

Constructing “Private” Historical Justice in State-Building

*Manal Totry-Jubran**

Wealthy philanthropic individuals operating within private law have been largely absent from the historical justice narrative of states in transition and, consequently, from normative discussion regarding the justification of their actions under the auspices of the market. This Article seeks to fill this void by examining the “private” historical justice of Jewish state-building prior to the establishment of Israel. Specifically, it focuses on the legal history of Baron Edmond de Rothschild’s settlement project during the Ottoman and Mandate periods and investigates the project’s normative implications. The Baron was a fundamental actor in the design of the Palestinian/Israeli space, as he supported existing Jewish settlements and established new ones. He also built several public institutions that continue to exist to date. I argue that the Baron’s settlement project needs to be addressed from a multidimensional aspect with regard to different groups that were affected by it. On the one hand, his settlement project was just towards the Jewish settlement because it provided a shelter for Jewish immigrants who fled Europe, and it realized the Jews’ right of self-determination. On the other hand, his project resulted in the coercive displacement of an underprivileged local Arab population called the fellaheen and unjustly infringed on their territorial rights.

* Faculty of Law, Bar-Ilan University. I would like to thank the participants of the “Historical Justice in the Context of the Israeli-Palestinian Conflict” workshop and especially Yitzhak Benbaji, Leora Bilsky, Doreen Lustig, Alon Jasper, Nurit Wimer, Maria Miguel De Pine and Jubran Jubran for their valuable comments. The data presented in this article was made possible thanks to a research grant from “The Edmond de Rothschild Foundation.” Cite as: Manal Totry-Jubran, *Constructing “Private” Historical Justice in State-Building*, 21 THEORETICAL INQUIRIES L. 305 (2020).

INTRODUCTION

The building of the Jewish national state was carried out through land acquisition and the settlement of Jews, as well as the construction of Jewish localities within the space of Palestine,¹ and it was enabled by numerous actors. Among these were wealthy philanthropic individuals and families, such as the Hirsch and the Rothschild families,² who established a Jewish presence on the land, *inter alia*, by way of market transactions. These transactions had considerable implications for the local underprivileged Arab population known as the “fellaheen.” Jewish land purchasers, who bought land from elite-class Arab landowners called “effendis,” aimed to settle Jews in Palestine and were committed to the Hebrew Labor ideal of employing Jewish workers. Upon purchase, Jewish owners called for the evacuation of the fellaheen from the newly purchased land and prevented them from working it, thus dispossessing them and infringing on their occupancy rights. The effendis were motivated by land-based profit despite being well-aware of the consequences of selling land to Jewish individuals and institutions, and their lack of solidarity with the fellaheen also contributed to the latter’s dispossession.³

Several theoretical frameworks encompass the Zionist project of establishing a Jewish national home in the space of Palestine/Israel. Some provide criticism, conceptualizing it as a colonial settlement project which entailed wrongs committed against the local population.⁴ Others provide normative justifications for the project, based, among other things, on the Jewish right to national self-determination.⁵ These two important and well-founded bodies of research developed separately and contrastingly and did not discuss the normative account of wealthy private individuals’ actions and the significant role they played in this project.

1 I use the term “Palestine” throughout the article to refer to the space ruled by the Ottomans and the British Mandate prior to the establishment of the state of Israel. I use the term Palestine/Israel when dealing with the transformative period of establishing Israel.

2 Shulamit Laskov, *Hovevi Zion Be’maavak Im Rotshild Al Pney Ha’yeshuv* [*Hovevi Zion in Struggle with the Rothschilds on the Character of the Settlement*], 12 ZIONISM 29, 29 (1987) (in Hebrew).

3 Yael Allweil, *Building a Home-Land: Zionism as a Regime of Housing 1860–2005*, at 32 (2001) (Ph.D. Dissertation, University of California, Berkeley).

4 See, for example, Ilan Pappé, *Zionism as Colonialism: A Comparative View of Diluted Colonialism in Asia and Africa*, 107 SOUTH ATLANTIC Q. 611 (2008).

5 See, for example, Chaim Gans, *The Palestinian Right of Return and the Justice of Zionism*, 5 THEORETICAL INQ. L. 269 (2014).

This Article shifts the focus towards the contribution of philanthropic wealthy individuals to the nation state-building of Israel, what I refer to as “private historical justice,” and aims to provide a complex normative account of their actions. The suggested framework of private historical justice seeks to explore the actions of private actors and their implications in a critical aspect. The project’s primary innovative assertion is that the private historical justice opens a new window of opportunity to a wider and deeper understanding of the legal and normative consequences of well-organized private actions in the private sphere, which was neglected. Concretely, this Article investigates the normative implications of the legal history of land acquisition led by the Rothschild family, predominantly by Baron Edmond de Rothschild (the Baron), prior to the establishment of the State of Israel.⁶

The Article hinges on three main assumptions. First, individuals who amassed a large amount of land and utilized an institutionalized, long-term strategy contributed to the process of building the state no less than public and private institutions. Second, the examination of the *modus operandi* of individuals can reveal other layers of human rights violations and consequently give rise to additional normative implications. Third, there is constant dialogue and interaction, sometimes apparent and direct, in other cases hidden and indirect, between the public and private spheres, both of which contribute to the transitional process of regimes. Note that the distinction between the private and the public is not challenged herein, meaning that neither of these categories should be dismissed; they are both essential to normative discussions regarding state-building processes.

Due to his endeavors, the Baron was referred to as “The Father of the Settlement” (*Avi Hayishuv*).⁷ He was also known, by virtue of his philanthropic activity, as “The Famous Benefactor.” His actions formed an integral part of a much-celebrated state-building process, to the extent that in 1954, twenty years after his death, the Israeli government arranged for a state funeral attended by leading members of the Knesset (the Israeli Parliament).⁸ This Article presents a different, undiscussed aspect of the Baron’s enterprise, which has been left out of the historical (in)justice discourse and normative discussions, that took place under private law and as part of an allegedly neutral free market. Based on Margaret Moore’s theory of territorial rights,⁹

6 Specifically, between 1845 and 1934.

7 SIMON SCHAMA, *TWO ROTHSCHILDS AND THE LAND OF ISRAEL* 14 (1978).

8 *Id.* at 15.

9 Margaret Moore, *The Taking of Territory and the Wrongs of Colonialism*, 27 *J. POL. PHIL.* 87, 89 (2019). Further explanation about Moore’s theory will be given in part IV.A.

I maintain that the Jewish settlement project infringed on the territorial rights of the fellaheen, who inhabited the space of Palestine and were displaced as a result of Jewish land acquisitions. While land transactions were essential for the establishment of a Jewish national home and the future state and might be morally justified, I argue that the Baron's settlement project was nonetheless unjust towards the local Arab population.

The Article is comprised of four Parts. Part I presents the legal regulation of the land regime during the Ottoman period, which enabled a process of privatization of public lands and established non-state actors as leading agents in the design of the Palestine/Israel space. Part II presents the legal regulation of the land regime during the British Mandate and the dispossession of the fellaheen. The purpose of this presentation is to delineate the complex state-building process that took place prior to the establishment of Israel, which was made possible by, among other factors, the development of a new, more modern regime of property rights registration and privatization. Part III presents the Baron's settlement enterprise and its mode of operation during both the Ottoman period and the British Mandate and aims to show the central, continuous, and well-established contribution of the Baron's actions to the historical justice process. It also explores the implications of the Baron's activity for the local Palestinian community. Part IV discusses the normative implications of the Baron's settlement project throughout these periods. Finally, I close with a Conclusion.

