

THE ONE-STATE REALITY OF CONSTANT EXCEPTION

Hagai El-Ad

- *Israeli and Palestinian NGOs are getting closer: not because the civil space is widening in occupied Palestine, but because it is shrinking in occupying Israel*

ABSTRACT

After 50 years of occupation, to enable further oppression of Palestinians, stronger silencing of Israelis is now deemed necessary. The text moves back and forth from one side of the Green Line to the other, exploring the realities of Palestinians living under Israel's occupation regime, of Israelis striving to reject this reality – and the ways in which both are intertwined. Recent international developments and the rise of authoritarian leaders around the world resonate locally and further contribute to negative trends, but if challenged and reversed globally, then the international context can play a key role in the non-violent path for a future, for both Israelis and Palestinians, that will be based on freedom, democracy, and human rights.

KEYWORDS

Israel | Palestine | Occupied Palestinian Territories | Shrinking Civic Space | Green Line | Military Justice System | State of Exception | Bare Life | International Funding

What's the exact measure of "Israeli democracy" these days? For that, it's helpful to get a reading through the lens of a Palestinian.

Mai Da'na is a Palestinian from Hebron. Two and a half years ago in February 2015, late on a winter's night, Israeli soldiers entered her home. For Palestinian families, all over the Israeli-occupied West Bank, this is an everyday part of life: almost any soldier can enter a Palestinian home, anytime. No search warrant is required, no legal standards such as "probable cause" or "reasonable suspicion" are even relevant.¹

You see, in occupied Palestine, Giorgio Agamben's constant *state of exception*² is not philosophy: it is reality, and it has been exactly so for the past half century, and counting. Da'na herself and her children – she is 26 years old – have lived all their lives under this reality. In fact, this reality has been going on for almost double her lifetime. To fully grasp the meaning of living a *bare life*, one only needs to watch the video she took when the soldiers arrived, entered her home, demanded that the children be awakened and asked them their names in the dead of a cold night.³

Unlike Da'na, I am a Jewish Israeli citizen; I live in West Jerusalem, in Israel proper. Thus, my predicament is very different – in terms of who can enter my home, some 30 kilometres north of Da'na's, and in terms of a million other ways in which the lives of subjects and the lives of masters diverge. And yet, our spaces are interconnected – and this is what this piece, and this life, is about.

In recent years, Da'na began volunteering in B'Tselem's video project. Women videographers have consistently distinguished themselves as some of the best amongst the two hundred or so volunteers that for the past decade were empowered, through this citizen journalism project, to show the reality of the occupation exactly as it is.⁴ So, it was no wonder that in August 2017, when the project reached its 10th anniversary, B'Tselem decided to feature at the Jerusalem Cinematheque a programme highlighting "Palestinian Women, from the First Intifada⁵ until Today". It included a collection of video segments, all shot by women videographers – including the video by Mai Da'na from that night in February of 2015.

Screening the reality of life on one side of the Green Line⁶ on the other side of that line is a simple enough act. But what has thus crossed the line was much more than only those images from Hebron.

This is what transpired following the screening: The Israeli Ministry of Culture very publicly wrote the Ministry of Finance, demanding "that funding for the Jerusalem Cinematheque be re-examined in light of its screening of films by B'Tselem volunteers." The legal basis for such a demand became law⁷ in Israel back in 2011, as part of an earlier wave of "anti-democratic" legislation. Six years have since passed, and in recent months, the current Minister of Culture, MK Miriam (Miri) Regev (Likud), is waging a campaign, using her

governmental powers, against artists, screen-writers, theatres – and yes, cinemas – who dare go ahead with events, plays, or films that “incite against Israel”.⁸ According to her interpretation, showing the truth about Israel’s rule over Palestinians must be “incitement”.⁹ The minister wishes to exercise what she calls, in true Orwellian fashion, “freedom of funding”:¹⁰ her freedom *not* to fund artistic speech that deals with that constant state of exception in effect just a few kilometres away from the Jerusalem Cinematheque.

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Citizens – especially Jewish citizens – living on this side of the Green Line, are generally used to exercising their free speech rights. But in occupied Palestine, free speech has been a non-option since August 1967, two months after the occupation began. OC Central Command Order No. 101 – “Order Regarding Prohibition of Incitement and Hostile Propaganda Actions”¹¹ – has been in effect, with several amendments, ever since. Its point of departure is that Palestinian residents have no inherent freedom of protest or freedom of expression, and that even non-violent resistance and civil protest involving peaceful assembly are forbidden. For fifty years, we have been defining almost any Palestinian opposition to Israel’s occupation regime as incitement, while denying basic freedoms such as free speech. Is anyone really surprised that now a screening of a video collection focusing on the occupation regime is framed as – of course – incitement, and that the freedom of speech of Israelis is in question?

