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THE HABIBI LIBEL TRIAL: DEFAMATION AND THE HIDDEN-COMMUNITY BASIS OF CRIMINAL LAW†

Does the link between national community and criminal law reflect a practical limitation on the jurisdiction of domestic courts or is there a more intrinsic relation between the two? This question stands at the centre of the ongoing debate over the principle of universal jurisdiction – the ability of third-party national courts to adjudicate criminal cases that involve communities outside their territories. This article suggests that we can find the key for understanding the community basis of criminal law in the neighbouring field of libel law. At its centre stands the libel trial of Emile Habibi against the editors of Al-Sinara *that took place in 1988–90. Libel law provides an interesting arena for exploring the community component of criminal law, as it takes its guidelines for recognizing defamation from an 'imagined community.' Habibi, an Arab citizen of Israel, a writer, and a political leader, was accused by the editors of* Al-Sinara *of having collaborated with the Zionist forces during the war of 1948 and having thereby contributed to the Palestinian* Nakba *(the catastrophe). Habibi sued in an Israeli court, arguing that such accusations amounted to defamation. The case raises several fundamental issues: can the story of the Palestinian* Nakba *of 1948 be told in an Israeli court? what are the normative implications of recognizing this narrative? and more broadly, are national courts capable of distancing themselves from the demands of 'heroic history' and recounting the perspective of the defeated? As the article shows, the legal process offers moments of subversion and resistance and invites the court to acknowledge the ramifications of adhering to the hegemonic Zionist narrative of the 1948 war.*

Keywords: criminal law/community/defamation/*nakba*/law and literature/Emile Habibi/1948 war/collaboration/citizenship/multi-culturalism/minority groups/identity politics

One of the communist leaders asked me if we were collaborators. I said, no, we were not collaborators. But from the point of view of someone on the outside, especially if he is an Arab, it is legitimate to think that we were collaborators. Also, Jews from the far left would sometimes accuse us of being collaborators.

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But collaboration was the only way to survive in our land. – Emile Habibi, *I Stayed in Haifa*[1]

1 *Introduction*

The boundaries of modern criminal law have traditionally been delineated by the principle of territorial jurisdiction. This principle expresses the idea that criminal law is the symbol of state sovereignty and hence its legitimacy depends on its connection to a political community of citizens. In the age of globalization, this link between a political community and criminal law has become the focal point of an ongoing debate, relating to the attempts of third-party national courts to adjudicate criminal cases that involve communities outside their territorial jurisdiction. This question also arises when national courts identified with one party to a violent political conflict use their criminal law against the other party in a 'war against terror.' These developments oblige us to rethink the community basis of criminal law. Does the territorial principle reflect a practical limitation on criminal law or does it point to a fundamental principle of legitimacy that is now being eroded? This question, although fundamental to the practice of criminal law, has not received an adequate answer in the literature. Most writings focus on principles of international law while neglecting to examine the community basis of criminal law.[2] Within criminal law litigation the question is relegated to the preliminary stage of establishing the court's formal jurisdiction. The more fundamental question concerning the court's authority over a criminal defendant as stemming from a shared political community is usually not raised.[3]

1 (Tel Aviv, Israel: Transfax Film *Productions*, 1997) [Habibi, *I Stayed in Haifa*].

2 Stephen Macedo, ed, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia, PA: University of Pennsylvania Press, 2004); John Borneman, ed, *The Case of Ariel Sharon and the Fate of Universal Jurisdiction* (Princeton, NJ: Princeton Institute for International and Regional Studies, 2004).

3 A good example of this tendency is David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (New York: Oxford University Press, 2010) 569 [Luban]. This view is challenged by Antony Duff, who views the criminal trial as a dialogic process of calling the defendant to account before a community of fellow citizens. According to Duff's theory, the court's authority over a criminal defendant is a separate issue from the substantive issue of the defendant's guilt or the procedural issue about the fairness of the trial. Criminal law, he argues, is based on the idea of 'public wrongs,' which requires the drawing of the boundaries of the normative political community that calls the criminal defendant to account. See Antony Duff, 'Authority and Responsibility in International Criminal Law' in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (New York: Oxford University Press, 2010) 589 [Duff, 'Authority and Responsibility]. For elaboration, see Antony Duff et al, eds, *The Trial on Trial III: Towards a Normative*

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Criminal law cases and constitutional law cases are usually regarded as separate fields, at both the substantive and institutional levels (in Israel the former is decided by the ordinary courts and the latter by the Supreme Court sitting as the High Court of Justice). The general view is that there are only narrow points of convergence between the two fields – with regard to the constitutional rights of the defendant and, recently, also with regard to the rights of the victim.[4] However, if we consider the role of each in delineating the boundaries of the political community, the convergence can be seen as running much deeper. There is a deeper layer of constitutionalism that is affected by criminal law, which I call the question of 'boundary drawing' of the imagined normative community. Today, this question is again being raised in the debate about the legitimacy of universal jurisdiction over crimes against humanity and other crimes.[5]

Boundary drawing and the choices of judges in this regard are much more apparent in constitutional law cases, as demonstrated by a recent decision of the Israeli Supreme Court (May 2006) regarding the law of citizenship and the denial of the right of family unification for Israeli citizens who are married to Palestinians from the Occupied Territories.[6] This process of boundary drawing is not explicit in criminal law adjudication. Since modern criminal law is connected to the nation-state, it presupposes the existence of a political community over which it has authority (the monopoly of violence). It assumes that the issue of effective sovereignty has been settled. Challenges to the authority of the court are therefore relegated to a preliminary stage of the criminal trial involving questions of jurisdiction, which, it is assumed, can be properly answered

Theory of the Criminal Trial, (Portland: Hart, 2007); see also RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Portland, OR: Hart, 2007). I have examined the changing conception of community entailed by the rise of universal jurisdiction in Leora Bilsky, 'The Eichmann Trial and the Legacy of Jurisdiction' in Seyla Benhabib, ed, *Politics in Dark Times: Encounters with Hannah Arendt* (New York: Cambridge University Press, 2010) 198.

4 Douglas E Beloof, *Victims in Criminal Procedure*, 1st ed (Durham, NC: Carolina Academic Press, 1999).

5 See text accompanying note 3 supra.

6 HCJ 7052/03, *Adalah, The Legal Center for Arab Minority Rights in* Israel v Minister of Interior, PADOR [Hebrew database for verdicts] 217 (10) 06 (2006). The petitions demanded the annulment of the Citizenship and Entry into Israel Law (Temporary Provision) 5763-2003. A 6-to-5 majority of the Supreme Court approved the law. Justice Cheshin, leading the majority position of Court, focused on the Palestinian spouse, described as a 'foreigner' and as belonging to an enemy state, who therefore did not enjoy a constitutional right to become a member of the Israeli state. Justice Barak, the president of the Court, leading the minority position, focused on the Arab Israeli spouse and the breach of his or her constitutional rights to equality and family life in Israel. In other words, the preliminary decision on how to see the Palestinian – as a foreigner or as belonging to the political community through family ties – largely determined the legal outcome reached by the different justices.

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with the tools supplied by domestic criminal law. This preliminary process is not seen as relevant to the constitutional matter of determining the boundaries of the political community.[7]

However, once the court's authority over the defendant is challenged, we begin to perceive the importance that delineating the boundaries of the normative community has for criminal law. In order to overcome some of the obstacles that obscure the community component of criminal law, I propose to shift the attention to the neighbouring field of libel law.[8] My decision is informed by the unique position of libel law on the border between criminal and private law. I begin with Robert Post's thesis that libel law is about membership in a political community. It begins with a challenge to its rules of civility and ends with an authoritative decision about who is included and who is excluded.[9] In cases where defamation

7 Although it is understood that the very issue of jurisdiction of the court is a constitutional matter, once this is decided by the legislative body, the role of the court is viewed as one of application. My view is that the question of community boundaries cannot be reduced to questions of jurisdiction and it is often this reduction that obscures the constitutional role of the judges conducting criminal trials against alleged terrorists. For elaboration, see Leora Bilsky, 'Strangers Within: The Barghouti and Bishara Criminal Trials' in Austin Sarat, Lawrence Douglas, & Martha Umphrey, eds, *Law and the Stranger* (Stanford, CA: Standford Law Books, 2010) 96; Leora Bilsky, 'Political Criminal Trials in an Age of Terror' (2009) 5 Adalah's Review 9. For the debate in Israel regarding the scope of jurisdiction and its larger implications for the concept of sovereignty, see Yoram Shachar, 'Against Extra-Territorial Application of Criminal Law on National Grounds' (1996) 5 Plilim: Israeli Journal of Criminal Justice 5. See also SZ Feller & Mordechai Kremnitzer, 'Reply to the Article "Against Extra-Territorial Application of Criminal Law on National Grounds" by Y. Shachar' (1996) 5 Plilim: Israeli Journal of Criminal Justice 65. In the United States, see Ronald Dworkin, 'What the Court Really Said,' *The New York Review of Books* 51:13 (12 August 2004) 26, discussing terror trials in the United States: *Rumsfeld v Padilla*, 542 US 426 (2004); *Rasul v Bush*, 542 US 466 (2004); *Hamdi v Rumsfeld*, 542 US 507 (2004). Dworkin recognizes the political aspects of jurisdiction issues and suggests that the jurisdictional rule that aims to discourage 'forum shopping' should apply not only to defendants but also to the government.

8 In Israel, libel law has both civil and criminal applications. In other countries, such as the United States, the possibility of criminal libel prosecutions that existed in the past has been reduced considerably due to constitutional protection of freedom of speech and has become virtually obsolete. The crossing of the boundary between civil and criminal standards of proof and its profound impact on the imagined normative community in Israel was raised during an early criminal libel trial concerning the accusation that Zionist leader Rudolph Kastner had collaborated with the Nazis during negotiations over the fate of the Jews of Hungary; see Cr A 232/55, *Attorney General v Gruenwald*, [1958] 12 PD 2017. For elaboration, see Leora Bilsky, *Transformative Justice: Israeli Identity on Trial* (Ann Arbor, MI: University of Michigan Press, 2005) at 19–84.

9 Robert Post, 'The Social Foundation of Defamation Law: Reputation and the Constitution' (1986) 74 Cal L Rev 691 [Post].

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concerns accusations of treason, the role of the court in drawing the boundaries of a political community is particularly salient. Although treason is considered one of the most severe crimes in any criminal law, it is unlikely that the court will be willing to frankly address the community basis of its decision in criminal litigation. But what happens in cases in which the alleged 'treason' is not against the 'state,' as is the normal case in criminal law, but rather against a sub-community whose values might conflict with those upheld by the state? Will the court be frank about its constitutive role in delineating the boundaries of the political community of citizens? This question moves us from the criminal treason trial to the civil libel trial (dealing with allegations of treason). Can the civil court simply acknowledge, as a matter of fact, the existence of a competing normative community or are these also structural limits on the recognition of competing normative communities in private-law litigation? What are these limits? Can they teach us something about the process of drawing the boundary around the normative community in the field of criminal law? By turning to libel litigation we can gain an understanding of the way these normative decisions are not made abstractly but are intimately connected to a process of narration and collective memory. As the late Robert Cover observed, 'No set of legal institutions or prescriptions exists apart from the narrative that locates it and gives it meaning.'[10] In a divided society such as Israel, libel trials provide a fruitful arena for exploring this link between *nomos* and narrative, since the court is called upon to choose between clashing historical narratives. In order to decide whether a publication has the potential to degrade a person in the eyes of the community, the court has to make a preliminary decision according to which communal standards and according to whose narrative the boundaries of the community should be delineated. Thus, the court's deliberations in libel law litigation make explicit what often remains hidden and obscured in criminal law litigation.

This article discusses the libel trial of Emile Habibi against the editors of *Al-Sinara* that took place in 1988.[11] The two clashing narratives that stood at the basis of the controversy concern the 1948 war – a war that founded the State of Israel while at the same time destroying the fabric

10 Robert Cover, '*Nomos* and Narrative' in Martha Minnow, Michael Ryan, & Professor Austin Sarat, eds, *Narrative Violence and the Law: The Essays of Robert Cover* (Ann Arbor, MI: University of Michigan Press, 1992) 95 at 95–6.