I. LEGAL REGULATION OF THE LAND REGIME IN THE SPACE OF PALESTINE DURING THE OTTOMAN PERIOD (1858–1917)

This Part presents the legal regulations that applied to land acquisition during the Ottoman Empire's rule as of 1858, the year in which the Ottoman Land Code (OLC) was enacted. The OLC stayed in effect throughout the British Mandate period and even following the establishment of the State of Israel. The OLC was a formative element in the design of the Palestine/Israel space and society and is vital to the study of private historical justice. It contributed to the privatization of land and the formation of a land property market.¹⁰ Land became individually owned; consequently, foreign investment increased and Jewish settlements became feasible.¹¹ On the one hand, the commodification

10 Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholders 1948–1967*, 33 INT'L. L. & POLI. 923, 932 (2001).

11 FARID AL-SALIM, PALESTINE AND THE DECLINE OF THE OTTOMAN EMPIRE 77 (2015).

of land enriched the Arab effendis, but on the other hand, it resulted in the dispossession of the underprivileged Arab fellaheen.¹²

It is impossible to understand the Jewish state-building project without examining the essence of this code, which enabled the commodification of the land. Therefore, sub-Part A deals with the legislative reforms that this code implemented on land regimes, and elaborates on its implications for the Arab society. Sub-Part B presents the effects of the land reform on the Jewish settlement and on immigration within the space of Palestine at that time.

A. The Ottoman Land Code: Privatization of Land and Property Rights Entitlements

The OLC was an integral part of the *Tanzimat*, an overall reorganization and reform that took place across the institutions of the entire empire. This reform aimed to implement a policy of centralization, modernization, and strengthening of the Empire’s sovereignty;¹³ it targeted tax collection, military conscription, education, and the legal system.¹⁴

With regard to land reform, the OLC promoted a modern legal framework for property rights aimed at reasserting central control of land revenue within the empire by imposing taxes on land transactions.¹⁵ It reaffirmed Islamic laws pertaining to land but innovated greatly by altering the nature of land ownership, allowing individuals to own large areas of land, thus promoting a process of land privatization. In addition, the Ottoman government made efforts to establish a modern system of land registration to enable proper administration of land resources and transactions.¹⁶ These efforts aimed to secure the property of all Ottoman subjects, regardless of their religion.¹⁷

Article 1 of the OLC established five categories of land: “*Mulk*,” “*Miri*,” “*Mewat*,” “*Matruka*,” and “*Waqf*,” each with its specific and different set of rules and property rights. “*Mulk*” (“ownership” in Arabic) was the closest version to private property as understood in Western democracies.¹⁸ This category applied to a limited proportion of lands, found only in the centers

12 GERSHON SHAFIR, *LAND, LABOR AND THE ORIGINS OF THE ISRAELI-PALESTINIAN CONFLICT, 1882–1914*, 9 (1996).

13 AL-SALIM, *supra* note 11, at 6.

14 Ahmed H. Ibrahim, *Viewing the Tanzimat from Tulkarm*, 70 *JERUSALEM Q.* 131, 131 (2017).

15 WALID KHALIDI, *BEFORE THEIR DIASPORA: A PHOTOGRAPHIC HISTORY OF THE PALESTINIANS 1876–1948* (1991); Kedar, *supra* note 10, at 932.

16 *Id.* at 933.

17 AL-SALIM, *supra* note 11, at 22.

18 Allweil, *supra* note 3 at 10; AL-SALIM, *supra* note 11, at 14.

of towns and villages.¹⁹ “*Mewat*” (“dead” in Arabic) consisted of uninhabited and uncultivated land.²⁰ “*Matruka*” (“abandoned” in Arabic) referred to public land and resources in towns or villages, used for public purposes, such as roads.²¹ “*Waqf*” referred to endowment land,²² and the fifth and most common category, found in populated areas, was termed “*Miri*” (“tax” in Arabic).

Miri was land comprised of arable fields intended for cultivation,²³ and constituted the majority of the land in Palestine.²⁴ Prior to the enactment of the OLC, ownership of *Miri* land was held by the Empire (the state), which granted peasants (fellaheen) irrevocable leaseholds to cultivate and use the land. The fellaheen inhabited these lands and were entitled to pass on the right of cultivation to their heirs.²⁵ In other words, *Miri* land offered occupancy rights to dwell in the property, but the ownership remained in the hands of the state.

One of the new OLC most significant provisions is Article 78 that enabled private possession by individuals of *Miri* state land provided the land was cultivated for a period of ten years.²⁶ However, *Miri* land that ceased to be cultivated for more than three years returned to the hands of the state. Another way to own private rights in *Miri* land was by “reviving” *Mewat* land, turning it into agricultural land.²⁷

Furthermore, under the new land code, any individual in possession of *Miri* land was now required to obtain from the government a land deed called a *Kushan*, which documented the rights of the possessor. The OLC do not distinguish between the possessor and the cultivator and assumes that they are the same person. However, as I elaborate below usually the registered possessor was the effendis and the cultivators were the fellaheen who worked for the effendis. The code also stated that the possessor of *Miri* land rights was to be registered in the land registry called “*Tabu*.”²⁸ Authorization to possess *Miri* land was granted against a dual payment: a leasehold fee paid in advance in return for the *Kushan*, and an annual title fee on the crops grown on the land.²⁹ Landowners’ registry was also used by the military for future

19 Kedar, *supra* note 10, at 932–33.

20 Ottoman Land Code art. 6, 7 [hereinafter OLC].

21 *Id.* at art. 5, 91.

22 *Id.* at art. 4.

23 *Id.* at art. 3

24 AL-SALIM, *supra* note 11, at 82.

25 Classical Ottoman land-tenure legislation made a fundamental distinction between the right to cultivate land (*Tasarruf*) and full ownership of land (*Raqaba*).

26 OLC, *supra* note 22, at art. 78; Kedar, *supra* note 10, at 935.

27 OLC, art. 103.

28 *Id.* at art. 3.

29 AL-SALIM, *supra* note 11, at 91.

recruitment;³⁰ thus, the state had a clear interest in implementing article 78 of the code because the allocation of *Miri* land for private use generated income for the state.

The 1858 land reform was innovative because it led to a gradual transfer of public land to private ownership.³¹ Furthermore, it released *Miri* state land to market transaction.³² Thus, the OLC, as well as the *Tanzimat* reform, had an immense effect on the local population, especially the peasants. By the second phase of the *Tanzimat* and the arrival of Jewish immigrants to Palestine, the local Arab population was comprised of two major social groups: the wealthy “effendis” (which is an Ottoman Turkish title meaning “Master” or “Lord”), and the peasants called the “fellaheen.”³³ The effendis were the elite class: landowners, merchants, and educated government employees. They were from well-known families, and some were also local political leaders.³⁴ The fellaheen cultivated the arable land, which until the enactment of the code was owned by the state,³⁵ and they had minimal access to political power.³⁶

Following the enactment of the OLC, which levied taxes on the cultivators, and following the *Tanzimat* reforms, which facilitated the imposition of military service via a central administration, the fellaheen sought to avoid these burdens.³⁷ They feared being drafted by the military, as long periods of service harmed their income. At the same time, they dreaded paying land taxes, especially in drought seasons.³⁸ The effendis took advantage of the fellaheen’s distress and made deals with them according to which the fellaheen would cultivate the land and deliver 25–30 percent of the crop to the effendis, who in return would register the land under their own names and pay all the taxes to the government.³⁹

Consequently, despite the fact that the fellaheen were the actual cultivators of the land, permits to possess *Miri* land (*Kushans*) were granted by the Ottoman

30 *Id.* at 92.