Indeed, space for an open society is shrinking in Israel. No longer can it be taken for granted that civil society non-governmental organisations (NGOs) in Israel proper, west of the Green Line, can function freely. One cannot deny the ironic, bitter, sense of justice in this process, that brings Israeli and Palestinian NGOs – and Israeli and Palestinian activists – closer: not because the civil space is widening in occupied Palestine, but because it is shrinking in occupying Israel.

Of course, for the millions of Palestinians we have been ruling for decades, the democratic space collapsed a long time ago. We have ruled millions of non-citizens with no political rights by military decrees for decades, and in that context, the casual vulnerability of Palestinian homes is just one example of how bare life can be, in a place where Israel controls with impunity¹² through administrative, arbitrary decisions people’s ability to travel abroad,¹³ receive a work permit,¹⁴ get married,¹⁵ have access to their land,¹⁶ build a home¹⁷ – to name just a few examples.¹⁸

But at the doorstep of this abyss, barely a few kilometres away, the pretense of a western democracy was alive and well. As recently as 2008, for example, Israel’s National Report,¹⁹ submitted as part of the state’s *Universal Periodic Review*, proudly stated that “Israel has an open, vibrant, and pluralistic civil society, actively engaged in raising priorities and challenging the Government’s conduct. The Government is engaged in an ongoing dialogue with numerous NGOs [...]”.

Fast forward less than a decade to current day Israel, where equating NGOs opposing the occupation with treasonous servants of suspect foreign powers has become routine, from the Prime Minister down. In this current reality, an ongoing cocktail of intimidation, infiltration, and legislation is the new normal.²⁰ The need to maintain the appearance of democratic norms has now been mostly set aside, replaced by a political appetite to demonstrate to a cheering public that the government is after the fifth column.

Thus, the efforts led by the Minister of Culture are only a few out of many likeminded initiatives. Together, these spell out the shrinking of space for free speech and for civil society. It is a process that took place mostly in the last seven years in Israel, moving forward in tandem with the likes of Hungary, India, and Turkey. This rising authoritarianism in Jerusalem can be spotted even from as far as Berlin: in June 2017 a spokesperson for the German Ministry of Foreign Affairs said that Hungary, by passing a law that bans foreign funding to NGOs and civil society groups, has thus joined “the ranks of countries like Russia, China and Israel, which obviously regard the funding of NGOs, of civil society efforts, by donors from abroad as a hostile or at least an unfriendly act.”²¹ A few months later, Israel was featured in the Secretary-General’s annual “reprisals report” on *Cooperation with the United Nations, its representatives and mechanisms in the field of human rights*.²²

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Of all the various efforts to act against Israeli human rights NGOs, the most steadfast one has been to try and curtail access to international funding. But the government cannot simply pass a law to which an addendum with the list of undesirable groups will be attached – that would be too blunt. It took several years and a few legislative iterations, until an administrative criterion which would apply almost exclusively to the, well, undesirables was identified: a relatively high percentage of “foreign state-entity funding”. Some context: international funding is common and extensive in Israel, across the spectrum, including the Israeli army (lavishly supported by the US), research programmes (with unique access to EU funding), hospitals, universities, schools, museums, welfare NGOs, settler groups, human rights organisations and much more. But in the NGO sector, foreign embassies, United Nations grants and the likes quite obviously tend to invest in promoting human rights, and not in the advancement of the occupation. Hence by looking at an NGO’s relative funding from such sources, one can *de-facto* produce a list of the NGOs the government is after, without having to resort to listing them on an individual basis.

The above logic was at the core of the most recent amendment to Israel’s not-for-profit law. According to an amendment passed in 2016,²³ beginning in 2018 (based on 2017 fiscal data), groups which receive 50 percent or more of their funding from “foreign state-entity” sources will practically need to self-identify as foreign agent NGOs. The amendment was initially marketed as simply “advancing transparency”²⁴ – but since the law was passed, it serves as the staging ground for further legislation,²⁵ completely removed

from “transparency”, but rather quite transparently about yet more public shaming and administrative limitations and burdens against human rights NGOs.