11 CC (NZ) 388/88, *Habibi v Mashuur* (1991), IsrDC 51(3) 3 [*Habibi*]. The weekly *Al-Sinara* was founded in Nazereth in 1983. It represented the beginning of a new media era for Arab journalism, one that was autonomous and market-oriented. The old era, which was more ideologically and politically oriented, is represented by newspapers such as the Communist Party's *Al-Ittihad*, founded in 1948. See Amal Jamal, 'Going Outside: Developments in Arab Media in Israel,' *Ha-Ayin Ha-Shvi'it* 70 (January 2008) 28 at 30.

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of the Palestinian Arab community. In 1948, in the midst of the battles between Palestinians and Jews over the future of the land, an arms deal was signed between the Jewish forces and the Czechoslovakian government that played a crucial role in the subsequent Jewish victory. It was this deal that stood at the centre of the libel trial forty years later. Habibi, a prominent Palestinian writer and a member of the Israeli Communist Party (Maki), who served as a member of the Israeli Parliament, the Knesset, for many years, was accused by the editors of the Nazareth-based Arabic newspaper *Al-Sinara* of having been involved in the arms deal.[12] Specifically, he was accused of having collaborated with the Zionist forces in facilitating the deal and having thereby contributed to the disaster of his own people. Habibi sued in an Israeli court, arguing that such accusations amounted to defamation. The judges were thus called upon to decide which communal narrative should determine the meaning of treason and patriotism in Israeli law: the Zionist narrative of a war of independence or the Palestinian story of the *nakba* (catastrophe, the destruction of the Palestinian community).[13] In other words, the court was called upon to draw the boundaries of the Israeli political community in relation to the founding war of 1948.

II *Back to 1948*

This case raises two fundamental issues: can the story of the Palestinian *nakba* of 1948 be told in an Israeli court? And what are the normative implications of recognizing this narrative? The State of Israel was born in war. This was a war between the Jews of Mandatory Palestine and the Arab nations surrounding them, and also a civil war between Jewish and Arab inhabitants of Palestine. Israel's founding document, the declaration of independence, reflects this fact. While characterizing the state as a Jewish state, it also refers to the ongoing war between Arabs and Jews and promises equal citizenship to the Arab citizens of Israel.

12 Lutfi Mashuur, 'It Is Not Just a Matter of Senility,' *Al-Sinara* (8 April 1988) [in Arabic] [Mashuur].

13 The term '*al-Nakba*' was first applied to the Arab defeat of 1948 by the Syrian historian Constantin Zureij in his book *Ma'na al-Nakba* (*The Meaning of the Disaster*), published in 1948. One of the first to use the term *al Nakba* was 'Arif-al-'Arif in his monumental book on the events of the war and its aftermath; see 'Arif-al-'Arif, *Al-Nakba*, (Sidon and Beirut: Al-Maktaba al-' Asriya, 1960) vol. 6. Since the Six Day War in 1967, the term has become the official Palestinian designation for the 1948 war, and Nakba Day is commemorated every year on 15 May, the anniversary of the creation of the State of Israel. The term became familiar to the Israeli public at large only in the 1990s. See Ronit Lentin, 'The Contested Memory of Dispossession: Commemorizing the Palestinian Nakba in Israel' in Ronit Lentin, ed, *Thinking Palestine* (New York: Zed Books, 2008) 206.

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Israel did not adopt a formal constitution in which the borders of the state and the relations between Arabs and Jews within these borders were defined, although during the 1990s, the Knesset enacted several basic laws that formally defined the State of Israel as 'Jewish and democratic.'[14] However, this formula did not resolve the issue of the clashing narratives about its foundation, nor did it help clarify the normative implication of such a clash for delineating the boundaries of the political community.

Israeli political scientist Yoav Peled and jurist Avigdor Feldman have argued that the Israeli political system creates two parallel layers of citizenship: Republican for Jews and Liberal for Palestinian.[15] This, in turn, shapes the 'legal subject' perceived by the courts: a 'Jewish subject' located in history and in territory and a 'Palestinian subject' whose complaint is individualized and decontextualized.[16] Feldman relies on Lyotard's concept of the *differend*[17] to explain why under such political–legal conditions the court is unable to give due recognition to the two narratives. Acknowledging one narrative of the 1948 war as a war of independence necessarily silences the other narrative that depicts it as a national disaster. According to this argument, change can only be achieved outside the court through a constitutional reform that amends Israel's basic laws and changes its constitutional definition (as 'Jewish and democratic') to be more inclusive of Arab citizens as equals.

The clash of narratives is not only a question of historiography. Recently, a proposed law, popularly known as the '*nakba* law' has brought this dilemma to the fore. It states that any public demonstration of mourning during Israel's Independence Day will be considered a felony punishable by up to three years of imprisonment.[18] The fear of the Palestinian counter-memory is apparently so strong that the law

14 *Basic Law: Human Dignity and Liberty* 5752-1992, SH No 1391, art 1(a): 'The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as *a Jewish and democratic* state' [emphasis added].

15 Yoav Peled, 'Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens and the Jewish State' (1992) 86 American Political Science Review 432; Gershon Shafir & Yoav Peled, *Being Israeli: The Dynamics of Multiple Citizenship* (Cambridge, UK: Cambridge University Press, 2002).

16 Avigdor Feldman, 'Jewish and Democratic State: Discourse and Space in the Court of Justice' in Dafna Barak-Erez, ed, *A Jewish and Democratic State* (Tel Aviv: Ramot Press, 1996) 261 [in Hebrew], using the example of the court decision in the case of HCJ 114/78, *Burkan v Ministry of Finance* (1978), 32(2) PD 800.

17 According to Lyotard, the lack of the means of representing ones' victimization in the public-legal discourse constitutes a state of *differend*; see Jean-François Lyotard, *The Differend: Phrases in Dispute*, translated by Georges Van Den Abbeele (Minneapolis: University of Minnesota Press, 1988).

18 Draft Bill amending the Yom Ha-Atzma'ut Law [Independence Day Law], No 458 (2009) (Isr).

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does not even mention the word *nakba* and fails to elaborate the reasons for such mourning. During the legislative process the draft law was altered, replacing a criminal sanction with a civil sanction.[19] Notwithstanding the public outcry over the new law, the rationale behind it is not new to Israeli courts. The judgments of the Israeli Supreme Court sitting as the High Court of Justice demonstrate that the problem exists even in landmark cases in which the Court strongly defended the rights of Palestinian citizens against discriminatory policies. A good example is the celebrated *Ka'adan* decision in which the Israeli court protected the right of a Palestinian citizen to buy a house in a communal Jewish village in the Galilee.[20] This decision is viewed by many as Israel's *Brown v Board of Education*[21] desegregation case. However, despite its historical significance, the Court's recognition of the plaintiffs' rights was facilitated by the decision of the plaintiffs' attorneys not to elaborate the Palestinian counter-narrative.[22] Chief Justice Barak adopted a 'future-oriented' approach under which the plaintiff is encouraged to exclude the story of the *nakba* voluntarily and not claim its continuing influence in areas such as unequal land distribution in Israel. This approach allows the Court to amend discriminatory practices only on an individualized basis. The way forward is through legally sanctioned amnesia, reminiscent of the approach advocated by Israeli intellectual Yehuda Elkana 'in favor of forgetting.'[23]

19 Draft Bill amending the Yesodot Ha-Taktziv Law [Budgetary Principles Law], No 1403 (2009) (Isr). The suggested amendment prohibits public bodies working on a public budget to participate in activities that (1) negate the existence of the state of Israel as the state of the Jewish people; (2) negate the democratic character of the State. The finance minister can withhold budgets to public bodies that disobey the prohibition. The explanation to the draft law adds that the sanction will be directed at public bodies that either organize or finance activities which may 'undermine the foundations of the State of Israel or contradict its values.'

20 See HCJ 6698/95, *Ka'adan v Israel Land Administration* (1995), 4(1) PD 258. This decision changed a practice of many years according to which the State of Israel, through the Israel Lands Administration, allocated lands to the Jewish Agency for Israel, which in turn, restricted their sale to Jews only. The Court held that this policy constituted unlawful discrimination on the basis of nationality. It further held that the fact that the settlement was built through the Jewish Agency for Israel (and not directly by the state) could not legitimize such discrimination.

21 347 US 483 (1954). For further investigation about the effect of the *Brown* decision on state policies of segregation, see Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 1991).

22 For changes during the 1990s in the willingness of members of the Arab public to turn to the Israeli court in their struggle for equal citizenship and for the dilemma of legitimizing the Israeli legal system, see Gad Barzilai, *Communities and Law: Politics and Cultures of Legal Identities* (Ann Arbor, MI: University of Michigan Press, 2003) at 134–43.

23 Yehuda Elkana, 'Bi-zkhut ha-shikhehah [In Favor of Forgetting],' *Ha-Aretz* (2 March 1988) 13.

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Can forgetting be reconciled with the demands of justice, given that courts, under common-law tradition, are mnemonic institutions par excellence? For example, what place can the Palestinian counter-memory of the 1948 war have in an Israeli court? Are national courts, which are committed to sustaining faith in the national project, capable of distancing themselves from the demands of 'heroic history' (of wars won, successful revolutions) and tell the story from the point of view of the defeated?[24]

I shall consider these larger questions through a close examination of the libel trial of Emile Habibi (1988–9).[25] I turn to civil litigation even though the demands of national history are stronger in constitutional and criminal law. However, it is precisely in those two areas of public law that the reluctance of the court to acknowledge its constitutive role in delineating the boundaries of the normative community is evident. In contrast, in the field of civil litigation, we can expect to find greater openness to counter-narratives, to moments of resistance to and rupture of the hegemonic story. Unlike public litigation, in which one party is always the state, in civil litigation the parties are private individuals and the court is expected to be a neutral umpire over the dispute. In the libel trial of Habibi, both parties were Arab citizens of Israel[26] and it was they who narrated the two clashing histories of 1948. Although we cannot expect to find a coherent counter-memory of the *nakba* in such a setting, the legal process, which offers moments of subversion, irony, and resistance, invites the court to acknowledge the counter-narrative about the foundation of the state from the perspective of a minority group. This dynamic can shed new light on our understanding of the community basis of law. It reveals the role of the trial in shaping the communities'

24 The philosophical dimensions of this problem are elaborated by Jacques Derrida, who argues that a 'founding violence,' the violence of war and revolutions that constitutes many modern nation-states, is structurally repressed by the nation-state, since it remains beyond or before the law. It is an a-legal moment. Derrida explores how developments in international law that try to pierce the shield of sovereignty and to criminalize war crimes, genocide, and crimes against humanity are attempts to end this structure of silence and repression; see Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' (1990) 11 Cardozo L Rev 919 at 920.

25 For the Habibi district court case, see *Habibi*, supra note 11; for the Supreme Court appeal, see CA 809/89, *Mashuur v Habibi* (1992), 41(1) PD 1 [*Mashuur v Habibi*].

26 As I explain below, libel litigation is often the field where parties try to police the breach of national narratives and memories. See Ilan Pappe, 'The Tantura Case in Israel: The Katz Research and Trial' (2001) 30:3 Journal of Palestine Studies 19. Compare also the libel case against Muhammad Bakri – CC (TA) 6053/08, *Azuri v Ben-Nathan* [2009], PADOR [Hebrew Database for verdicts] 270 (39) 09 (2009) – regarding his film *Jenin Jenin*, which provides a contested version about war crimes allegedly committed by the IDF in Jenin during 2000.

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boundaries and hence as an important location for change, resistance, and challenge by minority groups.

