation Private' (2007) 59 *Stanford Law Review* 871, 885–90; Jack L Knetsch and Thomas E Borcherding, 'Expropriation of Private Property and the Basis for Compensation' (1979) 29 *University of Toronto Law Journal* 237; Glynn S Lunney Jr, 'Compensation for Takings: How Much is Just?' (1993) 42 *Catholic University Law Review* 721; W Harold Bigham, '"Fair Market Value", "Just Compensation", and the Constitution: A Critical View' (1970–71) 24 *Vanderbilt Law Review* 63; Ann E Gergen, 'Why Fair Market Value Fails as Just Compensation' (1993) 14 *Hamline Journal of Public Law and Policy* 181; Robert C Ellickson, 'Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls' (1973) 40 *University of Chicago Law Review* 681; James J Kelly Jr, '"We Shall Not Be Moved": Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation' (2006) 80 *St John's Law Review* 923.

[5] cf Henry E Smith, 'Property as the Law of Things' (2012) 125 *Harvard Law Review* 1691. See also Henry E Smith, 'Community and Custom in Property' (2009) 10 *Theoretical Inquiries in Law* 5; Thomas W Merrill, 'The Property Prism' (2011) 8 *Econ Journal Watch* 247, 247.

[6] See George A Hillery Jr, 'Definitions of Community: Areas of Agreement' (1955) 20 *Rural Sociology Journal* 111.

[7] See Gideon Parchomovsky and Peter Siegelman, 'Selling Mayberry: Communities and Individuals in Law and Economics' (2004) 92 *California Law Review* 75. Loss of communality may be seen as a sub-category of a greater

Exploring the case of Israel's 2005 disengagement plan, as a result of which 21 residential communities were uprooted by expropriation, this article argues that loss of communality should be taken into account in expropriations that uproot entire communities in order for the legal arrangement to be efficient, fair and, of no less importance, to reflect the values embodied in the right to property. This requires a comprehensive normative infrastructure regarding what property is and the values it should promote. The absence of such an infrastructure will lead, as the Israeli experience reveals, to outcomes that are unjust and inefficient and do not fulfil their initial purpose – that is, to serve as a remedy for loss of communality.

It should be clear from the outset: this is not a theoretical issue. The expansion of urban renewal initiatives,[8] industrial, technological and economic developments,[9] as well as climatic and geographic changes,[10] constantly increase the need for governments to use their eminent domain power in a way that may lead, directly or indirectly, to entire communities being uprooted. Consider the story of Chavez Ravine, a close-knit Los Angeles residential community, which was home to generations of Mexican-Americans and whose residential property was expropriated by the state for the establishment of the Dodger Stadium,[11] or that of the small village of Valmeyer, Illinois, which after the Great Flood of 1993 accepted federal government assistance to relocate to higher ground about two miles (3.2 km) to the east atop the bluffs, on the north side of the eponymous valley.[12] Another striking example is the story of the Swedish towns of Kiruna and Malmberget, which were located next to, and above, iron ore mines; these mines in recent years had threatened the feasibility of the continuing existence of these communities because of fear that the ground would collapse. The LKAB Company, which is owned by the Swedish government, was responsible for funding the transfer of the communities to a different location on the ground that '[t]he iron ore in the northern ore fields supplies the world with steel and brings jobs and money to our mining communities, our region and to Sweden as a whole'.[13] In the

issue that questions the exclusion of the owners' subjective value from the eminent domain compensation calculation: see, eg, Krier and Serkin (n 4) 866; Ellickson (n 4) 736–37; Lee Anne Fennell, 'Taking Eminent Domain Apart' [2004] *Michigan State Law Review* 957; but cf Nicole Stelle Garnett, 'The Neglected Political Economy of Eminent Domain' (2006) 105 *Michigan Law Review* 101.

[8] Such initiatives intensified after the US Supreme Court's decision in *Kelo* (n 3): see, eg, Ilya Somin, 'Let There Be Blight: Blight Condemnations in New York after Goldstein and Kaur' (2010–11) 38 *Fordham Urban Law Journal* 1193; Cohen (n 2) 492; Lynn E Blais, 'Urban Revitalization in the Post-Kelo Era' (2007) 34 *Fordham Urban Law Journal* 657.

[9] The principal recognition that economic development qualified as a valid public use under the Federal Constitution of the United States was reaffirmed in *Kelo* (n 3). See Cohen (n 2).

[10] See in this regard UNHCR, UN Refugee Agency, 'Climate Change: The Storm Ahead', http://www.unhcr.org/pages/49e4a5096.html. See also A Dan Tarlock, 'Takings, Water Rights, and Climate Change' (2012) 36 *Vermont Law Review* 731, 731.

[11] Matthew J Parlow, 'Unintended Consequences: Eminent Domain and Affordable Housing' (2005–06) 46 *Santa Clara Law Review* 841.

[12] See Isabel Wilkerson, '350 Feet above Flood Ruins, a River Town Plots Rebirth', *The New York Times*, 31 October 1993. Similar events occurred in Chelsea, Iowa, where '[p]eople were split over whether to move away from this low spot beside the Iowa River or to stay put' in the aftermath of serious flooding in 1993: see Monica Davey, 'Iowa Town Survived Flood, but Teetered in the Aftermath', *The New York Times*, 14 July 2003.

[13] See http://www.lkab.com/en/Future/Urban-Transformations/FAQ. For more on the story of Kiruna and Malmberget see http://www.strangeharvest.com/mt/archive/the_harvest/kiruna_the_town.php; 'Sweden to Save

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Israeli context, it seems that such considerations should affect the way in which the Israeli government is expected to implement the settlement regulation of Bedouin villages in the southern part of Israel, as part of the Prawer Plan.[14] These considerations should also affect the future handling of the evacuation of settlements in the West Bank, as part of a political agreement between Israel and the Palestinians. These worldwide examples reveal that the issues discussed in this article are far from hypothetical. Considering close-knit neighbourhoods, such as Poletown, Detroit[15] or New London, Connecticut[16] as communities renders this question crucial.

This article consists of four parts. Section 2 presents the basic facts of the Israeli disengagement case and explains the challenge it presents in terms of the compensation formula of standard expropriation laws. Section 3 details the legal arrangement enacted by the Israeli legislature to address the unique circumstances of the expropriation. Section 4 demonstrates why the legal arrangement failed to achieve its primary goals of addressing the communal characteristics of the expropriation, as well as other expropriation regime values of efficiency and fairness. The conclusion in Section 5 calls for a thorough examination of the values that underlie property as an essential step towards a change in expropriation laws.

2. THE STORY OF THE ISRAELI DISENGAGEMENT PLAN

The Jewish settlement enterprise in the West Bank, the Golan Heights and the Gaza Strip began with the Israeli victory in the 1967 Israeli/Arab War and the resulting capture of territories that were strongly associated with the Biblical past of the Jewish people.[17] This historic-religious bond with the newly occupied territories led many young, mostly religious, Israelis to strive to make these territories part of the sovereign Jewish state. However, while these aspirations remained only theoretical until after the 1973 Yom Kippur War, they gained a practical expression from the beginning of 1974, when the Gush Emunim (Bloc of the Faithful) movement was established.[18] David Newman argues that 'Gush Emunim was … a movement of religious Zionists favoring the long-term retention of the West Bank, Gaza Strip, and the Golan Heights by Israel and their ultimate inclusion within the sovereign territory of the State'.[19] Led by religious (and some would say, Messianic) emotions, Gush Emunim acted to thwart any practical possibility of territorial compromise, mainly through a massive settlement policy

"Sinking" Town', *BBC News*, 28 September 2004, http://news.bbc.co.uk/2/hi/europe/3694204.stm; http://www.lkab.com/en/Future/Urban-Transformations.

[14] Israeli Government Decision No 5345 of 27 January 2013 (in Hebrew), http://www.pm~o.gov.il/Secretary/GovDecisions/2013/Pages/des5345.aspx.

[15] Dissenting opinion of Ryan J in *Poletown Neighborhood Council v Detroit*, 304 NW 2d 455 (1981); Jeanie Wylie, *Poletown: Community Betrayed* (University of Illinois Press 1989) 58.

[16] *Kelo* (n 3).