The above amendment (known as the “Transparency Law”) does not limit access to foreign funding. However, in June 2017 the Prime Minister publicly confirmed that he has tasked Minister Yariv Levin with formulating a new law that would block foreign governmental funding to Israeli non-profits, in an effort explicitly targeting human rights groups opposing the occupation.²⁶ Quoted in Ha’aretz, Minister Levin explained the background for the change in the government’s position, from the law the government promoted only a year earlier, which did *not* limit foreign governmental funding, to now wishing to block such funding through new legislation. Levin explained how the new US administration makes it possible: “It wouldn’t have made it through in the period of the Obama administration. They were very uneasy about the bill. The present administration has no problem with it.”²⁷

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Palestinians cannot easily cross the Green Line and enter Israel: special permits are needed for work, medical care, or other reasons. Authoritarian thinking, however, needs no such permit, a green light from the powers that matter will suffice. Similarly, the winds blowing from Washington DC appear to be felt on both sides of the Green Line. A few weeks following Minister Levin, it was Defence Minister Lieberman who used almost identical language – but now in the context of actions on the other side of the Green Line, namely the possibility to go ahead with demolitions of *entire* Palestinian villages: Khan al-Ahmar east of Jerusalem, and Susiya in the South Hebron Hills.²⁸

Mai Da’na’s footage also crossed the Green Line. Its modest screening before 100 or so spectators was sufficient – in 2017 Israel – to trigger a McCarthy-style governmental review of one of Israel’s most established cultural institutions. For, to enable further oppression of Palestinians, stronger silencing of Israelis is now deemed necessary. Our fates are intertwined.

Similarly, the international mechanisms that somewhat delayed these developments are intertwined. Not only are many international actors used to taking their cue from Washington – now under Trump – but also Israel’s leadership is currently empowered by the favourable winds blowing from the rising authoritarian powers across the globe. Facing these circumstances, there are no foolproof solutions, and the outlook is often bleak.

As rightfully worrying as these negative developments inside Israel are, they are not the reasons why Israel cannot be considered a democracy. For that, we need not focus on what has transpired in recent years, but open our eyes to the past half century. Israel’s rule over millions of Palestinians with no political rights has been in effect for all of Israel’s existence as an independent state, except the first 19 years. That is why Israel is not a democracy, and indeed has not been one for many a decade already. We live in a one-state reality between

the Jordan River and the Mediterranean Sea, a state whose constant state of exception is one of masters and subjects, of millions with political rights – and the millions without.

Yet, here is what I genuinely embrace: yes, the authoritarian global realignment is real. If you have any doubts, just listen to Netanyahu, Trump, Modi, Orbán,²⁹ and the many other contenders to join their ranks. But it is not preordained that this will be the *only* global realignment witnessed by humanity in the 21st century. The Universal Declaration of Human Rights is too precious an achievement, won after unimaginable human suffering. We know what is at stake. We might as well stand together so that “the equal and inalienable rights of all members of the human family” are realised, so that “the foundation of freedom, justice and peace in the world” will be as solid as it must be. There are no assurances of success: only the certainty that it is a future worth fighting for.

NOTES

1 • “An officer or a soldier so authorized in general or in a specific instance is authorized to enter, at any time, any place, vehicle, boat or airplane for which there may be reason to suspect use, or were used for any purpose which harms public peace, security of the IDF forces, the maintenance of public order, or for purposes of uprising, revolt or riots, or there is reason to suspect the presence there of a person who violated this order, or goods, objects, animals, documents to be seized in accordance with this order, and they are authorized to search any place, vehicle, boat or airplane and any person on them or coming out of them.” “Order Regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009,” No Legal Frontiers, November 1, 2009, accessed November 27, 2017, Section 67, nolegalfrontiers.org/military-orders/mil019ed2.html?lang=en.

2 • See Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005): 1-112, for an exploration of how supposed times of crisis or states of emergency are used by governments to override rights.

3 • The video can be viewed on BTselem’s YouTube channel: “Soldiers Enter Hebron Homes at Night, Order to Wake Children, 24/02/15,” YouTube video, 3:51, posted by BTselem, March 29, 2015, www.youtube.com/watch?v=oHRj-GF5dwg.

4 • Since 2007, BTselem’s camera project has been distributing video cameras and providing training to Palestinian volunteers in the West Bank. The project has become one of the most successful of its kind globally. For more information and background, examples of video footage and more, please visit “BTselem’s Camera Project,” BTselem, 2017, accessed November 27, 2017, www.BTselem.org/video/cdp_background.

5 • The first Intifada, a Palestinian uprising against the Israeli occupation, started in December 1987. The second Intifada started in September 2000.

6 • The Green Line, Israel’s 1949 Armistice border

with its neighbours, is often referred to as the pre-1967 borders. Lands captured in 1967 by Israel beyond the Green Line are the Occupied Territories.