III *The litigation*

On 8 April 1988, *Al-Sinara* published a fierce attack on Emile Habibi in an article by its editor, Lutfi Mashuur, titled, 'It Is Not Just a Matter of Senility.' Among others, it accused him of having accompanied Shmuel Mikunis, a Jewish fellow member of the Israeli Communist Party, on an 'exciting national mission' to Czechoslovakia in 1948 to purchase weapons for the young state of Israel. Habibi brought a libel action against the editors of *Al-Sinara* in the district court of Nazareth asking the court to declare that this and other statements in the article amounted to defamation. At the core of this trial was the issue of collaboration. Who should be considered a collaborator? According to which normative standard should his conduct be evaluated? What should be the relevant community for determining such questions? To decide these questions, the Israeli court was asked to go back to the foundational moment of the State of Israel, the war of 1948, and to look at it from the perspective of the defeated Palestinians. The trial therefore brought to the fore the clashing historical narratives in a deeply divided society.

In deciding the substantive issue of whether the publication had the potential to degrade the person in the eyes of the community, the court had to make an initial decision according to which communal standards the dispute should be resolved. When the defamation concerns acts of purported collaboration with state authorities by a member of the defeated community, there is a fundamental tension between the form of the trial (the appeal to state courts to validate one's dignity as a non-collaborator) and the substantive claim (of non-collaboration with state authorities). Thus, it is not clear why a libel suit concerning the accusation of 'collaboration' should be brought to the Israeli court at all. Even if the court accepts the contentions of the plaintiff and declares that accusing an Arab citizen of collaborating with Israeli state authorities amounts to defamation, what moral status can this legal decision enjoy in the Arab-Israeli community? Does not the very fact of the legal victory provide the ultimate 'proof' of the plaintiff's 'traitorous behavior'?[27] As I shall show, the answer given by Habibi in his court testimony remains unsatisfactory. This question will accompany us in navigating our way between the different layers of identity and communal membership that were gradually exposed in the trial.

27 Compare Daniel More, 'Informers, Defamation and Public Policy' (1989) 19 Ga J Int'l & Comp L 503 at 527–30, discussing a prior libel trial of defamation brought by a Palestinian to the Israeli courts: CA 466/83, *Shaha v Dardiryan* (1986), 39(4) PD 734.

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IV *Methodology*

We can view the libel trial as providing a forum for airing alternative, even subversive narratives by minority groups, for exposing the 'hidden transcripts' of the group and relating history from the point of view of the defeated, and for challenging the normative boundaries of the community as revealed in the court's judgments. The danger is that the libel trial, which tends to paint issues in black and white, will obscure the complicated issue of collaboration, which by its very nature belongs to the 'grey zone' where distinctions between oppressors and oppressed become blurred.[28] In order to confront these difficulties, I adopt an approach that views the trial as performance.[29] This means looking beyond the judgment of the court, beyond the legal texts, and investigating the trial as event. In this case, I seek to study the interaction that took place among litigants, witnesses, and judges in their attempt to speak about Arab collaboration in the context of the 1948 war, in an Israeli court of law. This method allows me to explore the dynamics of power and subversion as they take place in a court of law. Central to this approach is the understanding that the legal forum is never neutral. Entering it and obeying its language rules changes the meaning of the words and the actions of the participants. The trial provides a stage for the re-enactment of acts of collaboration that took place years earlier, outside the courtroom, in obscurity. However, this re-enactment is never identical to actions in the social world. It takes place on a public stage, in an adversarial context, controlled by strict rules of procedure. The picture of collaboration that emerges in the trial is twisted and exaggerated, creating moments of parody and even subversion of the founding narrative of the state.

Another methodological decision concerns the treatment of law and literature in this article. Emile Habibi, the plaintiff in the libel trial, was also a famous writer who created the figure of the Arab collaborator in his semi-autobiographical novel, *The Pessoptimist*,[30] which became a point

28 The Italian-Jewish writer Primo Levi, who had been imprisoned in Auschwitz, coined the phrase the 'grey zone' to describe the intentional blurring of the line between victimizer and victimized; see Primo Levi, *The Drowned and the Saved*, translated by Raymond Rosenthal (New York: Vintage International, 1988).

29 Ariela J Gross, *What Blood Won't Tell: History of Race on Trial in America* (Cambridge, MA: Harvard University Press, 2008); Ariela Gross, 'Beyond Black and White: Cultural Approaches to Race and Slavery' (2001) 101 Colum L Rev 640 [Gross, 'Black and White']. As Gross explains, academic studies of performance draw on two quite different discourses, that of theatre, on the one hand, and that of speech-act theory and deconstruction on the other.

30 Emile Habiby, *The Secret Life of Saeed: The Pessoptimist*, translated by Salma Khadra Jayyusi & Trevor LeGassick (London, UK: Zed Books, 1985) [Habiby, *Pessoptimist*]. The book

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of reference for both Arab and Jewish discussions on the subject. The story which starts with the war of 1948 and ends after the war of 1967, records Israel's ruthless treatment of the Palestinian Arabs who endured the transformation of Palestine into the State of Israel. Habibi's anti-hero, Saeed, is a Palestinian refugee who is able to return from Lebanon to Israel, only to witness the expulsion of many other Palestinians. He himself can go back to his hometown, Haifa, because he agrees to serve as a collaborator, as an informer for the Israeli Secret Service. Henceforth he leads a secret life that, he hopes, will allow him to remain safe in his conquered homeland under the protection of the victorious Israelis. Although, as an informer, he does everything he can to satisfy the security agents, he constantly fails in his endeavours. At the end of the novel he finds himself in a mental hospital in Acco.

In a documentary film on his life, Habibi read passages from his novel and related the real-life origins of some of its most memorable episodes.[31] As a Communist Party member of the Knesset, Habibi repeatedly criticized the military rule that Israel imposed on its Arab citizens from 1948 to 1966. Collaboration was the choice of many Arab citizens in the difficult political reality following the 1948 war, and the communists offered a national alternative, one that criticized individual collaborators while upholding a political ideal of Jewish–Palestinian collaboration on the basis of the partition plan of 1947.[32] In his novel, however, Habibi identifies with the figure of the informer–collaborator. In an interview conducted years later, Habibi revealed that it was often his literature that liberated him to tell the 'truth' unconstrained.[33] The article in *Al-Sinara* took advantage of this blurring of boundaries between life and art and drew a direct causal line between Habibi's alleged collaboration in the arms deal of 1948 and his personal biography as depicted in his novel: 'It happened after the leaders of the "Hagana" [the main pre-state Jewish military organization] brought him back from Lebanon to Israel ... can such a thing take place without exacting a continuous

was originally written in Arabic in 1984 and was translated into Hebrew by writer Anton Shamas in the same year. Habibi based the novel on his own life story; see Rachel Feldhay Brenner, *Inextricably Bonded: Israeli Arab and Jewish Writers Re-Visioning Culture* (Madison, WI: University of Wisconson Press, 2003) at 159 [Feldhay Brenner].

31 For example, Habibi tells of his drive with the military governor and where, in a confrontation with a refugee Palestinian woman, he was paralysed and unable to speak or act in her defence; Habibi, *I Stayed in Haifa*, supra note 1.

32 Hillel Cohen, *Good Arabs: The Israeli Security Services and the Israeli Arabs* (Jerusalem, Israel: Hebrew, 2006) at 57 [in Hebrew]. For elaboration on the complex relation between the Israeli Communist Party and the ruling labour party (Mapai), see ibid at 55–84.

33 'Interview of Emile Habibi by Yaakov Agmon' (1997) 7 Iyunim Bitkumat Israel 671 [[in Hebrew; translated by author]] [Agmon].

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payment . . .?'[34] The conflation between life and fiction is also evident in *Al-Sinara*'s accusation against Habibi that he had allegedly profited from the suffering of his people in his literary writings.

The intermingling of life and fiction is the essence of collaboration, since it is the ability to 'cover,' to 'put on a mask,' that enables the collaborator to move between his two worlds.[35] Indeed, the figure of the collaborator in *The Pessoptimist* can shed light on the issue of collaboration in Habibi's libel trial. Moreover, the fact that the plaintiff in the trial and the author of the novel are one and the same person provides a rare opportunity to compare the ability of these two forms of discourse to deal with the complex subject of collaboration in relation to which each community tries to police its boundaries.

v *The structure of libel law*

In a libel trial, unlike other tort actions, the court is not called upon to find out the objective injury or to inquire about the subjective injury – whether the plaintiff felt degraded by the allegations. Rather, it asks whether a third person would have understood the contested words as having the potential to degrade or humiliate the plaintiff.[36] Robert Post, in his celebrated article, 'The Social Foundations of Defamation Law,' suggests that the key to understanding the structure of libel law lies in conceiving the person that is protected by the law in inter-relational terms.[37] According to this view, 'identity is continuously being constituted through social interactions . . . [T]hese interactions take the form of rules of "deference and demeanor."' This inter-relational view of identity necessitates the involvement of a third party to resolve disputes about

34 *Habibi*, supra note 11 (Evidence, translation in the court file of article from *Al-Sinara*, Exhibit No T/1;).

35 'Occupation creates collaboration, but the need to collaborate in turn creates the appearance of collaborating. Those who chose the appearance over the reality may be hard to detect'; Timothy Brook, *Collaboration, Japanese Agents and Local Elites in Wartime China* (Cambridge, MA: Harvard University Press, 2007) at 9 [Brook].

36 Israeli libel law requires that the defamation reach, apart from the injured person, at least one other person in order to establish a civil libel and at least two other persons in order to establish a criminal libel. For the law on libel in Israel, see Mordechai Kremnitzer, Khalid Ghanayim, & Boaz Shnoor, *Libel Law: De Lege Lata and De Lege Ferenda* (Jerusalem: Harry and Michael Sacher Institute, Hebrew University of Jerusalem, 2005) at 29–35, 55, 156–9, 186–7 [in Hebrew]. According to American law, defamation has to reach at least one other person apart from the injured. See *Kimmerle v New York Evening Journal Inc*, 186 NE 217 at 218 (NY CA 1933), reflecting the idea that the law protects the external dignity of the person – that is, his or her social value in society – and not the subjective dignity of the individual in his own estimation.

37 Post, supra note 9.

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the merits of the 'defamation' claim. In modern times, this role is exercised by courts. Post explains:

> In effect the court, speaking for the community at large, designates the plaintiff as worthy of respect, thereby confirming his membership within the community ... If he fails in this task and the court agrees with the defendant's interpretation, the plaintiff's efforts will result in an authoritative confirmation of his own stigma. In either case the defamation trial will demarcate the boundaries of community membership.[38]

As Post emphasizes, the need to decide the dispute according to community standards underlines the role of libel litigation in delineating the boundaries of the community. Caught in a cycle of claim and counterclaim, Habibi was led to take legal action. However, as we shall see, in a deeply divided society, with divergent historical narratives, the very act of turning to the court becomes part of the problem. In Habibi's trial, one of the crucial elements in Post's analysis of libel law – the authority of the court in the eyes of members in the relevant community – was missing. This phenomenon, which is typical of modern multicultural societies, is exacerbated in situations of an ongoing conflict where the constitutional structure of the state upholds the values and narratives of the dominant group. The problem of multiculturalism has led contemporary writers to investigate libel litigation on contested issues such as race, ethnicity, and sexuality, where the court has to navigate its way amid a clash of values in society.[39] Such analysis usually focuses on the court's judgment, examining how it decides the normative question of delineating the boundaries of the community. It views the community basis of the litigation as something to be discovered by the court. In contrast, the Habibi trial reveals an interesting dynamic in which both the parties to the litigation and the court negotiated their respective identities and collective memories while struggling to delineate the normative boundaries of the Israeli community. In what follows, I examine what happens to members of a minority group when their dispute about who is a collaborator and who is a loyal member of the community enters the court. I argue that the trial does not provide a neutral forum in which to hear arguments about their dispute in the social world outside the court-room. Rather, the trial has a constitutive role. It is a site for negotiating and performing the parties' social identities through antagonistic legal personae. In the process, the court itself is called upon to reflect on its own role of community building.

38 Ibid at 712.

39 Lawrence McNamara, *Reputation and Defamation* (Oxford: Oxford University Press, 2008) at 191–226 [McNamara, *Reputation*].