[17] For example, David Weisburd and Hagit Lernau, 'What Prevented Violence in Jewish Settlements in the Withdrawal from the Gaza Strip: Toward a Perspective of Normative Balance' (2006–07) 22 *Ohio State Journal on Dispute Resolution* 37, 43.

[18] ibid 44.

[19] David Newman, 'From Hitnachalut to Hitnatkut: The Impact of Gush Emunim and the Settlement Movement on Israeli Politics and Society' (2005) 10 *Israel Studies* 192, 194.

on the West Bank.[20] The movement maintained a complex relationship with the Israeli government. Thus, while some of the movement's activities gained some government support, there were cases where the movement was in public confrontation with the government and the Israeli defence forces.[21] It was only after the 1977 political upheaval in Israel that Gush Emunim gained political legitimacy and the public cooperation of the government. Indeed, the first Likud government, led by Prime Minister Menachem Begin, was the first to reach out to the movement and to cooperate with it in order to expand its settlement activity.[22]

Ariel Sharon, later to lead the government that would uproot the settlers in Gaza, played a critical role in providing essential resources and infrastructure for the establishment of West Bank settlements at that time.[23] By the mid-1980s, the Jewish settler population on the West Bank was about 46,000 in 113 settlements; in 1992, including the Gaza Strip, there were about 137 settlements with a population of 107,000 settlers; and by 2004, approximately 140 Jewish settlements existed on the West Bank and in the Gaza Strip, with a population of approximately 230,000 people.[24]

Unlike the story of Jewish settlement on the West Bank, the initiative for the establishment of Israeli settlements in the Gaza Strip was governmental rather than popular. As part of its defence policy at the end of the 1970s, the Israeli government encouraged Israeli citizens to establish residential communities in the area, which was populated by Palestinians. The Israeli government's plan suggested the partitioning of Gaza into five isolated Palestinian urban areas, hoping to inhibit the free movement of Palestinian militants.[25] By 1977, the Israeli government had founded only five semi-military settlements and one non-military settlement. The 1977 political upheaval in Israel led to expansion of the settlement policy. As a result of this policy, many young people – mainly from the moderate religious movements, from villages and towns in southern Israel – accepted the challenge to settle in the territories, which they perceived as 'new frontiers'.[26] By 1992, 14 settlements had been established in the Gaza Strip and their population was increasing at a tremendous rate. After the two waves of Palestinian uprisings (the first and second *intifada*) that began in the late 1980s, the government founded two more settlements, but population growth slowed. On the eve of the withdrawal from Gaza in 2005, about 8,000 Jews lived in 21 settlements in the Gaza Strip.[27] Most of the settlements were located in the southern part of the Strip, where larger units of land, formerly used by the Egyptian army, remained sparsely populated by Palestinians. Unlike mainstream national religious settlers on the West Bank,

[20] Jonathan Rynhold and Dov Waxman, 'Ideological Change and Israel's Disengagement from Gaza' (2008) 123 *Political Science Quarterly* 11, 26.
[21] Newman (n 19) 194.
[22] See David Newman, 'The Role of Gush Emunim and the Yishuv Keillati in the West Bank 1974–1980', PhD dissertation, University of Durham, United Kingdom, 1981; Newman (n 19) 195.
[23] Neve Gordon, 'The Triumph of Greater Israel' (2004) 41 *National Catholic Reporter* 18.
[24] The Foundation for Middle East Peace, 'Report of Israeli Settler Population 1972–2006', http://www.fmep.org/settlement_info/settlement-info-and-tables/stats-data/israeli-settler-population-1972-2006.
[25] See Izhak Schnell and Shaul Mishal, 'Place as a Source of Identity in Colonizing Societies: Israeli Settlements in Gaza' (2008) 98 *Geographical Review* 242, 245–48.
[26] ibid 246.
[27] The Foundation for Middle East Peace (n 24).

settlers in Gaza were attracted to the new opportunities created for them, and developed a powerful inner attachment to their localities, avoiding any rhetoric that hinted at mystification of the place. They did not view any other place inside Israel as more or less sacred and therefore not worthy of settlement, but rather sought a place to improve their quality of life.[28]

This difference between the Israeli settlers on the West Bank and those in the Gaza Strip may be why, at the beginning of the Israeli settlement enterprise in the Gaza region, the Israeli settlers maintained rather peaceful relationships with their Palestinian neighbours. Stories about Israelis shopping in Palestinian towns, of mutual invitations to family and communal celebrations, and of joint development of businesses are common among Israeli settlers.[29] This serenity was violated, however, by the first *intifada* at the end of the 1980s. From that time on, clashes between Palestinians and Israelis became common, and caused physical as well as financial damage to both sides. Nevertheless, the Israeli residential communities in the area continued to function and their population increased over the years.[30] As some residents argue, not only did the security problem not discourage the residents, it strengthened them.[31]

In 2004, the 21 functioning Israeli communities in the Gaza Strip differed from one another both in size and settlement structure, and especially in their population characteristics. The communities ranged in size from a small agricultural village with ten members to a community of 2,600 persons. Half of the communities were religious, two were non-religious, and the rest had both religious and non-religious members. As to the settlement structure, most of the communities were structured as a *moshav*[32] and most engaged in agriculture. A few communities

[28] Schnell and Mishal (n 25) 248, 257; Joyce Dalsheim, 'Twice Removed: Mizrahi Settlers in Gush Katif' (2008) 14 *Social Identities: Journal for the Study of Race, Nation and Culture* 535, 542.

[29] For example, in an interview with T, a member of Gadid, in Nitzan, Israel (25 June 2011), she mentioned that '[i]n the early years we went to Deir al-Balah and Khan Yunis in order to shop. After our wedding, David and I walked around Gaza; he entered one shop while I went to another. I took my children to a photographer in Khan Yunis to take their pictures'. Another testimony to the peaceful relationship between the parties was: 'We were so involved with the Palestinians …, for example, at our wedding; half the population of Deir al-Balah was at the wedding. I'll show you pictures, with the Mukhtar of the town and with the sheikhs and all … David was also the coordinator of security and he was very connected. And … we even had a party for the month of Adar [a Jewish month], at the beginning of the month, and we brought … There are many fishermen in Deir al-Balah; it's close, it's near the sea, so they brought the fish, and we had a fish dinner at the beginning of Adar, a fish dinner together with the community of … you know, with the Palestinians from Deir al-Balah'. A similar description appeared in an interview with S, a resident of Ganei Tal, in Yad Binyamin, Israel (1 January 2012), who said: 'I traveled in Gaza with my two little girls. I just traveled there. And I'm not talking about Khan Yunis. It was almost our capital city. We bought Passover dishes and all kinds of fabrics; on Purim [a Jewish holiday], when we needed bright fabrics …, we went to Khan Yunis. We bought vegetables there, even sandals for [the] children. My mother was always laughing: "Where are your sandals from?" And I answered: "from Khan Yunis". It was natural. It was natural. The relations with the Arabs were, at first, really good'.

[30] The Foundation for Middle East Peace (n 24).

[31] For example, the testimony of R Yigal Kaminetzky, who served as the Chief Rabbi of the evacuated area before the Commission of Inquiry that examined the disengagement plan and its results, 17 June 2009 1437, 1529–70, available (in Hebrew), http://elyon1.court.gov.il/heb/hitnatkut/doc/protocol_17_06_09.pdf. See also Schnell and Mishal (n 25) 245–48; Miriam Billig, 'Is My Home My Castle? Place Attachment, Risk Perception, and Religious Faith' (2006) 38 *Environment and Behavior* 248.