31 Allweil, *supra* note 3, at 4; Attila Aytakin, *Agrarian Relations, Property and Law: An Analysis of the Land Code of 1858 in the Ottoman Empire*, 45 MIDDLE E. STUD., 935, 941 (2009).

32 SHAFIR, *supra* note 12, at 19.

33 AL-SALIM, *supra* note 11, at 95.

34 These included the Sursock, Karkabi, Farah, Khuri, and Tueini families that resided in Beirut. KENNETH W. STEIN, *LAND AND QUESTION IN PALESTINE: 1917–1939*, 56 (1984).

35 *Id.* at 99.

36 *Id.* at 24.

37 AL-SALIM, *supra* note 11, at 92.

38 *Id.*

39 *Id.*

authorities mainly to the urban and rural notables—the effendis, whose names were registered in the *Tabu*.⁴⁰ The fellaheen continued to cultivate the land believing it was theirs, whereas following the enactment of the OLC they did not legally own it.⁴¹ It is estimated that in 1907, the fellaheen were full or part-owners of, or enjoyed cultivation rights to, approximately 20 percent of the land in the Galilee and 50 percent in Judea.⁴² The code stated that legal ownership of land took precedence over actual occupation and cultivation. In this way, it enabled absentee ownership and made land habitation and cultivation inferior to ownership.⁴³ Indeed there were many absentee owners of land in Palestine who dwelled elsewhere.⁴⁴

The OLC turned the fellaheen into mere means of production,⁴⁵ disconnecting land from labor (cultivation) and leading to the commodification of both land and labor, which became subject to the logic of the market.⁴⁶ While prior to the enactment of the OLC the fellaheen's cultivation and occupancy rights were respected by the state, once landownership was transferred to the effendis, the right of cultivation lost most of its entitlement.⁴⁷ Farmers, who prior to the OLC had cultivation and occupancy rights provided to them by the state, now became tenants of new (private) landlords and risked eviction from the land they occupied and had no legal way of objecting their eviction.^{48,49} However, as elaborated in the Part II.B, in 1929 the tenants' rights was protected within the Protection of Cultivators Ordinance.

Some landowners kept peasants as paid labor. However, in many cases, peasants were dispossessed due to changes in agricultural use, by being replaced by “better” workers or due to the sale of the land to Jewish owners who immediately replaced them with Jewish workers, under the policy of Hebrew labor.⁵⁰ Some studies estimate that during the Ottoman period ten percent of the land was transferred from Arabs to Jews, and that the Ottoman land reform enabled the formation of the Jewish homeland and the dispossession

40 *Id.* at 84.

41 *Id.* at 91.

42 STEIN, *supra* note 34, at 24.

43 Allweil, *supra* note 3, at 13.

44 *Id.* at 26.

45 *Id.* at 5.

46 *Id.*

47 *Id.* at 14.

48 Allweil, *supra* note 3, at 32.

49 Alan Dowty, *A Question That Outweighs All Others: Yitzhak Epstein and Zionist Recognition of the Arab Issue*, 6 J. ISR. STUD. 34, 37 (2001); Allweil, *supra* note 3, at 13.

50 *See* Part II.

of native Arab peasants.⁵¹ Others show that 23 percent of the lands were sold to Jews by the effendis.⁵² However, the greater number of land transactions from Arabs to Jews as well as the replacement of the Arab fellaheen by Jewish workers was done under the British Mandate.⁵³

Alongside these reforms, the Jewish settlers faced several obstacles in purchasing land. These are discussed in the next sub-Part.

B. Land Reform and Jewish Immigration

Until 1867, any sale of land to foreign subjects was forbidden.⁵⁴ In June 1867, the transfer of land to subjects of foreign countries that had an agreement with the Ottoman Empire, such as Britain, France, and Austria, became possible by law.⁵⁵ This legislation affected Jewish immigrants arriving in large groups from Russia and Romania (countries that did not reach such agreements with the Ottoman Regime) following a series of pogroms, as they were not able to register land under their names.⁵⁶

Another significant regulation that limited the ability of Jews to purchase land was an order issued in November 1892 by *Kushta* (the headquarters of the Ottoman Empire), which prohibited any acquisition of *Miri* land by Jews in particular.⁵⁷ A few months later, in April 1893, *Kushta* declared that the purpose of this order was to prevent the permanent settlement of Jewish immigrants.⁵⁸ It also clarified that the order was aimed at preventing attempts to bypass the prohibition imposed on Jews to purchase land by way of registering land under the names of Ottoman Jews on behalf of European Jews.⁵⁹ These clarifications illustrate the ambivalent attitude of the Ottoman

51 Some even claim that the OLC gave cause to the refugee problem in 1948. See Allweil, *supra* note 3, at 14–15.

52 Allweil, *supra* note 3, at 14.

53 STEIN, *supra* note 34, at 173.

54 Aytakin, *supra* note 31, at 939.

55 *Id.*; Asher Solel, Sifrei Ha'auza Ha'pnimeam Shel Ha'moshavot Be'shlhai Ha'shilton Ha'othmani [*Private Land Registers of the Jewish Colonies at the End of Ottoman Rule*], 58 CATHEDRA: FOR THE HISTORY OF ERETZ ISRAEL AND ITS YISHUV 74, 74 (1990) (in Hebrew).

56 *Id.* at 76.

57 Simon Rubinstein, *Ylutz V'etikva B'enose Rehishat Karka Al Yedei Ha'yehudim B'heretz Israel Be'shelhai Ha'kufa Ha'otmanit* [*Constraint and Hope on the Acquisition of Land by the Jews in the Land of Israel in the Late Ottoman Period*], 41 KARKA 97, 97 (1996) (in Hebrew).

58 *Id.*

59 *Id.*

Empire towards its Jewish subjects; the state was committed to its subjects, yet was reluctant to allow European capital investment and massive Jewish immigration that could change the composition of the state's population.

Pursuant to *Kushta's* clarifications, the governing authorities in Palestine posed obstacles to land transactions, mostly as regards *Miri* land, less so as regards *Mulk* (private) land.⁶⁰ In 1910, a law prohibiting the sale of land to Jews who were citizens of other countries came into effect.⁶¹ Another statute, which remained in force until 1913, prohibited registering or obtaining mortgages on land in the name of associations and institutions.⁶² This *de facto* limited Jews' ability to purchase land because most of the associations and corporations which existed at the time were Jewish, except for some German-Christian institutions.⁶³

Despite these regulations, Jewish individuals, private companies, and organizations purchased land, bypassing the legal prohibitions⁶⁴ by registering lands in the name of Jewish ottomans.⁶⁵ Moreover, alongside the formal registration of the Ottoman authorities, the Jewish colonies created internal, unofficial land registration books, which included registration of all property rights and land transactions.⁶⁶ The Jewish neighborhoods, the colonies, the Baron's administration, and other Jewish institutions all hired professional surveyors who measured lands and drew up maps with detailed boundaries, areas, and shapes of all parcels.⁶⁷

However, these were unofficial land registration books with no legal validity; the immigrant Jewish settlers could not register land on their names in the official registration books.⁶⁸ Nonetheless, as detailed in the following Part, these unofficial registration books became of great importance during the British Mandate, when they were adopted as part of the official land registration books.

Despite its efforts, the Ottoman Empire was unsuccessful in creating a precise system of land registration; it was unable to survey, map, or settle title, and many owners refrained from registering land transactions in order

60 *Id.* at 98.

61 *Id.*

62 LEAH DOUKHAN-LANDAU, *THE ZIONIST COMPANIES FOR LAND PURCHASE IN PALESTINE 1897-1914*, 19-21 (1979).

63 *Id.* at 21.