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VI *Why turn to the court?*

We begin our investigation with the cycle of accusations and counter-accusations that led Habibi to turn to the Israeli court. We can trace the origins of the dispute back to 14 October 1983, when the Arabic weekly *Atadamon* published a letter by an anonymous reader, a certain 'Mr M,' who quoted from an interview with Shmuel Mikunis, a former leader of the Israeli Communist Party (Maki), published in the Hebrew newspaper *Yediot Aharonot* on 24 September 1982.[40] In this interview, according to 'Mr M,' Mikunis claimed that he had first established contact with the Soviet Communist Party on 8 March 1948, in Belgrade, and that he had been accompanied by Emile Habibi, but he hastened to add that 'they treated him very badly. They did not believe a word he said.'[41] Mr M remarked, 'Even though more than a year has passed since this information was published ... I have not read any explanation or response that can clarify in what way Emile Habibi took part in the arms deal for the Zionist organizations, against the Arabs of the land.' Habibi, at the time the editor of the communist newspaper *Al-Ittihad*,[42] responded to this serious allegation with a long and detailed article a few days later:

I did not travel with Mikunis on March 8, 1948, to Belgrade or to any other place. Not then, and not at any other time before the establishment of the State of Israel. Only from 1956 did I visit the Soviet Union ... and the historical truth is that the League for National Liberation headed by the late Fuad Nasar received an invitation from the Communist Information Chamber based in Belgrade to send a representative of the league for consultation. The league decided to give me a mandate in this important patriotic and international mission. It is true that we heard that the 'Palestinian Communist Party' also received an invitation and that it was decided to send Shmuel Mikunis. I travelled by myself. The trip was not easy. I met Mikunis only in Belgrade. We saw the meeting with the Chamber as very important since it was our first meeting with the world communist movement. We hoped that this meeting would help resolve our disagreements with Mikunis. Unfortunately, we did not meet with members of the

40 'Mr M,' Letter to the Editor, *Atadamon* (24 Sept 1982) [in Arabic; translation in court file].

41 Zvi Zinger, 'Shmuel Mikunis: Meetings,' *Yediot Aharonot* (24 September 1982) weekend supplement: 17–9.

42 This daily newspaper, considered at the time the most important publication in Arabic in Israel, was established in 1944 by Emile Habibi and two other public figures. Habibi edited the paper until 1989. The Israeli government tried several times to close the paper, the best-known attempt being in 1953. *Kol ha-Am* filed a petition against their suspension to the Israeli Supreme Court, which ruled in favour of the petitioners, and the judgment became a landmark case in the protection of freedom of speech in Israel.

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Chamber and only met with several of the leaders of the Yugoslav Communist Party. The meeting was short. We listened to them more than we spoke. The conversation revolved around global politics and the reasons why the Yugoslav position differed from the Soviet one on the recommendations of the international investigative committee on the future of Palestine. After this meeting I did not see Mikunis another time. And I did not hear about the role of Mikunis in negotiating the weapons from Czechoslovakia until later, many years later. And talk about this issue was vague ...[43]

Although Habibi considered the allegation as 'a vicious lie, an attempt at personal defamation, degradation of my personal, national, and political honor,'[44] he nonetheless had decided to refrain from suing in Israeli courts, since the party forbade him.[45] Habibi's refutation, however, did not end the cycle of accusations. Time and again the 'arms affair' was raised by Arab newspapers, and each time, Habibi was challenged to go to court.[46] His decision not to sue was taken as an implicit admission to the allegations. Finally, after the publication of the *Al-Sinara* article on 8 April 1988, five years after the first allegation was published, Habibi decided to end the cycle and bring a libel suit to the Nazareth district court.

One explanation for choosing to sue in an Israeli court could be that the plaintiff had a very naïve understanding of the court's ability to be a neutral arbiter in cases involving internal conflicts within a minority group. However, in his literary works, Habibi demonstrated a very sophisticated understanding of the limits of law as it pertains to a defeated national minority. *The Pessoptimist* paints a bleak picture of the life of the Arab citizens of Israel under the military regime that was in force until 1966. On several occasions, the narrator inserts critical observations about the impossibility of justice for Arabs under the Israeli court system. This occurs, for example, when Saeed, the protagonist–narrator, asks his wife about the land that used to be owned by her family. When his wife answers that the Israeli government has confiscated it along with the rest of the land in their village, Saeed asks why her uncles did not pursue their just claims in an Israeli court of law. His wife retorts that

43 *Habibi*, supra note 11 (Evidence, translation of article from *Al-Ittihad*, 18 October 1983, Exhibit No N/3) [Evidence from *Al-Ittihad*].

44 Ibid.

45 Ibid.

46 See *Habibi*, supra note 11 (Evidence, translation of article from *Al-Tadamon*, 21 October 1983, Exhibit No N/15). For the many times in which the participation of Habibi in the arms deal was mentioned by Arab newspapers, see *Habibi*, supra note 11 (Evidence, translation of article from *Al-Tadamon*, 14 October 1983, Exhibit No N/2); *Habibi*, supra note 11 (Evidence, translation of article from *Al-Tadamon*, July 1983 Exhibit No N/9); *Habibi*, supra note 11 (Evidence, translation of article from *Al-Sinara*, 8 March 1985 Exhibit No N/13).

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the village chief (mukhtar) explained to the villagers that, according to the Israeli authorities, after the Arab defeat in 1948, both they and their property belong to the state. The wife adds her own observation about the limits of the 'rule of law': 'By what law do the defeated claim their right from the conqueror?'[47]

Habibi's protagonist is an informer and a collaborator with the Israeli military governor and the *Shabak* (security police). His very existence in Israel (he is an illegal refugee who could be deported back to Lebanon) is dependent upon his continuous willingness to collaborate with the state authorities, to sell out his community by informing on activities of the Communist Party. The novel provides an exaggerated description of the life of an Arab citizen after the war of 1948, who gradually loses his subjectivity and becomes the 'property' of the State of Israel. With his sarcastic tone, Habibi is able to puncture the myth of liberal legalism and to demonstrate the futility of Arab citizens' attempts to regain their lost lands through the Israeli courts of law.[48] This literary depiction sends a strong critical message that there is no possibility for the courts to bridge the abyss between the defeated and the victor.

Nonetheless, in his real life, Habibi decided to take legal action, to sue for libel in an Israeli court of law. It might be argued that, in a private civil action, unlike in the case of the state's confiscation of Arab lands, the legal system is assumed to maintain its neutrality toward the litigants. Indeed, this belief is connected to the courts' rhetoric of the rule of law and can serve to enhance the regime's legitimacy in the eyes of national minorities.[49] However, this view of the legitimacy of private-law litigation in contradistinction to public-law litigation depends on assuming a rigid divide between private and public law, which has long been challenged by critical legal scholars.[50] In the context of libel law, it requires that we treat a libel tort suit as based on a purely factual examination (an empirical test about opinions in the relevant community)

47 Habiby, *Pessoptimist*, supra note 30 at 90–2. For a discussion of Habibi's views on the law as depicted in his novel, see Farid Ghanem, 'Al-Mutafaqim: *The Pessoptimist*, State Security and the Exception-Rule in Legal Practice' (2004) 4 Adalah's Review 11.

48 The novel gives several instances of the court's failure and, by providing dates and places, gives them the aura of real-life reports.

49 For an analysis of the dynamics of legality and legitimacy in the Israeli High Court of Justice, see Ronen Shamir, 'Land Mark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice' (1990) 24 Law & Soc'y Rev 781. A survey from 2004 reveals that the Israeli court system enjoys a high degree of trust among the Arab population (61%), higher than that for the Israeli and Arab media, which are trusted by only 20% of the Arab population, or the Israeli Knesset, trusted by 19% of the Arab population; see Mada-Al-Carmel: Arabic Center of Applied Social Research, *First Annual Survey* (Haifa, Israel: Mada-Al-Carmel, 2004).

50 For a compilation of articles on this subject, see David Kairys, ed, *The Politics of Law: A Progressive Critique*, 3d ed (New York: Basic Books, 1990).

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that does not involve any normative evaluation on the part of the court. However, in Anglo-American law as well as in Israeli law, libel has never been understood as a purely 'factual' analysis. This is especially evident in cases of 'defamation *per se*.'[51] Courts often introduce some kind of normative evaluation (policy considerations) to libel litigation by using criteria such as 'right-thinking members of society.'[52] The main difference among jurisdictions is the willingness of courts to acknowledge smaller segments of society as providing the normative test. In fact, as Post and others explain, the function of libel law should be understood, not simply as a remedy for a private injury between two individuals, but in normative terms, as taking part in community-building (deciding the boundaries of inclusion and exclusion).[53] When the libel involves an accusation of collaboration with state authorities (one that portrays as treason any help an Israeli Arab citizen gave to the State of Israel in winning its war of independence), the normative component of the judgment must be considerable.[54]

So the puzzle returns with greater force: Why initiate a trial in which a legal victory is most likely to translate into a political failure? Why initiate a legal action that stands in tension with the plaintiff's critical views about the Israeli court system? When Habibi took the stand in the trial, he was cross-examined by the defence precisely on this issue: why, in light of his previous explanations for not bringing a libel suit, he had nonetheless decided to turn to an Israeli court. Habibi's answer is revealing:

51 Defamation *per se* argument asks the court to decide the case on a point of principle. *On* defamation *per se*, see Mike Steenson, 'Defamation Per Se: Defamation by Mistake?' (2000/1) 27 Wm Mitchell L Rev 779; Patrice S Arend, 'Defamation in an Age of Political Correctness: Should a False Public Statement That a Person Is a Gay Be Defamatory?' (1997) 18 N Ill UL Rev 99; Mortimer R Kadish & Sanford H Kadish, 'The Institutionalization of Conflict: Jury Acquittals' (1971) 27:2 Journal of Social Issues 199. Historically, libel trials were the source of limiting the jury function to 'fact' finding as opposed to questions of law. In Israel, see Shulamit Almog & Avinoam Ben-Ze'ev, 'Libel: In Whose Eyes?' (1994) 2 Mishpat Umimshal 235 [Almog & Ben-Ze'ev].

52 There is a difference between English law, which tends to employ the test of 'right-thinking persons' that refers to society as a whole, and American law, which adheres to a more sectarian test. See Lawrence McNamara, 'Bigotry, Community and the (In)Visibility of Moral Exclusion: Homosexuality and the Capacity to Defame' (2001) 6 Media and Arts Law Review 271; Lyrissa Barnett Lidsky, 'Defamation, Reputation and the Myth of Community' (1996) 71 Wash L Rev 1 [Lidsky]; Michel J Tommaney, 'Community Standards of Defamation' (1969/70) 34 Alb L Rev 634.

53 Post, supra note 9.

54 This question is usually raised in relation to the sub-group of criminals or prisoners. In these cases, the court tends to ignore the prevailing views in these communities by presenting them as undermining the very commitment to the 'rule of law.' The exemplary case is *Connoley v McKay*, 28 NYS 2d 327 (NY Sup Ct 1941).