[32] David Weintraub and others, *Moshava, Kibbutz and Moshav: Patterns of Jewish Rural Settlement and Development in Palestine* (Cornell University Press 1969); Nava Haruvi and Yoav Kislev, 'Cooperation in the Moshav' (1984) 8 *Journal of Comparative Economics* 54.

were *moshav shitufi* (collaborative *moshav*),[33] and others were *yishuv kehilati* (community settlement).[34] Although most of the settlements were agricultural, that was not the only source of employment in the area. As the communities grew and became established economically, some members began to develop businesses, mainly in the service sectors. By the mid-2000s, when the disengagement plan was implemented, the most common professions among the members of the various communities in the area were agriculture, education and public services.[35] The structural differences, although seemingly technical in nature, impacted on both the economic and social strength of the communities.[36]

In 2004, when negotiations between the Israeli government and the Palestinian Authority reached an impasse, Israeli Prime Minister Ariel Sharon announced his government's intention to execute a unilateral withdrawal from the Gaza Strip.[37] This announcement caught the parties to the negotiations, as well as the members of the communities in the area, by surprise.[38] In addition to the political controversies raging at the time, the Israeli legislature faced a legal challenge in that 21 entire communities were to be uprooted.[39]

Israeli legislators deliberated for over a year, and the Knesset then enacted the Implementation of the Disengagement Plan Law 2005 (the Disengagement Law),[40] which set out the legal arrangements for regulating the evacuation of all communities from the area. The Disengagement Law and its unique features are the focus of the next section.

3. THE DISENGAGEMENT LAW – A CONCEPTUAL CHANGE IN PROPERTY?

The disengagement plan and the expropriations that resulted from its implementation represented dramatic moves in both political and legal terms. Although Israel had experienced the evacuation of settlements from the Sinai Peninsula in the early 1980s,[41] the disengagement decision was unique both because it was decided after the right to property had been characterised as a

[33] David Morawetz and others, 'Income Distribution and Self-Rated Happiness: Some Empirical Evidence' (1977) 87 *The Economic Journal* 511, 514–15.
[34] Erez Tzfadia, 'Geography and Demography: Spatial Transformation' in Guy Ben-Porat (ed), *Israel since 1980* (Cambridge University Press 2008) 42, 48.
[35] See http://jobkatif.org.il/english/where-are-they-now/careers.
[36] For example, Miriam Billig, 'Settlers' Perspectives on the Disengagement from Gaza', The Floersheimer Institute For Policy Studies, Publication #3/44, 2005 (in Hebrew).
[37] The disengagement plan, although in a limited version, was approved by the Israeli government on 6 June 2004 and by the Israeli parliament (the Knesset) on 26 October 2004. For the Israeli government decision see http://www.sela.pmo.gov.il/PMO/Archive/Decisions/2004/06/des1996.htm.
[38] Rynhold and Waxman (n 20).
[39] For a detailed review of the 21 evacuated communities, as well as their characteristics, see 'History of Gush Katif – Gaza Strip', The Jewish Agency for Israel, http://www.jewishagency.org/JewishAgency/English/Jewish+Education/Compelling+Content/Eye+on+Israel/Current+Issues/Peace+and+Conflict/Disengagement/2.+History+of+Gush+Katif++Gaza+Strip.htm#f.
[40] Implementation of Disengagement Plan Law 2005.
[41] Nurit Kliot and Shmuel Albeck, *Sinai – Annatomia shel Preida* (*Sinai – Anatomy of Separation*) (Am Oved 1996); Nurit Kliot, 'Decision-Making on Settlement Evacuation in Israel: Compensation and Resettlement, Sinai 1982 Gaza Region and North Samaria 2005', The Floersheimer Institute for Policy Studies, Publication #3/45, 2005, http://www.fips.org.il/site/p_publications/item_en.asp?doc=&iss=&iid=726.

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constitutional right, and because it ordered the evacuation of communities that had functioned for a long period.[42] The unique features of the evacuation led the Israeli legislature to the conclusion that deviation from the current Israeli expropriation regime was apposite. This deviation, I argue, is significant because it represents a conceptual shift regarding the entire Israeli concept of property. In order to better understand this conceptual shift, a brief overview of the current Israeli expropriation law is appropriate.

Israeli expropriation law consists, basically, of a rigid formula, well accepted in most Western jurisdictions,[43] according to which the government is allowed to expropriate private property under two cumulative conditions: first, that the expropriation is designated for public use; second, that the owner will be entitled to compensation based on the fair market value of the expropriated property.[44] Notwithstanding its similarity to most Western expropriation regimes, Israeli expropriation law has two unique characteristics. The first is the discretion granted to the expropriating authority to reduce compensation by up to 40 per cent in cases where the owner enjoys the improvement that results from the expropriation,[45] and, second, that the owner is entitled to reclaim the property if it was not used for the public purpose for which it was expropriated in the first place.[46] Israeli expropriation law, however, does not distinguish between property types or between owners. Moreover, the circumstances under which the expropriation is implemented do not affect the legal arrangement. Owners are entitled to fair market value compensation for their property, regardless of the significance of the property to them and irrespective of the additional harm or loss they have suffered as a result of the expropriation.[47]

The Disengagement Law took into consideration the unique circumstances of the expropriation and thus represents a significant change in Israeli property discourse. The Law's statement that its goal is to create a compensation system that will provide 'fair and appropriate compensation, in light of the *special circumstances* of the expropriation'[48] demonstrates the legislature's recognition that the current, rather strict, expropriation regime does not allow a just and proper outcome under the circumstances. This constitutes a paradigmatic shift regarding property. Although the legislation did not primarily intend to give a different meaning to property values

[42] See Yehuda Troan, 'The Examination of Historic Precedents to the Disengagement Plan', Center of Research and Information of the Israeli Parliament (the Knesset), 2 February 2005 (in Hebrew), http://www.knesset.gov.il/mmm/data/pdf/m01039.pdf.

[43] For example, US Constitution, Amendment V; Basic Law of the Federal Republic of Germany (Grundgesetz), art 14; Constitution of the Republic of South Africa, art 25.2.

[44] For the most part, the Israeli expropriation regime consists of two primary laws: the Mandatory Land Ordinance (Acquisition for Public Purposes) 1943 (LO) and the Planning and Building Law 1965 (P&B Law). For a comprehensive review of the Israeli expropriation legislation, see Yifat Holzman-Gazit, *Land Expropriation in Israel: Law, Culture and Society* (Ashgate 2007) 14–18.

[45] LO, ibid art 20(2)(a); P&B Law, ibid art 190.

[46] The owner's entitlement to reclaim his or her property where the property was not used for the public use for which it was expropriated in the first place was established by the Israeli High Court of Justice (HCJ) in HCJ 2390/96 *Karasik and Others v State of Israel* 2001 PD 55(2) 625. In 2010, the Israeli legislator amended the LO so that it would address the owner's entitlement to reclaim the property in cases where the purpose of the expropriation had changed: see LO (n 44) arts 14A and 14B. See also Holzman-Gazit (n 44).

[47] LO (n 44) art 12(b).

[48] Disengagement Law (n 40) art 1(2) (emphasis added by author).

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but was the result of political pressure by power groups in Israeli society, it seems that the conceptual shift described above should be detached from its motives. For that matter, the importance of the designated legislation of the Disengagement Law lies more in the practical recognition of the differences between objects of property and less of the motives that led to it. Although the motives are not negligible, as such, it seems that the practical recognition of property diversity is significant for future arrangements. Indeed, the Israeli legislature's recognition of the need to establish a unique property arrangement – one that will create a balance between the various values expressed in a given property instance – represents, perhaps most of all, the understanding that not all property should be treated in the same manner.[49]

In essence, the Disengagement Law ordered compensation for loss of residence as well as loss of business.[50] Both of these losses were to be calculated according to the market value of the property. In order to deal with specific market failures that negatively affected the value of the assets in the evacuated area,[51] the Disengagement Law provided an alternative valuation process, by which the value of the assets could be assessed according to the average value of such assets, irrespective of their actual value.[52]

However, the Disengagement Law deviated from the current expropriation regime in that it contained two additional compensation mechanisms. The first, and perhaps the more exceptional, is an in-kind compensation mechanism, according to which the Law offered a conditional right to community re-establishment.[53] The second is the right of each resident of the evacuated area to receive an additional monetary premium. Thus, every resident of the evacuated area who meets the Law's conditions is entitled to receive additional payment, in excess of the market value of the expropriated property.[54] The Disengagement Law's use of these two exceptional compensation mechanisms primarily reflects the recognition of the Israeli legislature that in the specific circumstances of expropriation an additional loss should be recognised. This loss, suffered by owners who lost their property as a result of the expropriation, is the loss of communality.[55]

These two deviations from prevailing Israeli expropriation law highlight what I believe is one inherent deficiency in the treatment of community by most Western jurisdictions: the failure to recognise community as a vital component in property law in general, and in expropriation law in

[49] This understanding represents a turn from a monist conception of property to a value pluralistic one, whereby the legal arrangement regarding the property in question should be constructed in accordance with the values that this specific property maintains: see Hanoch Dagan, *Property: Values and Institutions* (Oxford University Press 2011); Joseph W Singer, *Entitlement: The Paradoxes of Property* (Yale University Press 2000) 37; Gregory S Alexander, 'Pluralism and Property' (2011) 80 *Fordham Law Review* 1017.