64 Rubinstein, *supra* note 57, at 98.

65 Solel, *supra* note 55, at 76-77; DOUKHAN-LANDAU *supra* note 62, at 22-24.

66 *Id.* at 24-25.

67 *Id.*

68 Solel, *supra* note 55, at 79.

to avoid taxes and being enlisted for military recruitment.⁶⁹ Consequently, by the end of the Ottoman period, only about five percent of the land in Palestine was registered in the official registration books.⁷⁰ As presented in the next Part, the extensive acquisition of lands by Jews and their registration under Jewish ownership took place during the Mandate rule, which was very much committed to the Zionist project.

II. LEGAL REGULATION OF THE LAND REGIME IN PALESTINE DURING THE BRITISH MANDATE (1917–1948)

British forces occupied Palestine in the summer of 1917 and imposed a military regime. On 2 November of that year, the “Balfour Declaration” was issued via a letter sent by the British Foreign Secretary, Lord Balfour, to Lord Rothschild.⁷¹ On 25 April 1920, the military regime was replaced by a civilian, mandatory government headed by the High Commissioner, Herbert Samuel, who was the executive commander appointed by the British government to rule Palestine and in charge of the Governmental administrative Activities. Contrary to the Ottomans, the British were deeply committed to the development of Jewish settlements.⁷² During its first 15 years, the Mandate administration enacted 40 ordinances on land matters (some of them amended more than once), which served the Jewish settlement at the time.⁷³ These regulations were even regarded as “a master-piece of how colonial regimes occupy legal systems.”⁷⁴

This Part presents some of these significant regulations. It first deals with the legal ordinances on land registration, focusing on their selective

69 AL-SALIM, *supra* note 11, at 92.

70 Kedar, *supra* note 10, at 933.

71 GIDEON BIGER, *THE BOUNDARIES OF MODERN PALESTINE 1840–1947* at 49 (2004).

72 Article 6 of the Mandate for Palestine, as approved by the Council of the League of Nations on 24 July, 1922, stated: “The Administration of Palestine [...] shall encourage, in cooperation with the Jewish Agency [...] close settlement by Jews on the land, including State lands and waste lands not required for public purposes,” http://avalon.law.yale.edu/20th_century/palmanda.asp. For the actual British efforts to establish a Jewish national home, see Robert Home, *An ‘Irreversible Conquest’? Colonial and Postcolonial Land Law in Israel/Palestine*, 12 *Soc. & LEGAL STUD.* 291, 295 (2003).

73 Jeremy Forman & Alexandre Kedar, *Colonialism, Colonization, and Land Law in Mandate Palestine: The Zor al-Zarqa and Barrat Qisarya Land Disputes in Historical Perspective*, 4 *THEORETICAL INQUIRIES L.* 491, 492 (2003).

Note that the term “settlement” is used to describe the pioneering Jewish localities.

74 Home, *supra* note 72, at 294–95.

implementation that benefited the Jewish settlement, and then elaborates on the dispossession of the fellaheen class.

A. Legal Regulation of Land Registration

The new regime adopted, with some amendments, the land laws of the Ottoman government, which required all land transactions to be registered in the land registration books, but it also enacted other ordinances on land matters.⁷⁵ However, since the official land registration books were taken by the Ottoman authorities following their regime's collapse, it became impossible to renew the activities of the land registry during the early years of the Mandate.⁷⁶ This motivated the British government to close the Ottoman land registry altogether and prohibit any land transactions until a new registry was established.⁷⁷

Two years later, on 18 September 1920, the High Commissioner of Palestine signed the "Land Transfer Ordinance of 1920,"⁷⁸ which effectively adopted the Ottoman land laws published in 1858, as amended in 1912–1914, turning them into more advanced land laws.⁷⁹ The aim of the Ordinance was to ensure that the land registry contained a complete and accurate record of all transfers of land rights, and to prevent transactions from being made without the consent of the land registry offices' directors.⁸⁰ Subsequently, during the second half of the 1920s, a comprehensive process of land survey and settlement of title in Palestine was initiated, based on the Australian Torrens system.⁸¹ According to this system, land rights were recorded in state-administered registers in numbered blocks and parcels, based on precise mapping. Legal entitlements to each parcel were then determined in a quasi-legislative process, based on the Land Transfer Ordinance of 1920.⁸²

Section 7 of the Land Transfer Ordinance, regarding the right of associations to act as landowners according to the Ottoman law of 1913, left the law in effect. However, it enabled associations to act as landowners, provided that a

75 Robert Home, *Scientific Survey and Land Settlement in British Colonialism, With Particular Reference to Land Tenure Reform in the Middle East 1920–50*, in 21 *PLANNING PERSPECTIVES* 1, 2 (2006).

76 ASHER SOLEL, *HATICHUM HAGEOGRAPHY SHEL GVULOT HAZCHUYOT AL KARKA'OT BE'ERETZ ISRAEL VEMIPUYAM* [THE GEOGRAPHICAL DEMARCATION AND MAPPING OF THE RIGHTS TO LAND IN ISRAEL] (1991) (in Hebrew).

77 Home, *supra* note 75, at 15.

78 Land Transfer Ordinance, 1920.

79 See Home, *supra* note 75, at 15.

80 Home, *supra* note 72, at 299.

81 Kedar, *supra* note 10, at 938

82 *Id.*

banking institution was given a mortgage on the land. Moreover, associations could act as landowners if the land was needed for their activities.⁸³ This section of the Land Transfer Ordinance partially abolished the Ottoman restrictions imposed on the transfer of land in relation to corporations, which, as noted above, were mostly Jewish at the time.⁸⁴ A simple and expeditious way to conduct valid government land registration books was to transfer all existing unofficial land registration books' records to the official land registry. Subsequently, an order to amend the land registration books was published in 1926, setting a period of three months for the delivery of unofficial books to the government's land registration department.⁸⁵ Pursuant to this order, any unofficial books not delivered within this period were to be considered null and void for use as registration evidence before the courts.⁸⁶ Therefore, the order permitted the registration of any sale, gift, mortgage, lease, distribution, and any other transfer of land made prior to the publication of the order of 1926 in the government land registration books.⁸⁷

As mentioned in Part I, the Jewish colonies maintained solid, albeit unofficial, land registration books at the time. The Land Transfer Ordinance encouraged the committees of the Jewish colonies to complete and update their internal land registration books before submitting them to the government's land registration department. The committees expected the drawings and maps in these books to be used as evidence by the officials.⁸⁸ Accordingly, the Jewish communities were the main beneficiaries of this regulation, as it ensured their rights. The Arab communities had no internal land registration books, maps, or drawings marking their ownership of land.⁸⁹ Moreover, as elaborated in Part

83 SURVEY OF ISRAEL, *Ha'mipuy Le'izorech Hesder Karkaot Be'erez Israel, Mi'shelhey Ha'ikufa Ha'othmanit Ve'ad Ha'yom – Chelek Beit: Tkufat Ha'mandat [The Mapping for Land Settlement in Eretz Israel, From Late Ottoman Period till Present Days – Part 2: Mandate Period]*, https://www.mapi.gov.il/Heritage/Pages/cadaster_b.aspx (Last visited Apr. 14, 2020) (in Hebrew).

84 *Id.*

85 Solel, *supra* note 55, at 83.

86 *Id.*

87 The process of land survey and the settlement of title continued throughout the British Mandate and was accompanied by the legal regulation of land. Thus, in 1928, the Land (Settlement of Title) Ordinance was enacted and has constituted the basis of Israel's legal system regarding land to this day. Kedar, *supra* note 10, at 938.