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I have expressed my position regarding the Israeli courts in various forums. One of the achievements of Israeli democracy is its courts. I have argued about it with friends and opponents. [I also argued] about the necessity and benefit of turning to the courts in the [occupied] territories. I supported using the court system there as well. I do not ignore the fact that there are laws in Israel that I do not agree with and that the courts are constrained by these laws. If you ask me whether one should not approach the Israeli court with political questions like the one raised by this trial, my answer is: During my entire political life I have not encountered a nightmare like the articles in *Al-Sinara*, without even understanding the reason for this. I have sent messengers so that the defendant will leave me alone. But he walks in his circles and I in mine. I tried to ask about his attitude in articles. Still, he kept on writing that if what he says is not true, then I should sue him. I did not want to go to court, I do not need such things. I wrote articles, I answered the accusations, I sent people, I asked, and every time I tried to find another way he saw it as a sign of my weakness. Until I had no other choice but to go to trial. It is not connected to the Israeli court that I highly value.[55]

We can read Habibi's testimony as a rhetorical gesture to the court. In contrast to Habibi's previous response in *Al-Ittihad* in which he expressed his doubts about turning to the Israeli court system,[56] and in contrast to the critical views of the Israeli legal system expressed in his literary work, here he begins and ends his testimony by expressing his high respect for the Israeli courts. In fact, he views the court system as a symbol of Israeli democracy. He does not deny its limitations, particularly in light of the laws constraining the court and especially in political trials such as his. However, since every attempt by Habibi to answer the allegations was immediately 'interpreted' by his opponents as supporting their claims against him, he was left with no other choice. Habibi is led to the court as a last resort – to end the 'nightmare.' The question arises, however, whether an Israeli court has the capacity to end the cycle of accusations, to restore honour, and to reaffirm membership in the Arab community. What kind of community was created during the trial? and how did it correspond to the normative community invoked by the court in its judgment?

As Post explains, litigation has its public dimensions of delineating membership in a community. However, because of the position of the Arab community *vis-à-vis* the Israeli court, our litigation provides a rare occasion for examining the negotiations involved in the identity formation of the two communities, Jewish and Arab, at this very sensitive intersection of defining the boundaries of Israeli citizenship.

55 *Habibi*, supra note 11 (Evidence, Habibi's trial testimony, 19 November 1990).
56 Evidence from *Al-Ittihad*, supra note 43.

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As our litigation concerns the 'foundational narratives' of the State of Israel; it forces each actor in the legal drama (parties and judges) to relate its own version to the Other and to negotiate a common ground. Neither the parties nor the court can continue to adhere to a 'pure' version of their narrative, and the trial process becomes an arena in which the parties negotiate the terms of the narrative and its meaning in a way that can include the competing narrative. I offer the libel trial of Habibi as a metaphor for trials in general, a process that transforms antagonists into collaborators. Collaboration, in my discussion, is both the 'original sin' and also the redeeming feature of trials in general.

VII *Language*

Habibi's decision to submit to the court's authority and the adjustments that decision involved are immanent in the language of the court documents. The original dispute over Habibi's alleged collaboration took place on the pages of Arabic newspapers. Even though Arabic is one of the official languages in Israel,[57] in order to enable the court to decide the dispute, the relevant publications had to be translated into Hebrew, the language of the court.[58] Moreover, large parts of the testimony during the trial were dedicated to 'cultural translation' – to explaining Arab politics and Palestinian views of Israeli history to an Israeli court. At times, this turned into a grotesque 'grammar lesson.' For example, Lutfi Mashuur, one of the defendants, explained to the court the difference between two Arabic letters (*s* and *sh*), a difference that is indicated by the addition of a small triangle to one of the letters. He argued that Habibi had deliberately misspelled his name, turning 'Mashuur' into 'Masuur,' which in Arabic means stray dog.[59] Another, more loaded example related to one of the allegations against Habibi, that as a writer and public speaker he had made a 'camp of dollars' out of the suffering of his people. The plaintiff explained to the court that the word *muhayam* (camp) in Arabic was strongly associated with the Palestinian refugee camps and hence entailed a moral condemnation of him. The defendant, on the other hand, claimed that the choice of word was innocent, merely referring to a gathering of a large number of people, like the biblical-Hebrew term 'camps of people.'

57 Hebrew and Arabic are recognized as official languages in Israel. For a discussion of the historical origins of this duality under the British Mandate and the gap between law in the books and law in action in this regard, see Ilan Saban & Muhamad Amara, 'The Status of Arabic Language in Israel: Law, Reality, and the Limits of Using Law to Change Reality' (2004) 1 Medina ve-Hevra 885.

58 Indeed, the court's file contains hundreds of pages of newspaper articles in Arabic, translated into Hebrew.

59 See *Habibi*, supra note 11 at 25 (Defendants' Closing Arguments).

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It is here that we have a first glimpse of an interesting inversion that occurred during the trial. The defendant, who outside the court adopted the position of the Palestinian nationalist, relied on the Hebrew word to support his argument, while Habibi, who advocated cultural collaboration between Jews and Palestinians, insisted on the connotations of the Arabic word for camp, thus invoking the traumatic Palestinian memory of dispossession and refugeehood.

These acts of translation between Arabic and Hebrew can be seen not merely as indicating submission to the authority of the court or the fact of the plurality of languages in Israel but also as a subversive device to make the court (judges, lawyers, and witnesses) aware, through the very act of translation, of the difference between the historical narratives of the two communities. The translations forced the court to grapple with the sensitive issue of Arab collaboration, bilingually, through translations of Arab newspaper articles on the subject. It thus created a temporary inversion of everyday experience in Israel, since, in the context of this trial, Arabic was the original language of the dispute and Hebrew was assigned a secondary place, as a translation.

As we pointed out, one of the allegations against Habibi was that he profited from translating his literature into foreign languages, thus making money from the suffering of his people. Thus, the translations during the trial were a re-enactment of his 'original sin.' Literary critic Rachel Feldhay Brenner implies that Habibi's decision to translate his novel *The Pessoptimist* into Hebrew can be considered a kind of collaboration: 'Why would an Israeli Arab writer expose such an ethically problematic representation of an Israeli Arab character to the world at large – and to the Israeli world in particular? Does the confession not reconfirm the stereotypical, negative opinion of the Arab as devious and cowardly?'[60] The same can be asked about the trial, since the translated articles revealed a world of Arab politics obsessed with the issue of who was a collaborator, and their translation was an airing of this 'dirty linen' in an Israeli court. Feldhay Brenner argues that, by employing the genre of the confession, the novel indicates a moral conversion of the informer. The confession of moral failure, of selling out to the Israeli authorities, allows the protagonist to regain authorial subjectivity by transforming his traumatic experiences into the written word.[61] The novel reveals to the Israeli reader the experience of collaboration in the context of the 1948 war. A trial, however, is no place for confessions of moral failure and the plaintiff cannot gain any moral authority by offering such a confession. Rather, a trial is an adversarial field that encourages each side to cling to its version of moral purity and blame the other side for moral

60 Feldhay Brenner, supra note 30 at 165.
61 Ibid at 169.

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failure. It is therefore appropriate to inquire whether the trial forced the plaintiff into a kind of collaboration by the very act of translating 'dirty linen' into Hebrew, without the redeeming features of literature.

The translated texts in Habibi's trial dealt mostly with the issue of collaboration and its lingering influence on contemporary Arabic politics in Israel. The translation exposed the court to sensitive issues that deeply concern the Arab community in Israel, including the betrayals of their own leaders in pivotal moments of their history. For the legal historian, the trial's file provides a rich source of social history, revealing the internal debate of Israeli Arabs over the collaborators in their midst. This material revealed to the judges the degree to which the contemporary politics of the Arab citizens of Israel was obsessed with questions of 'who is a collaborator' and 'who is a patriot,' as part of the legacy of military rule. Such exposure to the 'hidden transcripts' of the minority community could have encouraged self-criticism by the court, but it could also have contributed to a moralistic attitude of 'blaming the victims,' in particular the collaborators among them. We shall later examine how the court dealt with this sensitive issue in its judgment. At this point, we merely note that the seemingly neutral act of translation is loaded with moral and political implications in the context of litigating collaboration.

VIII *Witnesses*

Subjecting himself to the jurisdiction of the Israeli courts and translating the 'evidence' into Hebrew, therefore, proved to be morally loaded, painting the plaintiff as a kind of collaborator in the eyes of his Arab community. Paradoxically, in order to gain legal recognition of the defamation – that is, that he was wrongly depicted as a collaborator – Habibi had to collaborate with the Israeli court system. To win the case, the plaintiff had to win the confidence of the court, to play by its rules, to speak its language, and thus to engage in further acts of 'collaboration,' as is evident in his choice of witnesses.

The authority of the witnesses in the eyes of the court depends, among other things, on their reputation. An Israeli court cannot hold in high esteem a public figure who condemns any ties with Israel as a matter of principle. This fact influenced the choice of witnesses. Two central witnesses for the plaintiff were prominent literary figures: the poet Natan Zach and Professor of Literature Nissim Calderon. Zach testified that the plaintiff was 'considered among the leading Arab writers in Israel, and in the whole Arab world.' Likewise, Calderon testified that he was considered to be 'one of the greatest contemporary Arab writers. Among Jewish writers in Israel he is highly respected even by those who disagree with his political views.' However, by relying on their testimony Habibi was further 'implicated' in acts of collaboration with the

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dominant Hebrew culture. Indeed, Zach testified that his acquaintance with Habibi was the result of collaborating on the committee for Arab/Jewish writers, which Habibi headed from 1985 to 1988 together with Yoram Kaniuk. In an interview, Habibi related that such collaboration was not only political but that he was deeply influenced by Hebrew literature and culture.[62] By relying on these witnesses, Habibi seemed to play into the hands of the defendant, who also accused him of 'cultural collaboration.' Thus, the trial forced the plaintiff to abandon the nuanced understanding of collaboration that he presents in his literature and, in particular, the distinction he made between legitimate collaboration (such as cultural cooperation) and illegitimate collaboration (such as informing on fellow citizens). In the trial, Habibi was led to adopt a binary position by arguing that all claims about his alleged acts of 'collaboration,' whether political or cultural, were defamatory. However, by relying on Jewish witnesses, who had a limited knowledge of Arabic and little familiarity with the views of the Arab community, Habibi undermined his substantive claims and exposed an internal tension in his position. Zach admitted, 'My knowledge of Arabic is basic ... I testified here on the basis of reading in Hebrew ... I do not usually read Arabic newspapers ... I am not capable of reading a newspaper or poetry in Arabic.'[63] When Calderon was asked in cross-examination what he regarded as the most insulting statement in the *Al-Sinara* article, he replied,

> If you ask me what astonished me in the article that is the subject of this trial I answer: the sexual insinuation about Hayarkon Street in Tel Aviv, which is known to be a center of prostitution[64] ... I am a Tel Avivian, and the sexual issue shocked me ... the claim that he brought weapons in 1948 seemed to me a legitimate issue for debate, this did not outrage me.[65]

This testimony is a good example of the *differend*, the impossibility of testifying on the injury suffered by Palestinians in an Israeli court of law. In order to gain the confidence of the court, Habibi had to summon prominent witnesses from the Israeli cultural field. However, their testimony actually undermined his substantive claims, highlighting the gap between the Jewish and Arab view of 1948 and raising doubts as to the court's capacity to decide such a dispute.

62 Agmon, supra note 33 at 678–9.

63 *Habibi*, supra note 11 (Evidence, Testimony of Zach, 30 January 1989).

64 Mashuur, supra note 12, asserted that Habibi had lost a file of documents on Hayarkon Street in Tel Aviv.

65 *Habibi*, supra note 11 (Evidence, Testimony of Dr Nissim Calderon, 15 November 1990).