[50] Disengagement Law (n 40) ss E(a) and E(d), respectively.

[51] Such market failures could be attributed to the precarious security situation in the evacuated area: see HCJ 1661/05 *Gaza Coast Regional Council v The Knesset* 2006 PD 59(2) 481, 675.

[52] The second amendment to the Law regarding the normative calculation of compensation for residence and the third amendment to the Law regarding normative compensation for business.

[53] Disengagement Law (n 40) art 85.

[54] ibid 46.

[55] *Gaza Coast Regional Council* (n 51) 642.

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particular.[56] Learning from the Israeli experience is important, I believe, since it allows one to examine how theories about addressing communality loss in legal arrangements have been implemented in practice. In what follows, I would like to review further these two unique compensation mechanisms, and how they were applied in the Israeli context.

3.1 COMMUNITY RE-ESTABLISHMENT MECHANISM

The most significant change applied by the Disengagement Law was the partial inclusion of an in-kind remedy mechanism, which requires the government to support the re-establishment of communities.[57] This partial inclusion is reflected in the Israeli legislator's view of the re-establishment mechanism as being complementary to compensation. Hence, the law offers each property owner monetary compensation, based on the market value of the property.[58] Entitlement to be included in a community re-establishment arrangement requires owners to waive only part of their monetary compensation, while the responsibility to reconstruct their homes remains that of the owners.[59]

The re-establishment remedy for expropriations that uproot entire residential communities has already been discussed in the literature. Parchomovsky and Siegelman argue that a 'provision of a substitute location for resettlement … would allow for preservation of community character, albeit in a different place'.[60] The possibility of remedy in kind is raised, in the Israeli context, in a position paper of the Israel Democracy Institute which, in 2004, recommended 'compensation that, at least in the housing sphere, will not focus on money but rather on offering alternative housing – preferably such that would even maintain the original settlement and community framework as much as possible'.[61] Indeed, the idea of a remedy in kind, which is that a community would have the option of re-establishment, stood at the core of the discussions that preceded the enactment of the Disengagement Law.[62]

Recognising the importance of preserving communities, the Law states, in Article 1, that one of its targets is to 'relocate groups of settlers and residential cooperatives to alternative locations'.[63] In order to implement this goal in practice, the Law states, in Article 85, that the

[56] Hanoch Dagan, 'Pluralism and Perfectionism in Private Law' (2012) 112 *Columbia Law Review* 1409; Parchomovsky and Siegelman (n 7) 79.
[57] Disengagement Law (n 40) art 85.
[58] See text to nn 50–52.
[59] State Commission of Inquiry into the Handling of the Evacuees from Gush Katif and Northern Samaria by the Authorized Authorities, 6 June 2010 (Commission Report), http://elyon1.court.gov.il/heb/hitnatkut/doc/final_report_eng.pdf.
[60] Parchomovsky and Siegelman (n 7) 138.
[61] Yair Sheleg, 'Hamashmaut Hapolitit Vehachevratit Shel Pinuy Yeshuvim BeYehuda, Shomron Veaza' ('The Political and Social Significance of Evacuating Settlements in Judea, Samaria and Gaza'), Israel Democracy Institute, Research Paper 42, 2004, 49 (in Hebrew), http://www.idi.org.il/media/322622/pp_42.pdf.
[62] Israeli State Comptroller and Ombudsman, 'Monitoring Report Regarding Aspects of the Treatment of Gush Katif's Evacuees Following the Disengagement Plan's Implementation', 7 January 2009, 8 (in Hebrew), http://www.mevaker.gov.il/serve/showHtml.asp?bookid=536&id=191&contentid=9930&parentcid=9928&frompage=16&direction=1&bctype=0&startpage=8&sw=1366&hw=698.
[63] Disengagement Law (n 40) art 1(4).

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government (through the designated administrative authority) may contract a group of owners or a community in order to relocate their activity to a communal framework outside the evacuated area.[64]

The Law is not very detailed about who is entitled to claim community re-establishment, or how this re-establishment is to be executed.[65] In fact, the Law speaks generally about a re-establishment option, without specifying its form.[66] A review of the provision reveals that the possibility of realising community re-establishment is limited in three ways. First, the Law orders that a re-establishment claim should be submitted by no fewer than 20 owners;[67] second, the Law leaves a wide margin of discretion for the authority as to approval of the owners' claim;[68] and, finally, it leaves much discretion in the hands of this authority with regard to the content of the arrangement.[69]

The unrestrained discretion awarded to the authority by the Disengagement Law was criticised by the State Commission of Inquiry into the handling of the evacuees from Gush Katif and northern Samaria by the authorised authorities established by the Knesset (Israeli parliament).[70] The Commission was established in order to investigate, determine findings, reach conclusions and submit recommendations 'on everything pertaining to assistance to the evacuees in connection with their settlement … and handling their needs in agriculture, business, employment and welfare'.[71]

As can be learned from the officials' testimonies before the Commission, the community re-establishment option was inserted into the Law in recognition of the fact that a community's preservation may assist in the rehabilitation of its individual members, and thereby a more effective and just remedy is presented.[72] While recognising that the importance of community in the lives of its members is not an Israeli invention,[73] the legal application of this recognition, by making community a significant factor in the equation of compensation for expropriation, implies a significant conceptual shift concerning the issue of what property is, and its role in the life of its owner.

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[64] ibid art 85.

[65] In art 85(d) the Law provides for several issues that the contract *may* deal with. Among these issues are provisions regarding the allocation of alternative land (inter alia, through exemption from a tender); payments to received communities and the re-establishment of public institutions. However, the Law does not specify the proper arrangement for each of these issues, leaving it to the parties' discretion.

[66] Israeli State Comptroller and Ombudsman (n 62) 15.

[67] Disengagement Law (n 40) art 85(a).

[68] ibid art 85(b).

[69] ibid.

[70] Commission Report (n 59) 11.

[71] ibid 3.

[72] See the testimony of Ranan Dinur – who served as Director-General of the Ministry of Industry and Commerce at the time (and then as Director-General of the Prime Minister's office) – before the Commission of Inquiry that examined the disengagement plan and its results, 22 July 2009 (in Hebrew), http://elyon1.court.gov.il/heb/hitnatkut/doc/protocol_22_07_09.pdf.

[73] For example, Alan Ehrenhalt, *The Lost City: Discovering the Forgotten Virtues of Community in the Chicago of the 1950s* (Basic Books 1995); Kai T Erikson, *Everything in its Path* (Simon & Schuster 1978); Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster 2000).

3.2 MONETARY PREMIUM

The second exceptional compensation mechanism adopted in the Disengagement Law is a variable monetary premium that was added to the fair market value compensation. Article 46 of the Law[74] stated:

> An Israeli citizen who meets the conditions specified in article 44(a)(2) as well as the following conditions:
>
> (1) On the day the plan was determined was aged at least 21 years;
> (2) His domicile was an evacuated community for at least three consecutive years immediately before the day the plan was determined,
>
> is entitled to a grant in the sum of NIS 4800 for each year, from the year he reached 21 years of age till the day the plan was determined.