88 *Id.*

89 For further reading on this issue, see Ronen Shamir, *Suspended in Space: Bedouins under the Law of Israel*, 30 L. & SOC. REV. 231 (1996); Kedar, *supra* note 10, 949–52.

I, the land registration reform effectively harmed the rights of Arab peasants, who lost their occupancy rights for not having registered them.

Another important stage in the context of land regulation was the “White Paper” policy, which became the governing policy for Mandatory Palestine from 1939 until the British departure in 1948.⁹⁰ The White Paper called for the establishment of a Jewish national home in an independent state within ten years. However, it limited Jewish immigration to 75,000 immigrants for five years and established that further immigration was not to be permitted unless the representatives of the Arab majority were prepared to acquiesce to it.⁹¹

The “White Paper” also restricted Jews from purchasing land from Arabs in certain areas.⁹² On 28 February 1940, the High Commissioner published regulations regarding land transfer, dividing Palestine into three zones.⁹³ In Zone A, which consisted of approximately 63 percent of the country and included stony hills, land transfers were forbidden save to Palestinian Arabs. In Zone B, consisting of about 32 percent of the country, transfers from Palestinian Arabs, save to Palestinian Arabs, were severely restricted, and were subject to the discretion of the High Commissioner. In the remaining zone, consisting of approximately five percent of the country and owned mostly by Jews, sales were unrestricted.⁹⁴

The implementation of these regulations depended on determining the landowners’ identity in the first two zones (lands that could not be purchased by Jews, and limited purchases). From 1940 until late 1946, and in fact until the cessation of land settlement activities at the end of the Mandate period, there was clearly a preference for completing land settlement procedures in areas in which only licensed land was allowed and in parts of the forbidden areas for sale.

By the end of the Mandate period, the British achieved the final settlement of approximately five million dunams, which constituted more than 20 percent of the territory of Mandatory Palestine.⁹⁵ These designations applied mostly to Jewish-owned areas or areas that were subject to dispute between Jews and

90 Michael J. Cohen, *The British Mandate in Palestine: The Strange Case of the 1930 White Paper*, 10 in EUR. J. JEWISH STUD. 79, 80 (2016).

91 Malcolm Macdonald, THE WHITE PAPER § II (1939).

92 *Id.* at § III.

93 Yosef Nevo, *Arviey Eretz Israel Ve’hasefer Halavan shel Shnat 1939 [The Arabs of Eretz Israel and the White Paper of 1939]* 12 CATHEDRA 148, 155 (1979) (in Hebrew).

94 Solel, *supra* note 55, at 83.

95 Kedar, *supra* note 10, at 938.

Arabs, but not to the Arab-owned areas of the Galilee or the Negev, which underwent land settlement after the establishment of the State of Israel.⁹⁶

Moreover, most of the land purchases by Jews from 1936 until 1947, in both the north and south, took place in the two areas where the settlement of titles process was proceeding at an accelerated pace. It is estimated that during the Mandate period, approximately 12 percent of Palestine was owned by Jews, and the rest of the settled land was Arab- and state-owned.⁹⁷ About one-third of the settled lands were acquired by Baron Edmond de Rothschild, who operated under the above restrictions as well as their relaxations.

The abovementioned orders exemplify the dialectic relationship between the private and the public in the process of history-making and territorial transformation, even if not in direct and apparent cooperation.⁹⁸ Legal regulations and their selective enforcement affect private actions and motivate the usage of certain strategies, such as the establishment of internal registrations. The transfer of the internal land registration to the formal books *de facto* benefited mainly the Jewish community. The selective policy of land settlement implemented by the British Mandate on Jewish-owned land ensured the property rights of the Jews. Thus, despite the formal restrictions placed by the Mandate, it contributed to the Jewish presence and settlement in Palestine.⁹⁹

To sum, the relationship between the ruling entity and the companies was not one of control by the imperial government over the private company. Rather, it was a sophisticated joint venture that, as shall be presented in the following Part, had harsh consequences for the local communities under the sponsorship of the market and the lack of solidarity of the effendis towards the fellaheen.

96 Arab owners were deprived of their land due to the fact that they were not able to prove their property rights, *see* Alexandre Kedar, *On the Legal Geography of Ethnocratic Settler States: Note Towards A Research Agenda*, 5 CURRENT LEGAL ISSUES 401, 420–37 (2002).

97 461,000 dunams were owned by the Jewish National Fund, other private entities owned 94,000 dunams, and another 100,000 dunams were franchise rights. *See* Solel, *supra* note 55, at 85.

98 Kedar and Forman developed this notion regarding the investigation of land rights, land law, and land administration within a multilayered colonial setting, by examining a major land dispute in British-ruled Palestine. They pointed to the joint efforts of the Mandate and Jewish colonization officials to appropriate land and undertake "development" operations in Palestine, fueled by the integrated impact of both the interests of colonial rule and those of Jewish colonization. Forman & Kedar, *supra* note 73.

99 *See* Home, *supra* note 72, at 294.

B. The Dispossession of the Fellaheen

Jewish institutions preferred to acquire land that could be easily settled; they therefore favored empty lands or lands where tenant encumbrance would be minimal or nonexistent. The Arab effendis, who were aware of these demands and sought profitable real-estate transactions, made efforts to deliver empty lands and persuaded the fellaheen to accept monetary compensation in exchange for vacating the land.¹⁰⁰ Since the fellaheen were often in deep debt, they were left with not much choice but to accept the compensation and relinquish their claim on the land.¹⁰¹ In 1929, the Protection of Cultivators Ordinance was enacted, confirming the use of monetary compensation in return for a written evacuation notice to the tenants.¹⁰²

The effendis' choice to profit from selling lands to Jews, despite being aware of the consequences for the peasant tenants, played a decisive role in the dispossession of the fellaheen.¹⁰³ Data shows that during the Mandate's first decade, Jews purchased one-quarter of the land from effendis and fellaheen. During that period, there were no protests against these sales.¹⁰⁴ After 1930, lands began being sold to Jews by the effendis at a continually increasing rate. This raised concern among the British authorities and the Arab leaders. However, the fellaheen, who were the main group being harmed by these purchases, did not actively resist, either because they were not always aware of their legal rights, or because they distrusted the government associations and feared taxation.¹⁰⁵

There is some contradiction regarding the number of Arabs who lost their lands due to land purchase by Jewish institutions and individuals. According to a report on immigration, land-settlement, and development from October 1930, known as the "Hope Simpson Report," about 30 percent of rural Arab families were landless.¹⁰⁶ However, the development Department, which operated from 1931 to 1939, estimated that less than 900 Arabs were displaced due to

100 STEIN, *supra* note 36, at 52.

101 *Id.*

102 *Id.* at 53.

103 Avraham Sela, *Hevra Ve'mosadot Bekerev Arvivy Palestin Betkufat Hamandat: Tmura, Heiader Neaut Ve'krisa* [*Palestinian Society and Institutions during the Mandate: Changes, Lack of Mobility and Downfall*], in MESHEK V'HEVRA BAYESHUV HA'ARAVI 1918–1948 [ECONOMY AND SOCIETY IN THE HEBREW SETTLEMENT 1918–1948] 291, 297–98 (Avi Bareli & Nahum Karlinsky-eds., 2003).

104 *Id.* at 66.

105 *Id.* at 5.