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IX *The defendant as Zionist*

So far we have investigated the challenges that a libel suit presents to an Arab plaintiff in matters of jurisdiction, language, and choice of witnesses. I argued that the trial contributed to the depiction of Habibi as collaborator of sorts, thus undermining his substantive claims. In what follows, we turn our attention to the defendant, Lutfi Mashuur, and see how the trial reshaped his public identity. Mashuur, who presented himself in the newspaper article as representing the patriotic Palestinian position, adopted the voice of a devoted Zionist as his central line of defence. Thus, the burden of representing the 'Zionist' narrative was undertaken by a Palestinian citizen of Israel who is highly critical of it. However, Mashuur's 'Zionist' discourse was a parodic performance of this identity, mimicking the Zionist slogans in an exaggerated manner. Thus, Mashuur argued that the court should uphold the general standard of the 'reasonable Israeli' test, according to which his article could not be considered defamatory. This claim is, of course, a complete inversion of the narrow sectarian position Mashuur upheld in the social world, where he opposed any kind of collaboration with the State of Israel, as expressed in the public condemnation of Habibi in the *Al-Sinara* editorial. In contrast, Mashuur's defendant's brief stated that

> In Israeli society ... publishing the fact that the plaintiff helped bring weapons to the State of Israel in 1948 ... when this is a matter of the defendant's concern for the security of the state ... should not be seen as defamation ... he shall be considered as one worthy of special praise and honor.[66]

A similar argument was used regarding the assertion that Habibi had publicly rehabilitated 'Land Day criminals' and members of Agudat ha-Kfarim:[67]

66 See *Habibi*, supra note 11 at 18 (Brief for Defendant's Closing Arguments).

67 Land Day is commemorated by Israeli Palestinians every year on 30 March to mark the violent events that took place on that day in 1976 when six Arab citizens were killed, around 100 wounded, and hundreds arrested during protests against the government's announcement of a plan to expropriate thousands of acres of Arab land for 'security and settlement purposes.' Land Day has become an important symbol for Arab Israeli citizens in their struggle against the confiscation of their lands. See Oren Yiftachel, *Ethnocracy: Land and Identity Politics in Israel/Palestine* (Philadelphia, PA: University of Pennsylvania Press, 2006). Agudat ha-Kfarim (Villages Association) was established by Israel in the 1980s in the Occupied Territories in an attempt to create a Palestinian leadership that would replace the leaders of the PLO (Palestinian Liberation Organization). It was disbanded after the Oslo Agreement. Members of the Association were regarded in their communities as collaborators with the 'Zionist enemy.'

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... in the eyes of every reasonable and thinking Israeli in the Jewish state of Israel and according to its prevailing political, and social values ... Publicizing the struggle of a certain newspaper ... against Arab and Palestinian patriots who constantly struggle against the policy of Israel and its government ... will not be seen as defamation ... These acts will be considered in the eyes of the reasonable Israeli as worthy of praise and encouragement.

The defendant contended that

an Israeli court is not expected to express the views of Arabs in Israel ... but the view of Israeli society at large ... it is to be assumed ... that an Israeli court will not think ill of people belonging to an organization ... whose entire aim is to promote the declared goals of the Israeli occupation authorities of the West Bank, such as the members of Agudat ha-Kfarim.[68]

Mashuur's line of defence was to deny the very proposition that his article amounted to defamation. This is the 'defamation *per se*' argument, which asks the court to decide the case even before it has begun, on a point of principle. Mashuur argued that according to the standard of the reasonable Israeli, his assertions about Habibi should be considered praise, not defamation. Facilitating the arms deal with Czechoslovakia, which helped to achieve the Jewish victory in the 1948 war, should be considered an admirable act by the 'right-thinking' Israeli.

This was indeed one of the points made in the *Yediot Aharonot* article[69] that had drawn the wrath of *Al-Sinara*. Shmuel Mikunis had related in the interview the story of the arms deal in order to underline the positive contribution made by the Israeli Communist Party to the establishment of the state.[70] During the trial, Mashuur, who had strongly condemned the deal in his newspaper, presented the opposite view, adopting the Zionist perspective in praise of the deal. However, while Mikunis had truly believed that facilitating the arms deal was a praiseworthy patriotic act by the Communist Party, Mashuur was merely mimicking this position, adopting the Zionist discourse while trying to demonstrate how ill suited it is for an Arab citizen of Israel. For Mashuur, this was parody or the theatre of the absurd.

From a legal point of view, it is easy to explain the defendant's line of defence as a strategy devised to win the case in the most efficient way (on the level of principle). However, this explanation ignores the symbolic dimensions that are involved in libel litigation. Since the defendant was aware of the risk of legitimizing the Zionist perspective, he tried to signal to his community that his position was just a legal mask, an act

68 See *Habibi*, supra note 11 at 13 (Brief for Defendant's Closing Arguments).
69 Zinger, supra note 41.
70 Ibid.

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of mimicry, and a parody of Israeli citizenship. For example, he reiterated the legal formulas about the 'reasonable Israeli' until they sounded like empty slogans that did not reflect any real commitment on his part. He takes his 'Zionist' position *ad absurdum*, when, for example, he declares that an Israeli court would not think ill of members of an organization 'whose entire aim is to promote the declared goals of the Israeli occupation authorities of the West Bank ...' Finally, in different parts of his defence, he contradicted himself so that his assertions could not be heard as a coherent narrative. When these phrases are uttered in an Israeli court of law by an Arab citizen, they necessarily have an ironic undertone that invokes the contradictions of living as an Arab in a Jewish state.

Approaching the trial as a place where people perform identities can reveal the subversive moments in the litigation. As legal historian Ariela Gross argues, 'Instead of turning trials into texts to be read, the historian reading the traces of performances ... must turn texts back into performances ...'[71] Gross suggests applying Butler's theory of the performativity of gender to trials dealing with racial identity. When applied to our libel trial, this approach points to the paradoxes and distorted re-enactments involved when Arab litigants argue about the meaning of the war of 1948 in an Israeli court. It shows the trial to be a stage on which the social script of Israeli citizenship is debated by members of the Arab minority. This debate, however, is convoluted, as each side has to reverse its beliefs in order to be heard by the court. We have already seen how the trial procedure forced Habibi to adopt the mask of a kind of collaborator, which undermined his legal claim. The defendant, who adopted a Zionist mask in order to win the case, faced a similar problem. However, Mashuur was aware that a legal victory would have no value if the trial demonstrated how easily he abandoned his political views and upheld the Zionist discourse. The defendant, like the plaintiff, was caught in a double bind. His solution was subversive – to speak through the Zionist mask at the trial but at the same time to signal to his community that this was only an act of mimicry, a parody of the 'right-thinking' Israeli.

Reading the trial as a performance helps us to explore the potential of these subversive moments in pointing to the missing narrative of the Palestinian *nakba*. It identifies the structural conditions that foil any attempt to testify about the *nakba* in an Israeli court and shows how even ordinary rules of procedure in private-law litigation affect Arab litigants differently than Jewish litigants, who share a public narrative with the court. The paradoxes that are revealed in the Habibi trial are so

71 Gross, 'Black and White,' supra note 29 at 651–2.

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palpable that they give concrete content to abstract ideas about the victim's loss of the means of representation. At the same time, the 'trial as performance' approach also demonstrates the potential of Habibi's trial to expose the contradictions of Israeli citizenship for the Arab minority. It invites the legal historian to examine not the formal arguments but the gap that the trial opens between words and identity, between the spoken and unspoken. It can thus help pierce the silences of Israeli politics in relation to Arab collaboration and the competing narratives of the 1948 war.

x *Judgment*

The lawsuit confronted the court with a difficult dilemma. On the one hand, if the court accepted the position of the defendant by upholding the standard of the 'reasonable Israeli,' it would undermine its own authority as a neutral arbiter in a libel dispute that concerned the Arab narrative of 1948. On the other hand, if the court accepted the libel by adopting a 'sectarian standard' of the Arab-Palestinian minority in Israel regarding collaboration with state authorities, it would undermine the myth of Israeliness, acknowledging the impossibility of an Arab citizen's identifying fully with the state and its symbols.

The decision of the district court,[72] later affirmed on appeal by the Supreme Court,[73] upheld Habibi's claims and found the article in *Al-Sinara* to be defamatory. As we shall see below, there was a strong dissent on appeal, and the reasoning of the district court and the appellate court differed in significant ways. For the purposes of this article, I will consider the judgment from a narrative perspective, examining the different discursive moves taken by the court in confronting the suppressed narrative of the *nakba*, without actually acknowledging that narrative.

The literature on libel law in plural and divided communities centres on the judgment of the court. This literature exposes the normative aspects of the litigation in choosing the communal standard according to which the court should evaluate the alleged defamation. Two main standards have developed in Anglo-American jurisprudence: the general standards approach (the English test), which relies on a variation of 'the right-thinking person' test; and the sectional standard approach (the American test), which upholds the values of a sub-state community. The English test uses the 'right-thinking person' as the point of reference for determining actionability. This test rests on the premise that the jurisdiction constitutes a community and that general standards of

72 *Habibi*, supra note 11.

73 *Mashuur v Habibi*, supra note 25.

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opinion exist in the jurisdiction with respect to the value judgment.[74] American courts recognize that an individual might value his reputation in the eyes of a community whose views diverge from the general consensus. To be defamatory, therefore, a statement need only lower the plaintiff's standing in the eyes of a 'substantial and respectable minority' of the community.[75] Israeli case law has followed the American test in this regard.[76]

For our purposes, it is important to notice how each standard helps delineate the boundaries of an imagined normative community. But while the general-standard approach assumes that the judge is a member of the normative community whose boundaries he or she articulates, the sectional standard recognizes a difference between judge and normative community. According to both standards, the decision is never strictly empirical, since not every section of society will be recognized as worthy of the court's recognition and protection. This is most evident in the refusal of courts to recognize the values of criminal groups, in prison or elsewhere, in cases of informers.[77]

In Habibi's trial the court had to choose between two clashing narratives about the meaning of the 1948 war in order to decide in the matter of defamation. However, unlike in constitutional litigation, in this trial both the sectional standard of the Arab community and the general standard of the 'reasonable Israeli' were represented by Arab litigants. Thus, the general standard embodied in the Zionist story of 1948 was filtered through acts of mimicry by an Arab citizen. This created a reflexive moment in the courtroom, which prevented the court from ignoring the different impact that the general standard has on Arab citizens. In other words, the court had to address the silencing effects that the Zionist narrative of 1948 might have on the Arab community, since the two parties to the litigation shared a narrative about 1948 as the *nakba*, which was very different from the one upheld by the court. The difficulty stemmed from the fact that the parties had to present their views to a court that relied on constitutional laws that not only ignore this narrative but actively try to silence and suppress it.

74 See McNamara, *Reputation*, supra note 39 at 11, quoting from *Tolley v JS Fry & Sons Ltd* (1929), [1930] 1 KB 467 [*Tolley*]: 'Words are not actionable as defamation, however much they may damage a man in the eyes of a section of the community, unless they also amount to disparagement of his reputation in the eyes of right-thinking men generally.'

75 *Restatement (Second) of Torts* § 559, comment e (1977). See generally, W Page Keeton et al, eds, *Prosser and Keeton on the Law of Torts* (St. Paul, MN: West, 1964) §111 at 777. For elaboration on the community basis of libel law, see Lidsky, supra note 52.

76 Almog & Ben-Ze'ev, supra note 51.

77 See *Mawe v Pigott*, [1869] IR 4, CL 54; *Tolley*, supra note 74.

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The court could accept the position of the defendant and dismiss Habibi's suit as not amounting to defamation according to the general standard of the 'reasonable Israeli.' Such a judgment, which would accord with the Zionist narrative of the 1948 war as a struggle for independence, would demonstrate the court's inability to protect the good name and reputation of Arab citizens in the eyes of their own community. It would further undermine the legitimacy of the court in the eyes of the Arab community, showing it to be incapable of adjudicating a libel dispute concerning an issue that is fundamental for the Arab community without reiterating the very narrative that that community objects to. Such a judgment would expose the limitations of Israeli citizenship and the unequal burden its foundation narrative puts on Arab citizens. Most importantly, it would undermine the ethos of Israel as 'Jewish and democratic,' since the court would thus admit that it was unable to protect the dignitary rights of Habibi, an Arab leader who had dedicated his life to fulfilling the promise of equal rights for Arab citizens of Israel. On the other hand, if the court accepted the libel and decided that the assertions against Habibi as a collaborator amounted to defamation, it would open the door to the perspective of the Arab community on 1948. Such a judgment would have a symbolic meaning since it would give official recognition to the excluded narrative of the Palestinian *nakba*. This recognition, however, might undermine the legitimacy of the court in the eyes of the Jewish majority. Adopting a sectional standard in a libel litigation that involved the foundational narrative of the state would be a *de facto* admission of the non-existence of a normative community of 'reasonable Israelis.' It would acknowledge the difficulty of an Arab citizen in identifying fully with the state and its symbols. The court seemed to be caught in the same double bind that constrained both the plaintiff and the defendant.