The monetary premium was designed to compensate the evacuees for their personal pain and suffering or, as the Director-General of the Israeli Prime Minister's office has argued, '[t]here is compensation for a home, there is compensation for land and for a business; this is compensation for the people'.[75] Since the Israeli expropriation regime, as in most Western jurisdictions,[76] does not recognise such additional compensation, this premium should be considered as another compensation mechanism to address the loss of communality. Indeed, in examining this issue the Israeli High Court of Justice (HCJ) held[77] that:

> [i]ndeed, the more years a person's life is consistently tied to the evacuated area, so naturally are the emotional difficulties greater and the suffering more immense. The suffering and emotional difficulty involved in the evacuation are immense, particularly because of the unique circumstances of the disengagement plan. This is because it is a forced evacuation and because the evacuation destroys an entire group of communities whose homes and community fabric their members founded and maintained for years. Indeed, several families lived in the evacuated communities for over twenty years and a second and third generation was born and raised in those communities, as pointed out to us by some of the evacuees during the hearing. Under these circumstances, it appears that the individual should not in any way be granted payment *ex gratia*. A personal grant is essential and necessary to achieve the purpose of providing fair and proper compensation for the evacuees, in the language of section 1(2) of the Law, and this affects the constitutionality of the law.

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[74] Disengagement Law (n 40) art 46.
[75] Protocol of a meeting of the Knesset's Finance Committee subcommittee for determining compensation for businesses in the Disengagement Law, 30 January 2005 (author's translation).
[76] An exception can be found in several American states (see n 3), and in South Africa where the Expropriation Act (Act No 63 of 1975), s 12(2), offers additional compensation for non-financial losses, including inconvenience and disturbance (this compensation is termed 'solatium' in South African legal jargon). Solatium is calculated as a percentage of the total claim, with a maximum amount. For a comprehensive review of the South African mechanisms for compensation for expropriation see Wilhelmina Jacoba (Elmien) du Plessis, 'Compensation for Expropriation under the Constitution', PhD dissertation, Stellenbosch University, 20 February 2009.
[77] See *Gaza Coast Regional Council* (n 51) 642–43 (translated from Hebrew by the author).

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Making the amount of the premium conditional upon how long a person had lived in the community is intended, as stated, to reflect the magnitude of the loss suffered by a member of the community.[78] The premise underlying this decision, as stated by the HCJ, is that the longer a person lives in a particular community, the stronger his or her involvement in the community and, therefore, the greater is the loss of communality.

These deviations from the then existing Israeli expropriation laws reveal that a paradigmatic shift did indeed occur in relation to the role of property, as well as the values that should be promoted by it. However, as the next section demonstrates, the results of this change were deficient in all the parameters that guided the Israeli legislature to create a unique legal arrangement: the will to express community importance; the attempt to create an efficient proprietary arrangement; and the will that this arrangement be, at the same time, both fair and just.

4. WHAT WENT WRONG?

In this section, I argue that the attempt by the Israeli legislature to give expression to the unique circumstances of the expropriation culminated in poor outcomes. This failure was the result of a shaky legislative arrangement, mainly the lack of a normative infrastructure that defines the meaning of community, as well as its role in property value. My argument is that the aspiration to express the importance of community ended in derogating from it; that the attempt to create an efficient arrangement culminated in an extensive waste of public funds; and that an attempt to set a fair settlement ended in grave consequences in terms of distributive justice and in discrimination against some property owners as compared to others. This section will conclude by arguing that none of these outcomes were inevitable.

In order to understand the scope of the decisive failure to express community values in the Disengagement Law, it might be appropriate to look first at the bottom line. Of the 21 residential communities that functioned in the evacuated area before the expropriation, only one, Ganei Tal, the most economically and politically powerful community, re-established itself in the very same form as before.[79] The re-establishment agreement signed between the State of Israel and Ganei Tal was not the only re-establishment agreement signed by the government of Israel and groups of evacuees. However, none of the other agreements gave the right to re-establish a community in the same form in which it existed before the expropriation. Thus, most of the 'new' communities are patchwork, their populations consisting of members from several original communities. In addition, unlike the agreement signed with Ganei Tal, most re-establishment agreements do not order the establishment of a new independent settlement, but rather the expansion of existing settlements (which required the evacuees to unite with existing communities). The creation of 'new' communities that maintain only a marginal relation with their members'

[78] Ellickson did not rule out the possibility of '[d]ifferent percentages based on factors such as the longevity of occupancy of the injured neighbor, or whether the neighbor is an owner-occupant or a renter', but conditioned such differentiation on empirical verification: Ellickson (n 4) 736–37.
[79] See text to nn 121–23.

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original communities caused great demoralisation among evacuees,[80] raised tensions between communities,[81] and led to the extinction of the community fabric.[82] In addition, because of the Law's partial embracing of the re-establishment mechanism, time became a significant component in the practical ability of owners to realise re-establishment. The long period of time that it took the Israeli government to formulate the solutions for the communities, as well as the duration of the negotiations conducted between the parties (which postponed the permanent settlement of the evacuees), led many of the evacuees to spend the compensation money given to them (for residence and business), so that when the partial solutions eventually became possible some of the evacuees were not in a financial position to realise them.[83] Finally, and perhaps as importantly, the actual cost of executing the disengagement plan amounts, at the time of writing, to four times the anticipated cost.[84] The Israeli legislature was required to amend the Law no fewer than four times[85] and the cumulative cost of these amendments, intended primarily to correct the compensation eligibility criteria, became substantially more than planned.[86]

[80] Interview with T (n 29) ('Why should you create a reality that makes me feel second class? Why? What happened? Why do I need to argue before the inquiry commission that I know that the state contracted with community X for this and that? How am I different from them? My husband established this whole bloc of communities from scratch. Worked like a dog. Worked like a dog. He scoured the whole country to find families who wanted to live in this dump. It was a dump then. Really, he went above and beyond. He worked like a dog. He built a community from scratch. And now we are classified as second class? They [Ganei Tal] are better than me? They will get a better deal? Their children will get more than my son? Why?').

[81] This tension caused evacuees from different communities to file a petition with the Israeli High Court of Justice arguing that the Israeli government discriminated against them in comparison with residents of Ganei Tal: see HCJ 10051/08 *The Resettlement Association for the Nizanim Area v Prime Minister of Israel* (2009, not yet reported). The petition was withdrawn by the petitioners after the state agreed to reopen the terms of the agreements with all the communities. These conditions were applied, partially, in Amendment No 4 to the Law.

[82] See, eg, Commission Report (n 59) 18–19.

[83] See, eg, protocols of the testimonies before the Commission dated 25 January 2010, 5126–27 (testimony of Mr Doron Ben Shlomi) (in Hebrew), http://elyon1.court.gov.il/heb/hitnatkut_protocol.htm; protocols of the testimonies before the Commission dated 9 June 2009, 888–90 (testimony of Mr David Banjo) and 950–52 (testimony of Mr. Avigdor Yichaky, former Director-General of the Israeli Prime Minister's office) (in Hebrew), http://elyon1.court.gov.il/heb/hitnatkut/doc/protocol_09_06_09.pdf; Ido Efrati, 'Seven Years On, Gush Katif Remains an Unsettled Question', *Ha'aretz*, 15 August 2012.

[84] See 'The Disengagement Plan from Gaza and Northern Samaria Settlements: Cost Estimate', Center of Research and Information of the Israeli Parliament (the Knesset), 31 January 2010 (in Hebrew), http://www.knesset.gov.il/mmm/data/pdf/m02539.pdf; Commission Report (n 59) 10.

[85] The first amendment was mainly technical and was designed to interpret obscure concepts in the law. The Implementation of the Disengagement Law (Amendment No 2) 2010 added compensation for business owners and employees. The implementation of the Disengagement Law (Amendment No 3) 2011 provided that compensation for the land component should be increased for private tenants and for personal property damaged by the evacuation process. This amendment also ordered a reduction in taxation for evacuees (especially with regard to tax on the purchase of a replacement residence). The implementation of the Disengagement Law (Amendment No 4) 2011 was as a result of an agreement between the evacuees' leaders and the Israeli government, according to which the state would increase the amount of compensation significantly and the evacuees would announce an end to their claims. This amendment significantly increased the total compensation for houses and agricultural businesses. In addition, this amendment attempted to match the conditions granted to Ganei Tal in its community re-establishment agreement and the conditions given to members of other communities.

[86] See Commission Report (n 59) 187.

These outcomes clearly deviate from the intentions of the Israeli legislature. A review of the actual deficiencies leads to the conclusion that the fault does not originate in the motivation for change, but in the absence of an adequate normative infrastructure to carry it out.