7 • “Budget Foundations Law (Amendment 40) – Reducing Budget or Support for Activity Contrary to the Principles of the State”. For additional background see: “The Nakba Law,” The Association for Civil Rights in Israel, November 9, 2011, accessed November 27, 2017, www.acri.org.il/en/knesset/nakba-law/.

8 • In early 2016 Regev tried to advance a “loyalty in culture” bill. That legislation was later shelved, in exchange for a commitment by the Ministry of Finance to more proactively enforce the abovementioned Amendment 40. Regev herself continued to invoke accusations against artists for disloyalty, incitement, or both, such as on September 2017 when she demanded the police to open an investigation against the Jaffa Theatre, for holding a solidarity event with Palestinian poet Daren Tatour. Tatour, an Israeli citizen, is under house arrest since late 2015. She is facing incitement charges, focusing on a poem she published, titled “*Qawem Ya Shaabi Qawemahum*” (Resist my people, resist them).

9 • For instance, Regev in September 2017: “It’s outrageous that Israeli artists contribute to the incitement of the young generation against the most moral army in the world by spreading lies in the guise of art.”

10 • Governmental funding for cultural institutions, mostly through the Ministry of Culture, is supposed to be independent of political bias. In January 2016 Regev said that she “will not allow the subversion of the foundations of the state, especially when it is government-funded.”

11 • “Israel Defense Forces Order No. 101 Order Regarding Prohibition of Incitement and Hostile Propaganda Actions,” BTselem, August 27, 1967, accessed November 27, 2017,

www.BTselem.org/download/19670827_order_regarding_prohibition_of_incitement_and_hostile_propaganda.pdf.

12 • See these three BTselem reports: "The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism," BTselem, May 2016, accessed November 27, 2017, www.BTselem.org/publications/summaries/201605_occupations_fig_leaf; "Whitewash Protocol: The So-Called Investigation of Operation Protective Edge," BTselem, September 2016, accessed November 27, 2017, www.BTselem.org/publications/summaries/201609_whitewash_protocol; and, "Getting Off Scot-Free: Israel's Refusal to Compensate Palestinians for Damages Caused by Its Security Forces," BTselem, March 2017, accessed November 27, 2017, http://www.BTselem.org/publications/summaries/201703_getting_off_scot_free.

13 • "Israel Bars Thousands of Palestinians from Traveling Abroad; Many Other Don't Even Bother to Make the Attempt," BTselem, May 15, 2017, accessed November 27, 2017, www.BTselem.org/freedom_of_movement/20170515_thousands_of_palestinians_barred_from_traveling_abroad.

14 • "Crossing the Line: Violation of the Rights of Palestinians in Israel without a Permit," BTselem, March 2007, accessed November 27, 2017, www.BTselem.org/publications/summaries/200703_crossing_the_line. Also see "Israel Deliberately Forces Inhuman Conditions on Palestinians Working in the Country by Permit", BTselem, July 31, 2016, accessed November 27, 2017, www.BTselem.org/workers/20160731_inhuman_conditions_in_checkpoints.

15 • See joint report "So Near and Yet So Far: Implications of Israeli-Imposed Seclusion of Gaza Strip on Palestinians' Right to Family Life," Hamoked and BTselem, January 2014, accessed November 27, 2017, www.BTselem.org/publications/summaries/201401_so_near_and_yet_so_far.

16 • See reports: "Access Denied: Israeli Measures to Deny Palestinians Access to Land Around Settlements", BTselem, September 2008, accessed

November 27, 2017, www.BTselem.org/publications/summaries/200809_access_denied; and, "Expel and Exploit: The Israeli Practice of Taking over Rural Palestinian Land," BTselem, December 2016, accessed November 27, 2017, www.BTselem.org/publications/summaries/201612_expel_and_exploit.

17 • "Restrictions on Palestinian Planning and Construction in Area C," BTselem, October 30, 2013, accessed November 27, 2017, www.BTselem.org/planning_and_building/restrictions_on_palestinian_planning_and_building.

18 • For a broader perspective, see the author's address on behalf of BTselem in a special discussion about settlements at the United Nations Security Council, "Hagai El-Ad's Address in a Special Discussion About Settlements at the United Nations Security Council," BTselem, October 14, 2016, accessed November 27, 2017, www.BTselem.org/settlements/20161014_security_council_address.

19 • "Israel," UPR Info, December 2008, accessed November 27, 2017, www.upr-info.org/en/review/Israel/Session-03--December-2008/National-report.