106 SIR JOHN HOPE SIMPSON, PALESTINE REPORT ON IMMIGRATION, AND SETTLEMENT AND DEVELOPMENT, ch. III (1930).

Jewish land purchase.¹⁰⁷ Historical researchers also provide differing data.¹⁰⁸ Some estimate that 8,000 fellaheen were dispossessed following significant land acquisitions in the 1920s,¹⁰⁹ while others estimate that 16,000 families were dispossessed.¹¹⁰ In any case, it seems that thousands of Arabs were effectively dispossessed in the 1920s and 1930s under the British Mandate’s rule due to large land purchases.¹¹¹

The above number gaps may relate to the different definitions of dispossession of Arabs and the difficulty in pointing to a direct connection to purchases by Jews.¹¹² This is because in some cases the fellaheen received compensation, their evacuation did not take place immediately following the purchase, and the official data regarding the number of cultivators was not accurate.¹¹³

Land acquisition by Jewish Zionist institutions and private individuals and organizations had an even greater and decisive economic impact on the Arab population due to the policy of “Hebrew Labor.”¹¹⁴ Enforced in the late 1920s by the Zionist Labor Federation (the *Histadrut*), this policy sanctioned exclusive Jewish training and employment at Jewish-owned workplaces in Palestine, mainly in rural colonies (*Moshavot*).¹¹⁵ The importance of this ideal increased during the Second Aliyah, especially among members of the Zionist labor parties. “*Aliya*” in Hebrew refers exclusively to the immigration of Jews to the historical land of Israel.¹¹⁶ They viewed self-training in all fields of work, especially in manual labor, as a necessary condition for the realization of Zionist goals in Palestine.¹¹⁷ As a result, the Arab fellaheen who cultivated land sold to Jewish purchasers not only lost their occupancy rights but were also deprived of the opportunity to work lands owned by Jews in the whole of Palestine.

The above was supported by the Hope-Simpson Report itself, which stated:

107 STEIN, *supra* note 36, at 110.

108 See the tables in STEIN, *id.* at 60, 121, 181, 182.

109 WILLIAM R. POLK ET AL., *BACKDROP TO TRAGEDY: THE STRUGGLE FOR PALESTINE* 236–38 (1957).

110 JACOB METZER, *THE DIVIDED ECONOMY OF MANDATORY PALESTINE* 93 (1998).

111 STEIN, *supra* note 36, at 157.

112 *Id.*

113 *Id.* at 156–157.

114 Allweil, *supra* note 3, at 32.

115 Steven A. Glazer, *Language of Propaganda: The Histadrut, Hebrew Labor, and the Palestinian Worker*, 36 *J. PALESTINE STUD.* 25, 25–26 (2007).

116 For further reading on the concept of *Aliya*, as opposed to immigration, see Sergio Della Pergola, *Aliya and Other Jewish Migrations: Towards an Integrated Perspective*, 30 *SCRIPTA HIEROSOLYMITANA* 172 (1986).

117 *Id.*

Actually the result of the purchase of land in Palestine by the Jewish National Fund has been that land became extra territorial. It ceases to be land from which the Arab can gain any advantage either now or at any time in the future. Not only can he never hope to lease or cultivate it, but, by the stringent provisions of the lease of the Jewish National Fund, he is deprived forever from employment on the land.¹¹⁸

This statement is even more significant in light of the fact that lands owned by Jews, including by the Baron, were usually located in valleys and fertile areas.¹¹⁹ Since Mandatory Palestine had a predominantly agricultural economy, control over fertile land was an essential criterion for the successful cultivation of land and, more importantly, for income.¹²⁰

III. THE BARON'S SETTLEMENT PROJECT IN PALESTINE (1882–1948)

Baron de Rothschild began his Jewish settlement enterprise in Palestine in 1882.¹²¹ He amassed a large amount of land during the Ottoman Period for the purpose of Jewish settlement. These lands were subsequently transferred to the newly established Jewish state. The Baron saw himself as a private individual doing good for the Jewish people, not a capitalist developer, nor did he consider himself a political figure.¹²² He was deeply committed to the idea of “working the soil” and was motivated by the notion of the revival of the Jewish people in *Eretz Israel* (Land of Israel), long before the Zionist vision was institutionalized.¹²³

118 *Id.* at 56.

119 Dalia Horovitz, *Rashey Ha'mosadot Ha'zionateam Be'eretz Israel Ve'she'elat Ha'avoda Ha'ivrit Betkufat Ha'alia Ha'shnia* [*The Heads of the Zionist Institutions in Eretz Israel and the Question of Hebrew Labor During the Second Aliya*], 7 *Ha'ziunut: Ma'asef Le'toldot Hatnua Ha'zionit Ve'hayeshuv Hayeudi Be'eretz Israel* [ZIONISM: ANTHOLOGY ON THE HISTORY OF ZIONIST MOVEMENT AND THE JEWISH COMMUNITY IN THE STATE OF ISRAEL] 95 (1982) (in Hebrew).

120 Allweil, *supra* note 3, at 134.

121 THEODORE NORMAN, *AN OUTSTRETCHED ARM: A HISTORY OF THE JEWISH COLONIZATION ASSOCIATION* 55 (1985).

122 Allweil, *supra* note 3, at 35.

123 SCHAMA, *supra* note 7, at 14, 17. He stated on several occasions that he was not a philanthropist, as there were plenty of cases in need of charity in the world, but he chose to embark on this enterprise in order to settle Jews in the Land of Israel. *Id.* at 17.

The Baron’s settlement project falls into two periods: during the first, under the Ottoman Empire’s rule, between 1882 and 1917, the Baron supported the existing Jewish settlement and operated in secrecy. During the second period, under the British Mandate, from 1917 until the establishment of the State of Israel in 1948, the Baron’s activity became institutionalized, and he carried it out under the auspices of a private company called the Palestine Jewish Colonization Association (PICA). This Article focuses on both periods, during which the Baron amassed a vast land capital of circa half a million dunams, established numerous (Jewish) localities, and built many public buildings which continue to exist and function to this day.¹²⁴ It could even be said that the Baron’s enterprise laid the cornerstone of the State of Israel and set out its borders.

This Part presents a historical overview of the Baron’s settlement enterprise within the space of Palestine, first during the Ottoman period and then under the British Mandate. It provides an in-depth understanding of his central role as a private philanthropist who supported existing Jewish settlements and established new ones. His *modus operandi* established his position as a major actor in the spatial transformation of Palestine/Israel. Committed to the Hebrew Labor policy, his mode of action also affected the Arab fellaheen.

A. The Baron’s Activity During The Ottoman Period (1882–1917): The Uniqueness of The Private

Land acquisition during this period had three main characteristics. First, it was done in exchange for economic support of the existing Jewish settlements, which became dependent on the Baron’s good will. Second, as opposed to other Zionist institutions’ and corporations’ *modus operandi*, the Baron acted at first in secrecy, covertly providing a basis for the Zionist project. Third, by the end of the nineteenth century, the Baron moved towards a more established and institutionalized strategy of land acquisition and settlement via the Jewish Colonization Association (JCA), yet continued to control and navigate the settlement project under the auspices of the private sphere.