4.1 COMMUNITY IMPORTANCE

One of the fundamental motivations for deviating from the prevailing Israeli expropriation laws was the recognition of the community as an important factor in its members' lives.[87] The unique circumstances of the expropriation, that all of the property owners were members of residential communities, inspired this motivation. However, quite surprisingly under the circumstances, the Disengagement Law refrained from defining community.[88] The premise underlying this deficiency was that a residential community that functioned in the evacuated area before the implementation of the disengagement plan should be considered a community.[89] While this descriptive definition may be helpful in determining backward-looking compensation,[90] it is not at all helpful in determining any forward-looking remedies. However, even the attempt to estimate backward-looking compensation on the basis of this definition of community may be difficult. The Israeli legislature's refusal to define 'community', or at least to determine what characteristics render a community legally recognisable as such, flattened the discussion about community and, more importantly for the purpose of this article, missed one of the prominent motivations underlying the legislative change.

As mentioned earlier, not all communities in the evacuated area were alike.[91] Some were strong communities with intense affinities among their members, which operated internal institutions and practices and enjoyed a functioning community life. Others were communities only in the geographic sense. The relations between their members were loose; community institutions, even if they existed formally, were not operational; communal practices were not followed or enforced. However, the Disengagement Law treated all communities alike, making no distinction between members of functioning and non-functioning communities. The absence of such a distinction, according to the argument below, eliminates the possibility of giving meaning to the community, at least in the substantive sense.

The re-establishment mechanism is designed, above all, to return owners to the same position that they occupied before the expropriation. This is, in fact, the aim of a market value compensation

[87] Disengagement Law (n 40) art 1. But cf Keren Tamir and Yaacov Bar-Siman-Tov, *The Disengagement from the Gaza Strip and Northern Samaria: Evacuation, Compensation and Legitimization* (Jerusalem Institute for Israel Studies 2007) xxi.

[88] Defining community is not an easy task. A study by George A Hillery Jr in 1995 found 94 different definitions of community in the scientific literature, with little common ground among them: see Hillery (n 6).

[89] The Disengagement Law (n 40) art 2 defines an 'Israeli settlement' as a settlement that is one of the settlements listed in the security order concerning the Administration of Regional Councils (Gaza Strip) (No 604) 1979 or in the Order Concerning Administration of Regional Councils (Judea and Samaria) (No 783) 1979.

[90] Such as a monetary premium for loss of communality.

[91] See text to nn 32–36.

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mechanism.[92] However, the uniqueness of the re-establishment mechanism is that it seeks to restore the pre-expropriation status quo not only financially but also in practical terms. In this sense, the re-establishment mechanism is a forward-looking remedy, seeking to heal past wrongs by correcting the future. Using this in-kind mechanism in order to remedy the wrongs of the expropriation requires an evaluation of what was lost. The Disengagement Law, so I argue, refrained from making such an evaluation, and therefore entitled property owners from non-functioning communities to receive what they never had. Moreover, the fact that the Law allowed any group of 20 owners, regardless of whether they belonged to the same community of origin, to demand community re-establishment, made it difficult to give expression to the importance of community. Indeed, even if the Israeli legislature avoided a normative definition of 'community' and settled for a descriptive one, granting a collection of owners from different communities the power to demand the establishment of a new community cannot be normatively justified in terms of conserving community or expressing its importance in the lives of its members.

The same is true of the variable premium mechanism or, as the Disengagement Law termed it, 'a grant for seniority'.[93] This grant was awarded to Israeli citizens who had lived in an evacuated community for at least three years before the disengagement decision, regardless of the nature of their property rights. Contrary to the community re-establishment mechanism, any additional premium should be considered a backward-looking compensation award, designed to supply monetary compensation for damage which occurred in the past and is not intended to be repaired in practice in the future. Measuring the extent of communality loss according to the duration of a person's membership of the community is designed to establish a distinction between the 'haves' and the 'have nots'. However, this measure, when operated exclusively, cannot realise the distinction in question, and therefore cannot be used as an instrument to express the importance of community. As mentioned, the entitlement to compensation for loss of communality should be determined according to the existence of communality in the first place.

Although the duration of domicile criterion may serve as a proxy for evaluating the extent of communality loss,[94] it cannot attest to the existence of community in the first place. In order to recognise the existence of communality, and therefore its loss as a result of expropriation, one needs to determine first whether the uprooted community was indeed a community or simply a group of individuals who happened to live in close geographic proximity. Although a thorough investigation of the nature of community is beyond the scope of this article, it can be argued that such a decision should be based on the characteristics of the community, the characteristics of the relationships that exist among its members and, equally important, the meaning that this social framework provides to its members. Such an examination may be performed in two ways: (i) *directly*, by establishing objective criteria for evaluating the existence of communality, such as the presence of community institutions and practices,[95] or (ii) *indirectly*, by considering

[92] For example, *United States v Miller* (n 3) 373.
[93] Disengagement Law (n 40) art 46.
[94] *Gaza Coast Regional Council* (n 51) 642.
[95] David W McMillan and David M Chavis, 'Sense of Community: A Definition and Theory' (1986) 14 *Journal of Community Psychology* 6.

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additional objective factors, alongside the duration of domicile in the community, especially the nature of the property rights held by owners.[96] The normative failures described above may explain why the Israeli legislature's intent to express community importance ended in such poor positive outcomes. However, derogating from community importance was not the only negative outcome. In what follows, I argue that the deficient normative infrastructure underlying the legal arrangement of the Law failed also in terms of efficiency and fairness.

4.2 EFFICIENCY

The expression of the importance of community in its members' lives was one of the fundamental motivations underlying the change in the current expropriation laws; however, it was not the only one. As mentioned earlier, the Law stated that one of its aims was to establish a 'proper and just' compensation arrangement in light of the unique circumstances of the expropriation.[97] In response to a petition submitted to the Israeli High Court of Justice against the Law, the state explained the rationale behind deviating from the current law by arguing that:[98]

> [t]he state believes that the general law does not give a proper response to the special situation of the disengagement. Cancellation of rights in the land as part of the disengagement is not a breach of contract by the state, is not a tort and not a process of normal expropriation … Therefore there is no room for the usual legal tools of torts, contracts, and property. They are not equipped to provide appropriate, *efficient*, and comprehensive results regarding the implementation of the Disengagement Plan.

The search for a comprehensive compensation arrangement that would address the unique circumstances of the expropriation, but remain efficient, was then one of the primary goals of the deviation from the current law. Yet, as the bottom line reveals, this hope was dashed.[99] In this section, I will argue that the reason for these inefficient results lay also in the absence of a normative infrastructure that the Israeli legislature should have laid for the legal arrangement proposed by the Disengagement Law.

Efficiency is an important consideration when expropriation is at stake.[100] The insistence of most Western jurisdictions on 'fair market value' as the basic measure of compensation for

[96] Posing the 'nature of the property right' as a supplementary criterion to the duration of domicile criterion may indicate how community members understand their place in the community, as well as the importance of community for them. Therefore, the stronger the property right (eg, ownership) the more it can be seen as evidence of the owner's intention to settle and assimilate in the community. On the other hand, the weaker the property right (eg, rental) the more it can be seen as evidence of the owner's non-assimilation into the community, or at least of the owner's reluctance to be assimilated: see in this regard Ellickson (n 4) 736–37.

[97] Disengagement Law (n 40) art 1.

[98] *Gaza Coast Regional Council* (n 51) 535 (emphasis added, translated from Hebrew by the author).

[99] See text to nn 82–87.

[100] One of the main justifications for granting the government the power to expropriate private property for public use is based on efficiency-related concerns, especially in relation to the familiar collective action problem: see Thomas J Miceli and Kathleen Segerson, 'A Bargaining Model of Holdouts and Takings' (2007) 9 *American Law and Economic Review* 160, 161; Steven Shavell, *Foundations of Economic Analysis of Law* (Harvard University Press 2004) 126; Fennell (n 7); Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 *Harvard Law Review* 621, 639, 673–74; Lee Anne Fennell,

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expropriation is mainly for reasons of efficiency.[101] In fact, the very rigid formula that stands at the core of legal expropriation arrangements in most Western jurisdictions – namely 'public use versus market value compensation' – indicates that expropriation is a legal instrument designed essentially to promote the welfare of the entire society.[102] Efficiency considerations are highly significant in determining the legal arrangement for expropriation because they allow for the creation of an array of incentives for both the property owner and the expropriating authority.[103] Maintaining such a balance between the incentives for the owner and the authority establishes an optimal investment policy on the part of the property owner and a restrained expropriation policy on the part of the expropriating authority.[104] Therefore, it seems that any legal arrangement designed to apply in expropriation situations cannot ignore efficiency and, as mentioned, the Israeli legislature indeed addressed this consideration as one of the primary goals of the Law.