The district court responded to this challenge by making two strategic moves. First, it focused its discussion on the arms deal of 1948, neglecting the other allegations of collaboration attributed to Habibi.[78] Second, it found ways to uphold the libel against Habibi without directly engaging the viewpoint of the Arab community and the Palestinian narrative of the *nakba*.[79]

A NARROWING THE DISPUTE TO THE 1948 ARMS DEAL

The judgment of Judge Ginat of the district court focused primarily on the 1948 arms deal with Czechoslovakia, which was only one of the six

78 *Habibi*, supra note 11, at 10..
79 Ibid.

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allegations against Habibi in *Al-Sinara*.[80] These allegations encompassed various aspects of collaboration with Israel: political collaboration (taking an active part in Israeli politics, serving as an Arab member of Knesset, and supporting a general draft of Arab citizens to the Israeli army); economic collaboration (sale of Palestinian land and collaborating with security forces in the suppression of riots against the confiscation of land during Land Day); reconciliation activities (engaging in talks and negotiations toward reaching a peace agreement between Jews and Palestinians); and cultural collaboration (enhancing cultural cooperation between Arab and Jewish writers and artists). These various types of 'collaboration' constitute the ongoing debate about the legitimate course of action open to the individual and to the leaders of the Arab community in the State of Israel. They reflect a deep disagreement within the Arab community of Israel about who is a patriot and who is a traitor.[81]

The court's decision to narrow its investigation to the arms deal can be explained in legal terms, since this was the issue that initiated the lawsuit, the focus of the oral arguments, and the most heatedly contested issue. However, this narrow frame had important implications in terms of historical understanding and community building. The arms deal returns us to 1948 when, before the establishment of the state, Jews and Palestinians can be considered on a par, as enemies engaged in a civil war. It precedes the much more complicated status of Palestinians as citizens of Israel living under a military regime from 1948 until 1966.[82] Thus, the war coloured the issue of collaboration in black and white, treason and loyalty, and a consideration of the grey colours of more mundane acts of collaboration initiated and encouraged by Israeli military rule was avoided. By confining the time frame to 1948, the court's judgment

80 The indictment consists of six allegations raised by *Al-Sinara*. The newspaper claimed that Habibi had travelled to Czechoslovakia in 1948 in the company of Mikunis to bring weapons to the State of Israel; that he had demanded, during his term as Knesset member, drafting young Arab men and women into army service; that he had boasted that the newspaper *Al-Ittihad*, which he edited was leading the fight against Arab and Palestinian patriots; that he had obtained by force and forged the signatures of Palestinian writers, poets, and artists on political agreements, against their will; that he had pardoned and praised, in public, members of Agudat ha-Kfarim, and the 'criminals of Land Day'; and finally, that Habibi had also profited from the suffering of his people, making a 'camp of dollars' out of it; *Habibi*, supra note 11 (Indictment).

81 Amal Jamal, 'Between Homeland and State: Patriotism within the Palestinian minority in Israel' in Avner Ben-Amos & Daniel Bar Tal, eds, *Patriotism: Homeland Love* (Tel Aviv, Israel: Dyunon, 2004) 399.

82 The judge explicitly stated that his decision related to the act of providing such help during the war of 1948, as at that time Palestinians and Jews were fighting and Habibi was not a citizen of the State of Israel and did not owe it loyalty; *Habibi*, supra note 11 at 10.

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could portray collaboration solely as the choice of the individual and overlook the complex issues arising from military rule and its central role in creating and maintaining webs of collaborators as a means of controlling the Arab population. Although the focus on the 1948 deal required the court to show considerable empathy with the defeated side, this was a limited and momentary act. It did not require the court to reckon with the second-class citizenship bestowed on the Palestinians, on the massive land confiscations that followed, or on economic discrimination and serious limitations on their right of movement and political organization – all of which could be found in the trial files. It did not address the dilemmas of everyday life faced by Arab citizens of Israel, struggling with competing loyalties between their nation and their state. The focus on the 1948 arms deal tended to obscure the alternative history of Israel told by Arab citizens whose traces are evident in the case files: land confiscations, Land Day of 1976, the collaboration of mukhtars (village leaders appointed by the state), the 1967 war, and Israeli settlements in the occupied territories. Without a proper framework, without a coherent narrative, the court simply dismissed arguments about more mundane acts of collaboration as incomprehensible, belonging to the 'internal politics' of the Arab community. The narrowing down of the discussion to the arms deal, therefore, allowed the court to ignore the most complex aspects of Arab collaboration. It also helped the court to do the impossible – to uphold the libel suit of an Arab citizen, based on allegations of collaboration with the State of Israel, without acknowledging the *nakba*.

The court was called upon to redraw the boundaries of the Israeli normative community to include Habibi under its protection. Indeed, it upheld Habibi's claims and accepted his libel suit. However, the court was also confronted with the problem of legitimacy. Its narrow focus on the arms deal helped it negotiate its own legitimacy while further obscuring the alternative history of the Palestinian *nakba* and detaching Habibi's position on collaboration from its political and historical context. The court upheld the rights of Habibi as a private individual, while effectively erasing the historical narrative that located Habibi as a leader of the Arab community.

B THE MEANING OF COLLABORATION

The word 'collaboration,' according to the dictionary definition, has two contradictory senses: (1) 'to work jointly with others ... especially in an intellectual endeavour'; and (2) 'to cooperate with ... an enemy of one's country and especially an occupying force.'[83] On the one hand, collaboration indicates the highest virtue of human beings as *homo politicus* – an

83 *Merriam-Webster*, online ed, *sub verbo* 'collaborate.'

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ability to work with each other, which is a precondition for any civilization. On the other hand, the word indicates the lowest vice, that of betraying one's community in times of trouble by 'selling out' to the enemy. In particular, after World War II, the term became associated with cooperation with the German occupying power and became almost everywhere synonymous with the betrayal of the national interests. This ambiguity can explain the repeated attempts by historians and political theorists to clarify the concept by making distinctions and limiting the word to one clear sense.[84]

Habibi's position regarding collaboration with Israel deliberately retains the ambiguity of the original term. After 1948, many Palestinians and other Arabs outside Israel considered the Arabs who remained under Israeli rule to be traitors. Habibi was engaged in a lifelong debate with the Palestine Liberation Organisation (PLO), which termed the Palestinians who had stayed within Israel 'the Arabs of 1948' or 'the inside Arabs' and saw them as collaborators of sorts. The dispute was personified in the debate between Habibi and his childhood friend, the Palestinian poet Mahmud Darwish, who renounced his Israeli citizenship and took upon himself a life of exile from his family, village, and land. When asked in an interview whether his literary work should be seen as a *j'accuse* against the Arabs who left in 1948, Habibi replied that it should be read as a defence, not an accusation:

> I defend my people, the Arab Palestinians who managed to stay in the State of Israel, notwithstanding all the difficulties ... To my dismay there are those who believe that we could stay because we turned into Zionists, or 'collaborators,' that we paid a high political price for staying. This is not true. First of all I wanted to say that the very decision to stay in one's homeland should not be subject to explanations or justifications ... The ones who have to explain are the ones who leave ...[85]

Habibi explained that he did not blame those who left either because they were victims, and one should not blame the victims. Habibi's lifelong debate with the PLO on his idiosyncratic views had an impact, bringing about a radical transformation in the way Arab Israelis were perceived by Palestinians 'of the outside.'[86] Indeed, throughout his public life Habibi

84 See Henrik Dethlefsen, 'Denmark and the German Occupation: Cooperation, Negotiation, or Collaboration?' (1990) 15 Scandinavian Journal of History 193 at 198 [Dethlefsen]. The author makes a distinction between collaboration as a sociological concept that refers to the enforced and necessary adaptation of whole societies under occupation and collaboration as a political decision taken by political decision makers who enjoy real choices.

85 Agmon, supra note 33 at 675–6.

86 In his eulogy for Habibi, Darwish acknowledged Habibi's lifelong struggle to show that the decision to stay in Israel should be understood not as betrayal but as a legitimate

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rejected the 'purist' position that equates staying in Israel and participating in its political life as collaboration of sorts. Saeed, the informer from *The Pessoptimist*, is a reincarnation of his earlier literary figure Um al-rubabeka (in translation, 'junk dealer'), the mother who stays in Israel, surviving by selling worthless remainders of those who left, while her family leaves Israel and condemns her for staying. Habibi depicts the woman's version of 'staying put' as superior to the military heroism adopted by Arab leaders, which led to catastrophe and exile.[87] Indeed, the *Pessoptimist* challenges the very moral scheme that unquestioningly accepts the dichotomy between the heroism of resistance and the cowardice of collaboration. By choosing to write a semi-autobiography and having it translated into Hebrew, Habibi enables readers to identify with the figure of the collaborator. His empathy toward the Palestinian refugee who turns informer in order to stay and survive in his homeland invites his readers to question the more conventional nationalist understanding of heroism and betrayal and to make important distinctions among different types of collaboration, some necessary, some despicable, and some admirable.[88]

How did the court's judgment relate to this nuanced understanding of collaboration and the meaning of 1948 for the Arabs who stayed in Israel? Judge Ginat of the Nazareth District Court wrote that the meaning of collaboration had to be decided according to 'whether a person who belongs to a nation that is at war with another and takes part in efforts to obtain weapons for the rival nation is to be praised or not.'[89] Instead of then considering the specific viewpoints held by members of the Arab community in Israel, the judge depicted the universal figure of a traitor and concluded that no community could uphold such persons

patriotic decision. Indeed, Habibi asked that the words 'stayed in Haifa' be engraved on his gravestone. Darwish said, You stayed in Haifa, while you were alive. The one who stayed in Haifa, that is how I called you ... he stayed where he was born, where he continued the organic and uninterrupted link between the land and its history and language. This is how you solved the dialectics of existential tension between subjugation and identity'; Mahmud Darwish, 'Emile Habibi' (1998) 12/13 Teoriyah u-Vikoret 463 [translated by author].

87 'When you were involved in political issues, she would get excited and was ready to fulfill any role given to her. And when one of you was arrested, she was at the jail to visit him even before his mother. She would bring you food and do your laundry'; Hannan Hever, *Producing the Modern Hebrew Canon: Nation Building and Minority Discourse* (New York: New York University Press, 2002) at 211–2 [Hever].

88 On different modes of collaboration, see Brook, supra note 35; Gerhard Hirschfeld, *Nazi Rule and Dutch Collaboration: The Netherlands under German Occupation, 1940–1945*, translated by Louise Willmot (Oxford, Berg; New York, St Martin's Press, 1988) at 1–11; Isaiah Trunk, *Judenrat: The Jewish councils in Eastern Europe under Nazi Occupation* (Lincoln, NE: University of Nebraska Press, 1996); Dethlefsen, supra note 84 at 193.

89 See *Habibi*, supra note 11 at 10 [translated by author].

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in high esteem. He presented his judgment as based on universal moral standards.

> If the question I presented is the right one, then there is no need to ask if the behaviour attributed to the plaintiff is abhorred by the public at large or by a segment of the public. The defendants attributed to the plaintiff help to the other side in times of war. It is clear that the receiving side will praise such help and pray that much more will follow, but this is not the question here. Even the one that receives the help would not see as legitimate such behaviour by the member of one people toward those who are fighting his people in a war.[90]

Relying on the universal condemnation of the 'collaborator' helped the judge side-step the difficult question of which community should provide the basis for his normative judgment – the Israeli community at large or the Arab segment of the population – since both were perceived as adhering to universal moral standards.