1. Acquiring Land in Exchange for Economic Support

The Baron’s major contribution was in assisting Jewish colonies called *Moshavot*.¹²⁵ These were established in the nineteenth century by a group

124 See Part II.

125 A *Moshava* (colony) is an agricultural settlement of private farms whose residents work independently or as hired workers. This form of settlement became especially dominant during the first Jewish *Aliyas* (immigration waves) to Jewish Palestine.

of Eastern-European immigrants who were among the first *Aliya* pioneers.¹²⁶ The majority of the immigrants who established the first colonies were urban orthodox Jews with no agricultural experience and of scarce means.¹²⁷ Moreover, due to the restrictions mentioned in the previous Part, these colonies experienced great difficulty in registering land ownership and in acquiring building permits from the Ottoman authorities,¹²⁸ as they settled in *Miri* land which was intended solely for cultivation, and construction on this type of land was prohibited.¹²⁹

Early in this stage, the Baron aimed to assist Jewish settlers in their struggle as they coped with these issues and to help them adjust in the colonies by way of financial aid, arranging for water supply, helping with the acquisition of building permits by utilizing connections to the Ottoman administration,¹³⁰ and providing additional housing needs.¹³¹ Such was the early activity of the Baron's representative—Eliyahu Scheid¹³²—when he arrived in Haifa to care for and assist settlers during the early stages of the settlement.¹³³ Assistance

Apart from their physical characteristics, the Jewish *Moshava* colonies became an integral part of “a coherent cultural system.” This type of settlement became a symbol of the cultural and national changes taking place among the Jewish people at the time. For further reading, see YOSSI BEN ARTZI, *HAMOSHAVA HAIVRIT BERETZ BENOF ERETZ ISRAEL 1882–1914* [JEWISH MOSHAVA SETTLEMENTS IN ERETZ-ISRAEL 1882–1914] (1988) (in Hebrew). Yaffah Berlovitz, *Ha'moshava Ha'ivrit: Reshita Shel Tarbut Eretz-Israelit* [*The Hebrew Moshava: The Beginning of an Israeli Culture*], in LE'SOCHEACH TARBUS IM HA'ALIYA HA'RISHONA [TALKING CULTURE WITH THE FIRST ALIYA] 70 (Yaffa Berlovitz & Yosef Lang eds., 2010) (in Hebrew).

126 RAN AARONSOHN, *HA'BARON VE'HAMOSHAVUT – HA'ITYASHVUT HA'YEHUDIR BE'ERETZ ISRAEL BE'RESHITA, 1890–1882* [THE BARON AND THE COLONIES – THE JEWISH SETTLEMENT IN ERETZ-ISRAEL AT ITS BEGINNING, 1882–1890] 3 (1990) (Hebrew).

127 *Id.* at 126.

128 *Id.* at 7.

129 DOUKHAN-LANDAU, *supra* note 62, at 25.

130 AARONSOHN, *supra* note 126, at 32, 49.

131 *Id.* at 3, 8–9, 22–23, 32, 37–39. In October 1883, the Baron decided to broaden his involvement in the settlement of Jewish Palestine and associate with the northern colonies of Rosh Pina and Zichron Ya'akov, in a relationship similar to the patronage of Rishon Letziyon. These colonies suffered from a dire financial situation due to scarce credit, large debts, and failed agricultural crops.

132 Scheid was the major representative of the Baron in mandatory Palestine for the purpose of managing his protégée Moshavot. ELIYAHU SCHEID, *ZICHRONOT* [MEMORIES] (1983) (in Hebrew).

133 AARONSOHN, *supra* note 126, at 47–48. During the first years of the Baron's patronage, the men primarily primed and worked the land, restored former Arab

included, among other things, a personal, fixed, monthly sustenance payment, rent coverage for settlers' families, medical services, and settlement of loans and debt repayment.¹³⁴

The assistance was granted under the condition of transferring the land ownership in the various colonies and registering *Koshans* in favor of the Baron's representative.¹³⁵ Registering the land under the name of the Baron's representative was aimed at preventing the settlers from selling it and earning the value of its enhancement due to the Baron's improvements.¹³⁶ Regardless of whether or not this was the real purpose of registering the land under the name of his representative, the result was the transfer of land to the Baron's ownership. In effect, during these early times, the Baron did not directly purchase land with money, but rather received land in exchange for the support he gave to the various settlements.¹³⁷ This resulted in the Baron having a complex relationship with the colonies under his patronage. Some view his mode of operation as weakening the Jewish settlements, as they became financially dependent on the Baron's goodwill.¹³⁸ In any case, this *modus operandi* established his position as a leading figure within the Jewish community and in the implementation of the Zionist project.

2. *Acquiring Land in Secrecy*

Due to the Ottoman government's policy of restricting the sale of land to foreigners and posing obstacles to registering land, the Baron and his administrators looked for ways to bypass this problem without arousing the authorities' attention and opposition.¹³⁹ Accordingly, at first, the Baron employed creative means to overcome these obstacles, such as registering land in the names of Jewish Ottoman citizens.¹⁴⁰

In addition, the Baron preferred to act in secrecy and with caution, so as not to alert the Ottoman authorities to the Jewish settlement attempts, and to prevent their hindrance.¹⁴¹ In a letter sent by Baron de Rothschild to Baron de Hirsch dated 1 February 1883, regarding the determination of the

serfs' buildings, and engaged in accelerated construction of homes, agricultural structures, and public buildings.

134 *Id.* at 8–9, 22–23, 32.

135 *Id.* at 35–36.

136 *Id.* at 36.

137 *Id.*

138 Allweil, *supra* note 3, at 32.

139 AARONSOHN, *supra* note 126, at 49–50.

140 DOUKHAN-LANDAU, *supra* note 62, at 22–23.

141 SCHAMA, *supra* note 7, at 91; AARONSOHN, *supra* note 126, at 49–50.

new colonies' location, he wrote that "for caution's sake, so as not to raise the Turks' political sensitivity and to mitigate their suspicions, better not to concentrate all of these colonies on the way to Jerusalem."¹⁴²

Accordingly, the Baron chose the geographical location of new settlements in a way that did not draw the attention of the Ottoman authorities.¹⁴³ He initially avoided establishing new settlements, focusing instead on developing existing colonies and expanding their areas. His main incentive to purchase land adjacent to the colonies in the following years was the acute agricultural difficulty caused, in part, by a severe shortage of agricultural land for settlers.¹⁴⁴

During his first visit to Palestine in April 1887, the Baron arrived at several important decisions that had a national effect on the space of Palestine. In September 1887, he successfully negotiated with the central Ottoman authorities in Kushta¹⁴⁵ the acquisition of a general *Koshan* confirming the Jewish settlement rights in Palestine and enabling land purchase, the construction of houses, and the excavation of wells requiring only the local authorities' permission.¹⁴⁶ Subsequently, he began establishing new settlements, some of them in remote areas, detached from existing Jewish settlements.¹⁴⁷ He attempted to purchase land in the far south of Gaza (Castina) and in Transjordan regions as part of a larger settlement program aimed at creating a contiguous Jewish settlement block of land.¹⁴⁸ Moreover, public buildings such as synagogues and schools were completed, all with the Baron's financial support.¹⁴⁹

Thus, in addition to acquiring land, the Baron began establishing the basic physical infrastructure of the Jewish *Yishuv*, which later became the Jewish state.¹⁵⁰ In contrast to the settlers' temporary and haphazard construction, the Baron's construction stood out, characterized by order and uniformity. Agricultural construction, such as sties and barns, was restored, and private homes began being built.¹⁵¹

142 SHMUEL YAVNIELI, SEFER HA'ZIONOT: TKUFAT HIBBATH ZION II [THE BOOK OF ZIONISM: THE PERIOD OF HIBBAT ZION II] 95 (1960).

143 *Id.* at 50.

144 AARONSOHN, *supra* note 126, at 52–53.

145 *Id.* at 76.

146 *Id.* at 75.

147 *Id.* at 67.

148 *Id.* at 79–80.

149 AARONSOHN, *supra* note 126, at 47.

150 *See* SCHAMA, *supra* note 7, at ch. 5, which provides detailed data regarding the Baron's contribution to the establishment of the public institutions.

151 *Id.* at 45.