The quest for an efficient expropriation regime should begin by defining the economic variables that complete the equation of losses and benefits that are suffered or gained by all parties; such a thorough examination is beyond the scope of this article. For the purpose of this article, I will rely on the work of Parchomovsky and Siegelman, who identified loss of communality as one of the economic factors that should be taken into consideration when an expropriation arrangement is constructed.[105] According to Parchomovsky and Siegelman, in order for a compensation regime for expropriation to be considered efficient, the loss of communality suffered by community members who were torn from their community as a result of expropriation needs to be taken into account.[106] Disregarding communality loss will lead to an inefficient expropriation arrangement 'because it enables the government to externalise a substantial part

'Common Interest Tragedies' (2004) 98 *Northwestern University Law Review* 907, 926–29; Thomas W Merrill, 'The Economics of Public Use' (1986) 72 *Cornell Law Review* 61, 86; Daryl J Levinson, 'Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs' (2000) 67 *University of Chicago Law Review* 345, 349.

[101] The decision to regard the market value of the property as fulfilling the 'just compensation' requirement can be attributed to efficiency considerations on two levels. The first is the assumption that the market is the best arena for determining the price of a property (including the expectations embodied in it, etc). In this regard see Ellickson (n 4) 683. A second level of efficiency might be learned from the US Supreme Court rulings, according to which '[b]ecause of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule': see *United States v 564.54 Acres of Land* (n 3) 510–11. This statement regarding the reason for establishing the market value as the measure for compensation can be interpreted in terms of efficiency, according to which market value compensation saves the costs associated with locating subjective losses embodied in the property.

[102] For example, *Strickley v Highland Boy Gold Mining Co* 200 US 527, 531 (1906).

[103] For the role of the compensation regime in directing owners' investment policies see, eg, Lawrence Blume and Daniel L Rubinfeld, 'Compensation for Takings: An Economic Analysis' (1984) 72 *California Law Review* 569, 619–20; Lawrence Blume, Daniel L Rubinfeld and Perry Shapiro, 'The Taking of Land: When Should Compensation Be Paid?' (1984) 99 *Quarterly Journal of Economics* 71; Frank I Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 *Harvard Law Review* 1165; Ed Nosal, 'The Taking of Land: Market Value Compensation Should be Paid' (2001) 82 *Journal of Public Economics* 431.

[104] For example, Blume, Rubinfeld and Shapiro, ibid; Michael A Heller and James E Krier, 'Deterrence and Distribution in the Law of Takings' (1999) 112 *Harvard Law Review* 997, 999; Thomas W Merrill, 'Incomplete Compensation for Takings' (2002) 11 *New York University Environmental Law Journal* 110, 131–33.

[105] Parchomovsky and Siegelman (n 7) 83–84.

[106] ibid 139–40.

of the cost of its policies on private property owners, thereby leading to inaccurate assessments of the cost-effectiveness and desirability of government policies'.[107] This concern naturally decreases in cases where the target of the expropriation is unique and its implementation requires expropriating specific land.[108] In the case of the Disengagement Plan, the expropriation was not for economic reasons or because of problems of multiple owners, but because of the Israeli government's understanding that a withdrawal was required for security reasons.[109] In this situation, it is only reasonable to assume that the expropriation would have been carried out even if the legal arrangement had not included an expression of communality loss. Yet I argue that, even in this situation, an efficient legal arrangement should take into account communality loss for two main reasons: first, because the authority's incentives are but one part of the economic incentives array embedded in the legal arrangement of expropriation (alongside, for example, the owner's incentives);[110] second, because ignoring loss of communality as an inherent component of the legal arrangement of expropriation in such a scenario may lead to this component being disregarded in all expropriations.

The re-establishment of a community is expensive. Regardless of its normative desirability in some cases, it cannot be argued that re-establishment of a community costs the same as one-time compensation to the individual owner.[111] The relatively high cost of re-establishing a community arises from, among other things, a number of unique characteristics of this mechanism, including the continuation of the relationship between the parties, the costs of negotiation, changes that occur in material prices during the re-establishment process and, no less important, the additional investment required by the state, such as the establishment of public institutions and infrastructure.[112]

Entitlement to community re-establishment should therefore be carefully and intelligently granted. While Parchomovsky and Siegelman suggest such entitlement as a default in cases where expropriation uproots an entire community,[113] I argue that offering such a default is expected to result in a legal arrangement that is both over- and under-inclusive. Therefore, I argue that the community re-establishment remedy should have two conditions. First, and as argued above, the community in question should meet the qualities of a community as a social framework.[114] Offering the expensive community re-establishment remedy for geographic communities that do not meet these qualities may result in wasted investment of public funds. Second, entitlement to the re-establishment remedy should be conditioned on the community

[107] ibid 136.
[108] See Michael Heller and Rick Hills, 'Land Assembly Districts' (2008) 121 *Harvard Law Review* 1465, 1492–93.
[109] See the Israeli government decision on the implementation of the disengagement plan (n 37).
[110] See source at n 107.
[111] For example, Keren Tamir, 'Compensation and Treatment of the Evacuees as Means for Creating Legitimacy for the Disengagement Policy' in Yaacov Bar-Siman-Tov (ed), *The Disengagement Plan: An Idea Shattered* (Jerusalem Institute for Israel Studies 2009) (in Hebrew) 97, 104.
[112] See, eg, the testimony of Ilan Cohen, former Director-General of the Israeli Prime Minister's office, before the Commission, 26 July 2009 (in Hebrew), http://elyon1.court.gov.il/heb/hitnatkut/doc/protocol_26_07_09.pdf.
[113] Parchomovsky and Siegelman (n 7) 138.
[114] See text to nn 94–96.

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members' interest in the re-establishment of their community. In parallel with the liberal aspect of this condition,[115] it is also important based on considerations of efficiency. Indeed, the interest of community members in preserving their community is an important factor in deciding the implementation of the community's re-establishment, since it reduces concerns over the inappropriate use of state benefits by property owners, as well as overinvestment that may go down the drain if the re-establishment process fails. Adopting a default rule, according to which every community that was entirely uprooted as a result of expropriation is entitled to the re-establishment remedy, means that the government takes a great and unjustified financial risk. On the other hand, setting a default rule, according to which the re-establishment remedy is granted retrospectively – so that a community would be required to show its interest in its re-establishment by doing it itself – may prevent the re-establishment of desirable, however financially weak, communities.

Because of the high costs and the financial risks that are involved in implementing the re-establishment remedy, I believe that the default rule should be set at the lower level. A community should therefore be given the opportunity to re-establish itself, while governmental support should be conditional upon the finalisation of the process. However, in order to overcome the distributive biases, because of which financially weak communities would fail to re-establish themselves owing to their own inadequate resources, the state should provide a community with conditional financial support (such as balloon loans or loans with grace periods) for the purpose of re-establishment. When the re-establishment process is completed, state financial support should be converted into a grant, which would represent the realisation of the remedy of re-establishment. The Disengagement Law ignored these two conditions. Instead, it granted an indiscriminate right to re-establishment, and has therefore produced inefficient results.

Yet the Law's inefficiency is not limited to its failure to recognise the distinction between different communities. In this regard, one can point to two other sources for its inefficiency. First, the Law gave individuals the right to claim re-establishment (or, rather, reconstruction) of a community, even if the new community included not even one member of the same community of origin.[116] In this situation, it is not clear how one can argue that the claim for re-establishment of such members can be justified by the loss of communality because, by their very actions, these members have demonstrated the marginal importance of communality in their lives. Indeed, those who were given the opportunity to re-establish themselves in the community where they lived before the expropriation, and chose not to do so, would find it difficult to argue for loss of communality. If communality served only as a marginal element in the lives of those community members, then the estimated value of this loss should be relatively low and, therefore, does not justify the application of an expensive mechanism such as re-establishment of community. It could be argued that the loss of communality lies not necessarily in the person's inability to live in the *same* community in which he lived prior to

[115] Parchomovsky and Siegelman (n 7) 141.