20 • See "Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Michael Lynk," A/HRC/34/70, Human Rights Council, March 16, 2017, accessed November 27, 2017, www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session34/Documents/A_HRC_34_70_AUV.docx, which highlighted an increasingly virulent environment for human rights defenders working on issues related to the occupied territories.

21 • Georgi Gotev, "Germany Voices 'Great Concern' Over Hungarian NGO Law." Euractiv, June 15, 2017, accessed November 27, 2017, www.euractiv.com/section/central-europe/news/germany-voices-great-concern-over-hungary-ngo-law/.

22 • "Cooperation with the United Nations, its Representatives and Mechanisms in the Field of Human Rights," Human Rights Council, A/HRC/36/31, September 15, 2017, accessed November 27, 2017, www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session36/Documents/A_

HRC_36_31.docx; Barak Ravid, "Netanyahu Slams Human Rights NGO B'Tselem for Joining 'Chorus of Slander' Against Israel." HAARETZ, October 16, 2016, accessed November 27, 2017, www.haaretz.com/israel-news/1.747653; Jonathan Lis, "Coalition Chairman Threatens to Strip Citizenship of Israeli Activist Who Criticized Occupation at UN." HAARETZ, October 21, 2016, accessed November 27, 2017, www.haaretz.com/israel-news/1.748609.

23 • "Law Requiring Disclosure by NGOs Supported by Foreign Governmental Entities (Amended) – 2016," The Association for Civil Rights in Israel, 2016, accessed November 27, 2017, <https://www.acri.org.il/en/wp-content/uploads/2016/07/Summary-of-NGO-Law.pdf>. For additional background see: "Update – NGO Law Approved by the Knesset," The Association for Civil Rights in Israel, July 11, 2016, accessed November 27, 2017, www.acri.org.il/en/2016/07/11/update-ngo-law-passed/.

24 • Transparency has never been the genuine issue, as all donations of NIS 20,000 (approx. US\$5,700) and above made to Israeli NGOs are publicly reported on an annual basis, as required by law. Further, since 2011, donations from foreign state-entity sources are additionally reported on a *quarterly* basis: "Proposed Bill on Disclosure Requirements for Recipients of Support from a Foreign State Entity, 5770-2010," The Association for Civil Rights in Israel, 2014, accessed November 27, 2017, www.acri.org.il/pdf/bill5770.pdf.

25 • See: Hagai El-Ad, "The Only Democracy... Right." Jerusalem Post, March 30, 2017, accessed November 27, 2017, www.jpost.com/Opinion/The-only-democracy-right-485702.

26 • "Israel to Develop Law Limiting Foreign Govt Funding to Left-wing NGOs," i24NEWS, June 12, 2017, accessed November 27, 2017, [\[develop-law-limiting-foreign-gov-t-funding-to-left-wing-ngos.\]\(#\)](http://www.i24news.tv/en/news/israel/147706-170612-israel-to-</p>
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27 • Yossi Verter, "Why Netanyahu Suddenly Renewed His Assault on Human Rights Groups." HAARETZ, June 18, 2017, accessed November 27, 2017, www.haaretz.com/israel-news/.premium-1.796041.

28 • "The Obama administration strongly opposed the eviction, but it appears the Trump administration has been much less involved in the issue", from Yotam Berger, "Israeli Defense Chief Blasts Radical Settler Youth as 'Disturbed Idiots'." HAARETZ, August 29, 2017, accessed November 27, 2017, www.haaretz.com/israel-news/1.809627.

29 • Krisztina Than, "Hungary, Israel Seek Closer Ties as Orban Campaign Unnerves Jews." Reuters, July 17, 2017, accessed November 27, 2017, www.reuters.com/article/us-hungary-israel/hungary-israel-seek-closer-ties-as-orban-campaign-unnerves-jews-idUSKBN1A214O. In July 2017, in a meeting in Budapest with the Prime Ministers of Hungary, the Czech Republic, Poland and Slovakia, Prime Minister Netanyahu said: "We have a peculiar situation: The European Union is the only association of countries in the world that conditions the relations with Israel... on political conditions... It's crazy. It's actually crazy... We have a special relationship with China. And they don't care. They don't care about the political issues." Hungarian Prime Minister Viktor Orbán responded: "Mr. Netanyahu, the European Union is even more unique. The EU places conditions on the ones already inside the EU, not only the countries on the outside", from: Barak Ravid, "Netanyahu Launches Blistering Attack on EU: Their Behavior Toward Israel Is Crazy." HAARETZ, July 19, 2017, accessed November 27, 2017, www.haaretz.com/israel-news/1.802143.



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