The judge's ability to uphold Habibi's position relied on universal moral standards not on hearing the particular details of the Palestinian narrative of the *nakba*. The translation of Habibi's claim into legal discourse universalized his position in order to uphold it. Similarly, when Habibi's novel was translated and made into a solo play by Muhammad Bakri, it was received enthusiastically by Israeli audiences. The critics emphasized the humanism of the play and identified with the character of the Palestinian 'schlemiel.' However, by relying on the universal humanism of Habibi and filtering it through parallels in Jewish history, the Israeli public (and the critics) was also quick to neutralize the political message of the play. The play was not understood in terms of the need to come to terms with Israel's responsibility for the Palestinian *nakba*.[91] In other words, the critics and audience universalized the political message and were thus able to avoid the painful process of a soul searching about Israel's treatment of the Arab minority that might lead to political revisions. This convergence between literature and law should give us pause. It is not surprising that the only way the judge could actually acknowledge the Palestinian perspective on the 1948 war was by abstracting the specific claim and applying universal moral standards to the dispute. At the same time, this abstract moral discourse of human rights tends to ignore the particular historical context and to flatten the narrative to the point where the need actually to listen to the Palestinian point of view is eliminated. The legal discourse of human rights is, therefore, enabling in terms of protecting the rights of individuals belonging to the minority but it also tends to obscure the historical story, with all its ambiguities and contradictions.

90 Ibid at 12.

91 See Hever, supra note 87; see also Feldhay Brenner, supra note 30.

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XI *Appeal*

We can identify three different approaches adopted by the judges in the Israeli Supreme Court in response to the challenge presented by Habibi's trial: 'abstract universalism,' 'contextual particularism,' and 'avoidance.' None of these approaches led the judges to a serious consideration of the actual views in the Arab community. On appeal, Justice Eliyahu Mazza, in dissent, rejected the moral universalism of Judge Ginat and advocated a contextual/historical approach for deciding the meaning of collaboration.[92] He refused to share the district court's assumption that such an act (helping the enemy in time of war) was universally condemned, arguing that its evaluation depended on the circumstances of the conflict, who initiated the war, to whom the people owed obligations of loyalty, and so on. This contextual approach holds the promise of trying to understand the views of the community involved. However, Mazza's theoretical position did not lead him to actually 'go visit' the views of the Arab community:

> The subjective feelings of the writer or the respondent are not enough. In order for the writing to constitute defamation, the court should be convinced that in the eyes of an *ordinary and reasonable reader* the described action would raise feelings of contempt to the respondent ... This was not proven by any evidence, and as I have tried to explain, such an assumption cannot be taken for granted.[93]

Thus, while acknowledging the need for contextual judgment, the judge relied on the idiom of the 'ordinary and reasonable reader' to refrain from explaining what its content should be. The majority of the judges, however, upheld Habibi's claim of libel, although, unlike the district court, they avoided making a specific moral or historical judgment about the claim of collaboration in the 1948 war. Instead they relied on the general tone of the article in *Al-Sinara* as degrading and humiliating without deciding on the most explosive issue, the historical truth about Habibi's role in the 1948 arms deal. As Justice Bach put it:

> In my view it is not important if helping obtain the weapons for Israel by an Arab Israeli can be considered a wrongful act by the public at large, the enlightened public or part of it, or not. The decisive fact is that in this publication the respondent became the target of defamation and accusations of treason, and it attributed to him despised motives of selfishness and personal benefit.[94]

The Supreme Court affirmed the compensation to Habibi of NIS 16 000. None of the judges made a real attempt to address directly the views of

92 *Mashuur v Habibi*, supra note 25 at 6 [translated by author].
93 *Mashuur v Habibi*, supra note 25 at p. 6 (paragraph 5) [translated by author].
94 Ibid at 13.

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the Arab community about the war of 1948, despite its centrality to the trial. Indeed, it seems that the court's judgment did not clear Habibi's name in the Arab community.[95] This can be explained by the fact that the judges did not make any decision regarding the truth or falsehood of the charges against Habibi in relation to his involvement in the arms deal. However, if we look at the trial as performance, we can see that it forced the court publicly to acknowledge the impact that the choice of a community of reference can have on the meaning of the ethos of equal citizenship in Israel.

It took another twenty years for a more empathic narrative, inclusive of the Arab minority in Israel, to be acknowledged by an Israeli judicial body. In 2003, the Orr Commission of Inquiry into the events of October 2000, in which thirteen Arab citizens were killed by police fire during violent demonstrations, published its report. The report opened with a short history of Arab citizens in Israel. In a courageous move, the commission confronted the issue of the 1948 war from the point of view of the defeated Palestinians, writing,

> This transformation [from majority to minority] was the result of a painful defeat that the Arabs suffered in their war against the Jews. The state in which they found themselves as a minority constitutes, in its very being, a constant reminder of their defeat ... The establishment of the state of Israel, which the Jewish people celebrate as the fulfilment of the dream of generations, is associated in the historical memory [of Palestinians] with the most difficult collective trauma of their history – the '*nakba*.' Even if nowadays they do not recite it day and night, the conception and birth of the state are inextricably linked to a polarized confrontation between two national movements that produced a protracted, bloody conflict. The content and symbols of the state, which are

95 In telephone interviews conducted by my research assistant, Ms Nasreen Alemy-Kabha with Arab journalists, they all agreed that the trial did not help to clear Habibi's name. Hanna Abu Hanna said that his impression was that 'the verdict did not have an effect on the Arab public. The legal victory did not clear his name in Arab society' (Interview of Hanna Abu Hanna [3 May 2010]; translated by author). Nazir Majli noted the difference in coverage of the trial between *Al-Ittihad*, which reported on Habibi's victory in the trial, and *Al-Sinara*, which did not really acknowledge that Habibi had won. However, he argued that the trial caused soul-searching about the politicization of the debate and helped to create a more objective and professional press (Interview of Nasir Majli [19 April 2010]; translated by author). Wadia Awada explained that the trial had a profound effect on the Arab community and undermined the image of the Communist Party, which until then had been considered a 'sacred cow' in Arab society. The story is still used against the Communist Party during election campaigns. Even though Habibi won the trial, the accusations against him continued to influence public opinion and the damage was irreversible. Awada thinks that the legal victory may have mitigated the effect of the accusations, but it did not clear Habibi (Interview of Wadia Awada [3 May 2010]; translated by author).

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anchored in law and glorify the [Israeli] victories in this conflict, commemorate for the members of the Arab minority their own defeat. As such, it is doubtful whether they have a way to genuinely identify with it. Time may heal their pain, but the more their national awareness strengthens, the more they will judge the very establishment of the state as problematic.[96]

As we have seen, the new *nakba* law of 2009 threatens to reverse this direction. It discourages any attempt to publicly acknowledge the Palestinian view of the 1948 war, seeking to uphold the hegemonic Zionist narrative while deliberately suppressing the Palestinian narrative.

The problematic implications of such a move are also evident in the field of criminal law, where a number of criminal suits have been brought against Arab-Israeli MKs for travelling to 'enemy states' such as Lebanon and Syria and making contact with enemy agents.[97] Although, these leaders have, indeed, broken the letter of the law, from their point of view they did not cross the borders into 'enemy land' but rather sought to facilitate family visits of Israeli Palestinian citizens torn from their family members in 1948. In other words, their actions have a symbolic meaning – they contest the delineation of the political community assumed by Israeli criminal law in a way that tends to discriminate against Arab citizens whose families left in 1948 and reside in neighbouring Arab countries. In defending their actions, they have challenged the court's authority to call them to account for acts that their own community regards as stemming from basic human needs and the moral obligations of the state to its citizens. Here, we see how the exclusion of the Palestinian counter-narrative about 1948 from the court's deliberation helps depict their acts as serious criminal offences, associating

96 State of Israel, *Report of the State Commission of Inquiry into the Clashes between Security Forces and Israeli Civilians* (2003) at 27 [translated by author].

97 See Crim C (Nazareth) 5196/01, *State of Israel v Bishara*, 2003(2) TAKDIN – Shalom, 9 [*Bishara*], in which MK Azmi Bishara and his parliamentary assistants were indicted for assisting Arab Israelis to cross the border into Syria (an enemy state) in order to meet with their families. Assisting a person to cross the Israeli–Syrian border is a felony according to Regulation 18 (a), (d) and Regulation 5 of the Emergency Regulations (Foreign Travel) (5708-1948). Not having any substantive defence, Bishara raised the 'abuse of process' defence, claiming that this was a humanitarian act, that the authorities had been aware of the very public actions and had not prevented them, and that the authorities had also behaved in a discriminatory and abusive manner toward the defendants. See also Adalah, News Update (28 January 2010) <http://www.adalah.org/eng/pressreleases/pr.php?file=28_01_10, regarding the indictment of MK>. Sa'id Ali Naffaa was charged, among others, for his alleged involvement in facilitating the entry to Syria of Druze religious leaders (holding Israeli citizenship). The indictment included aiding and facilitating unlawful travel to an enemy state, a violation of the Emergency Regulations (Foreign Travel) (5708-1948) and the Prevention of Infiltration Law (Offences and Jurisdiction) (5714-1954), 8 LSI 133 (1953–4). As of March 2010, the case is still pending.

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them with the larger category of treason.[98] If the normative basis for drawing the boundaries of the political community presupposed by the Israeli criminal code is not considered, these prosecutions remain legitimate and unproblematic for the larger public. Neither the court nor the prosecution is called upon to acknowledge how the complicated status of the Arab citizens of Israel might problematize the definition of treason and undermine the authority of the Israeli court over such cases. Unlike the central place given to the question of delineating the community in the Habibi libel trial, in these criminal trials, the issue is relegated to the periphery of the decision. It is deemed non-legal, residing in the humanitarian discretion of the court and not understood as a matter of legal right.[99]

XII *The missing community*

Our discussion of the Habibi Libel trial has revolved around the question of community. We examined the process of drawing the boundaries of the Israeli normative community in relation to an arms deal that contributed to the establishment of Israel in 1948. As we saw, Habibi was portrayed by the defendants as a traitor to the Palestinian community. Our point of entry into this fascinating trial was the accusation of 'treason,' an act considered one of the central crimes in every criminal code, since the political community is undermined from within by a citizen. Criminal law is concerned with treason to the state, which assumes a homogeneous community of all the citizens. Our central question was what happens in a state in which two national communities (majority and minority) remember and interpret the very founding of the state in different ways. Habibi's libel trial raised this question with particular clarity and urgency. How should the court understand an accusation of treason relating to collaboration by a member of a national minority with the security forces of the national majority, with which it was at war? The article presented the different answers given by the litigants and the judges on the bench. Interestingly, none of the judges treated this issue as a purely factual question regarding the opinions prevailing in the Arab community in Israel. This missing viewpoint, I argued, is not accidental but reveals the normative component of libel law that cannot be avoided when dealing with

98 Both Bishara and Naffaa were indicted for contact with a foreign agent, a violation of section 114 (A)(B)(C) together with section 91 of the *Israeli Penal Code* (5733-1973). These are offences 'against state security, foreign relations and official secrets,' which constitute among the most serious offences against the state. The code classifies the offence of contact with a foreign agent as an act of espionage punishable by up to fifteen years' imprisonment.

99 *Bishara*, supra note 97 at para 30: the humanitarian concerned was raised by the defence under the abuse of process defence and was rejected by the court.

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questions concerning the founding narrative of the state. I also argued that this normative component of delineating the boundaries of the imagined community by the court, which is revealed in a civil trial, is often hidden in criminal trials. However, the fact that it is often obscured does not mean that it is absent, or that we can safely ignore it. The lack of serious discussion of the community component of criminal law – that is, the source of the court's authority over the criminal defendant – has led to a long neglect whose effects are now felt in the growing debate on universal jurisdiction. This question can only be answered if we are willing to open up discussion about the legitimate normative boundaries of the political community presupposed by a criminal code. This issue is now occupying scholars of international criminal law.[100] But as I have tried to show in this article, it is no less important for domestic criminal law, which often assumes authority over citizens of a pluralistic political community who might strongly disagree about the normative boundaries of their shared community and the implications of those boundaries for criminal law. It is here that criminal law meets constitutional law. We studied the Habibi trial to discover the complex negotiation that takes place once this question is brought to the fore. The dynamic of the litigation, its dangers and accomplishments in litigating the boundaries of the Israeli normative community, can help facilitate a language that is still missing in criminal law.

100 See Duff, 'Authority and Responsibility, supra note 3; see also Luban, supra note 3.

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