[116] See, eg, testimony of Ilan Cohen (n 112) 2814; see also the testimony of Eliyahu Escosido, head of the regional council Sorek, before the Commission, 14 July 2009, 1677, 1731 (in Hebrew), http://elyon1.court.gov.il/heb/hitnatkut_protocol.htm.

expropriation, but in the loss of the very ability to live in a settlement characterised by the values of communality and cooperation. However, the concept of communality loss as the loss of the configuration of community life does not justify the establishment of new communities (especially considering the high cost of this remedy), mainly because a remedy for this loss is likely to be found through integration into existing communities.

Second, as is revealed by an examination of its provisions, the Law creates, in effect, a structured double compensation for the loss of communality. As stated above, the Law introduced two mechanisms designed to address this type of loss: the communality premium and re-establishment of community. The communality premium mechanism is a backward-looking remedy intended to compensate for loss that the person has suffered in the past, while the community re-establishment mechanism is a forward-looking remedy intended to repair past damage through restitution in practice. The two mechanisms are designed to compensate for the same loss: the loss of communality. The granting of either eligibility should depend, as noted, on the characteristics of the specific community. However, it is clear that eligibility for both remedies simultaneously constitutes, in fact, double compensation. An examination of the Law's provisions reveals that entitlement to one of these remedies does not preclude eligibility for the other. In this respect, an individual's entitlement to double compensation for loss of communality leads to the conclusion that the entire arrangement is inefficient.[117]

4.3 FAIRNESS

The third goal of the Disengagement Law was to achieve a *just* compensation arrangement.[118] Indeed, in its response to the petition against the Law submitted to the Israeli High Court of Justice, the state argued that the Law established a unique, comprehensive, *fair* and efficient compensation system that reflects the economic value of the violated rights.[119] Fairness can have two different meanings: equality or distributive justice.[120] In what follows, I argue that in

[117] While a proportion of the inefficient results described above may be explained by the Disengagement Law's hasty legislative procedures, the involvement of interest groups or legislative amateurism, I still maintain that the main cause of the inefficiency of the legal arrangement is the lack of a normative infrastructure of the need to compensate for loss of communality, as well as the lack of a comprehensive conceptualisation of community. This argument is based, as stated above, on the understanding that, without a proper conceptualisation of community, of its meaning, as well as of the values embedded in it, there is no normative, or positive, way to compensate for the loss of communality. Conceptualising community, then, defines the need for compensation for its loss, and may also provide a proxy to assess the intensity of this loss.

[118] Disengagement Law (n 40) art 1.

[119] See *Gaza Coast Regional Council* (n 51) 536.

[120] The question of whether distributive justice should be promoted in expropriations is debatable: see Hanoch Dagan, 'Takings and Distributive Justice' (1999) 85 *Virginia Law Review* 741, 785–90 ('Normative considerations, argue some critics, dictate that promoting the ideals of distributive justice should be exclusively confined to those fields of law that are specifically designed for fostering these ideals, such as tax law, welfare law, or some segments of land use law'). See also William K Jones, 'Confiscation: A Rationale of the Law of Takings' (1995) 24 *Hofstra Law Review* 1, 11 fn 37; Daphna Lewinsohn-Zamir, 'Compensation for Injuries to Land Caused by Planning Authorities: Towards a Comprehensive Theory' (1996) 46 *University of Toronto Law Journal* 47, 54, 59–60; Louis Kaplow and Steven Shavell, 'Why the Legal System is Less Efficient than the Income Tax in Redistributing Income' (1994) 23 *Journal of Legal Studies* 667, 667–69.

neither of these possible meanings was fairness achieved by the Law. As in the case of its other goals, it appears that the proposed arrangement does not promote fairness, but rather impedes it.

My argument is that the Law's neutrality concerning the characteristics of a community, and its allegedly egalitarian policy, resulted in inequality and regressive outcomes. As mentioned earlier, not all communities in the evacuated area were alike. While some communities were characterised by strong communality, others were not. Therefore, granting all communities the same remedies, including those that were designed to compensate for loss of communality, does not maintain equality but rather leads to inequality. This inequality is best understood if we turn to the purpose of compensation for expropriation: if such compensation should indemnify owners for their losses, each owner should be compensated for his or her *specific* losses. Thus, no one would suggest that considerations of equality require us to equalise the amount of monetary compensation given to a person the market value of whose expropriated house is 50,000 and a person whose house is worth twice that amount. In the same way, one cannot argue that one who suffers loss of communality as a result of expropriation and one who does not will be considered as equals if they are both compensated for loss of communality.

The Law is also incompatible with the second possible meaning of fairness, which relates to the distributive role of the compensation arrangement. The Law's silence regarding a community's financial as well as political strength has led to strong communities being favoured over weaker ones.[121] As mentioned earlier, only one of the 21 residential communities evacuated in the disengagement plan re-established itself in its original form. This community, Ganei Tal,[122] was the strongest, both financially and politically, among the evacuated communities.[123]

The fact that the only community that re-established itself fully is Ganei Tal raises questions regarding the distributive meaning of fairness in the law. The fact that weaker communities did

[121] The tendency of disadvantaged communities to suffer as a result of expropriation is known and is a result of, inter alia, expropriating authority incentives as well as the inability of these vulnerable groups in society to effectively ward off the realisation of expropriation: see dissenting opinion of Judge Thomas in *Kelo* (n 3) ('Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities", *United States v Carolene Products Co*, 304 US 144, 152 n 4 (1938), surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects'). I argue that this distinction between communities according to their strength should not be limited to examination of public use but also be implemented in the compensation regime.

[122] See the testimony of Eliyahu Escosido (n 116) 1705–06 ('First of all, the only community that was left intact and did not fall apart was Ganei Tal. This is a fact. It may be because it was a strong community before the expropriation, but also, so I think, it was because the agreement about its re-establishment was closed in advance' – translated by the author).

[123] Testimony of Advocate Yitzchak Meron, who represented some of the evacuees, in testimony before the Commission of Inquiry examining the Disengagement Plan and its Results, 27 July 2009, 3122 (in Hebrew), http://www.google.co.il/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0CEwQFjAH&url=http%3A%2F%2Felyon1.court.gov.il%2Fheb%2Fhitnatkut%2Fdoc%2F2009-07-27.doc&ei=wiZ1UN7EAoKm0QXmz4CABw&usg=AFQjCNEcBxmJv071fU6vj50_x9J2uaFd3A&sig2=hczNcU6kYJ_0Yu1f5w5FVw (last visited 30 December 2012) ('Ganei Tal, speaking of something disproportionate, received more than other communities').

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not meet the challenge of community re-establishment in their original form is not only evidence of the deficiencies of the legal arrangement but also calls into question its normative validity.

5. CONCLUDING REMARKS

The Israeli experience reveals that a step in the right direction, if not based on a solid normative structure, may cause more harm than good. The Disengagement Law's desire to accommodate the unique circumstances of the expropriation ended in a derogation from the institution of community, with inefficient results and unfair outcomes. As the Commission concluded:[124]

> This unrestricted framework, along with the state's powerful desire to reach agreements with all groups of evacuees, encouraged a 'race to obtain benefits'. That is how they led to the creation of several relocation agreements that do not achieve their rehabilitational purpose due to the absence of real community ties among the various individuals who banded together in a group; whose consolidation took years; which cost the state a fortune; which granted the settlers excessive benefits that included the allocation of valuable lands in high demand areas in the center of the country; and created unjustified gaps between different groups of evacuees.

Nevertheless, these failures should not undermine the principal recognition of loss of communality as an important component in an expropriation's legal arrangement, but should rather serve as a platform for further research on how it should be applied. Acknowledgement of the multiplicity of property values, as well as the need to address these diverse values in legal arrangements, requires a thorough examination of what values society wishes to endorse, and of the inner meaning of these values. Omitting such a thorough examination may leave property as an empty title or, worse, make it a destructive instrument, subject to manipulation by various, mostly stronger, factors in society.

[124] Commission Report (n 59) 11–12.

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