3. Institutionalizing Land Acquisition within the Private Sphere

An evident turn in the Baron’s strategy towards an institutionalized mode of operation occurred in 1899 when he reached out to the JCA and asked it to take his work in Palestine under its patronage. However, he remained quite involved in managing the settlement project.¹⁵² The JCA was established in 1891 by Baron Maurice de Hirsch, a Jewish philanthropist who set up charitable foundations to promote Jewish education and the settlement of oppressed European Jewry.¹⁵³ The JCA’s principal aim was to grant a solution to Jews being persecuted by the Russian authorities at the time, by establishing Jewish agricultural settlements. For this purpose, it purchased land in various countries around the world,¹⁵⁴ the main attempt being carried out in Argentina, where six million dunams were acquired.¹⁵⁵ However, it eventually became clear that this initiative failed, and the colonies established by the Baron were depleted of Jewish settlers.¹⁵⁶ Consequently, the main efforts shifted to the settlement of Palestine.¹⁵⁷

Baron Rothschild and the JCA reached an agreement to establish a “Jewish Palestine Committee” to manage the Baron’s activity in Palestine, comprised of six members: three on behalf of the JCA, and two members on behalf of the Rothschild family, in addition to the Baron himself, who presided over it. It was agreed that the committee would be responsible for managing the colonies, and have the right to decide on expanding colonies or establishing new ones, subject to the JCA’s consent.¹⁵⁸ The agreement between the Baron and the JCA was renewed several times, and in 1900 the Baron transferred the colonies’ lands to the JCA’s disposal.¹⁵⁹ This was the first formal step

152 Ya’akov Goldstein & Bat-sheva Stern, *PICA – Irguna Ve’matroteia* [‘PICA’ — *Its Organization and Purposes*], 59 *CATHEDRA* 103, 105 (1991) (in Hebrew).

153 NORMAN, *supra* note 121, at 9–14.

154 *Id.* at 7–9.

155 Dan Giladi, *Shney Baronim*: Rotshild Ma’avir Et Mifalo Le’irgoon “Mithare” Ve’metzil et Ha’ityashvut [*Two Barons: Rothschild Passes His Factory to a “Competing” Organization and Saves the Settlement*], 103 *ET-MOL* 7, at 7 (1992) (in Hebrew).

156 *Id.*

157 *Id.* at 8.

158 *Id.*

159 Ya’akov Godstein, *Trumatam Shel Habaron Rothschild, JCA Ve PICA Leyishuv Hagalil Ha’elyon Hamizrachi* [*The Contribution of Baron de Rothschild, JCA and PICA to Jewish Settlement of the North-Eastern Galilee*], in *THE NORTH EASTERN GALILEE & RAMAT CURAZIM* (Gavriel Barkai & Eli Schiller eds., 2002) (in Hebrew); Yair Seltenreich, *Mifgashei Tarbooiot? Moshavot Hagalil Ha’tahton Be’einei Pkidei JCA Ve’PICA* [*Cultural Encounters? Conception of the Lower*

towards institutionalizing a private-individual settlement project within an established real-estate company. However, the Baron continued to be the principal leader of his enterprise via the Jewish Palestine Committee, which managed his lands separately from the JCA's lands.

Apart from managing the Baron's colonies, the JCA and the Baron also purchased land jointly and enlarged the territory owned by Jews in Palestine.¹⁶⁰ From 1903 to 1914, the number of Jews in Palestine doubled from 40,000 to 80,000, and the number of land acquisitions by the JCA under the Jewish Palestine Committee, managed by the Baron, increased as well.¹⁶¹ This cooperation helped improve the farming conditions of the *moshavot* and attract more immigrants to settle in Palestine.¹⁶²

The Baron's *modus operandi* during this period launched a new era of organized philanthropy aimed at the Jewish settlement of Palestine. This organized process and professionalization in the field of philanthropy were evidenced in the establishment of large mechanisms for the promotion of national services and goals. Philanthropy began to go beyond its familiar boundaries of charity funds housed in synagogues or representatives moving from community to community. In this way, and due to his private character, the Baron established the infrastructure of the future state while attracting minimum attention. However, as discussed in the following Parts, from then on and during the Mandate period, extensive mechanisms began to develop, seeking to set new and broader ambitions to accommodate and settle Jews arriving in the space of Palestine.¹⁶³

B. The Baron's Activity in Mandatory Palestine: Dispossession and Institutionalizing the Private

In light of the occupation by the British authorities in 1917, and following the Balfour Declaration promising British support for a Jewish "national home" in Palestine, the Baron sought to establish a new and independent body to manage his settlement enterprise in the newly created political and

Galilee Colonies by Officials of the JCA and PICA] 120 CATHEDRA 107, 108–110 (2006) (in Hebrew).

160 NORMAN, *supra* note 121, at 59.

161 *Id.* at 63.

162 *Id.* at 65.

163 Debbie Haski-Leventhal & Paula Kabalo, Me' Hanadiv Hauadua Vead Hakeren Le' Israel: Arotzey Truma Le' erez Israel Velemedinat Israel Meshelhey *Hatkufa Hautmanit Vead Haiom* [A Historical Overview of Monetary Philanthropy In And For Israel In the 20th Century], in 6 The Center for the Study of Philanthropy in Israel 25 (2009) (in Hebrew).

economic reality.¹⁶⁴ For this purpose, he founded in 1924 the “Palestine Jewish Colonization Association” (PICA), which was registered as a company in the Official Gazette of the Government of Palestine.¹⁶⁵

PICA replaced the JCA in relation to all of the latter’s endeavors and properties in Mandatory Palestine.¹⁶⁶ Its objectives, as they appeared in its bylaws, stipulated that its income should be used solely for acquiring and developing land in Palestine.¹⁶⁷ The Baron’s son, James de Rothschild, was appointed as PICA’s president, and a Board of Directors, based in Paris, France, was established under him.¹⁶⁸ After the Baron’s death in 1934, James continued his father’s settlement project.¹⁶⁹

PICA’s establishment symbolized yet another step towards a more institutionalized and organized settlement strategy within the market sphere, under the sponsorship of the new regime. From then on, the purchase of land was conducted via this association, and lands were registered under its name. PICA continued to operate following the establishment of the State of Israel, and only in 1957, according to the provisions of James de Rothschild’s will, did it transfer all of its assets to the state, in addition to a large monetary gift for the construction of the Israeli Knesset building.¹⁷⁰

PICA was not officially a Zionist association. However, it consistently maintained close relations with Zionist officials and cooperated with their institutions, despite rising tensions between the two groups in the mid-to-late 1930s.¹⁷¹ PICA saw itself as working alongside the Zionist movement

164 Seltenreich, *supra* note 159, at 106.

165 Mayorek, *supra* note 153, at 321.

166 *PICA Law*, THE OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE 490 (Mar. 15, 1924). Announced in the Official Gazette on March 15, 1924.

167 *Id.* at § 4.

168 Goldstein & Stern, *supra* note 157, at .103, 110–111

169 SCHAMA, *supra* note 7, at 21.

170 *Id.* at 321–23. In 1962, following the establishment of Israel, the Rothschild family signed a cooperation memorandum of understanding with the government whose purpose was the establishment of the “Edmond de Rothschild Foundation,” a corporation equally owned by the State of Israel and Baron Edmond de Rothschild. The Foundation was established in order to continue realizing the Rothschild family’s longtime philanthropic vision founded on humanism, inclusion, and excellence. It fulfills its vision by realizing two main objectives: the promotion of higher education and the development of the Caesarea locality. A significant part of the Foundation’s philanthropic activity is dedicated to the promotion of education within the Arab localities in Israel.

171 These tensions arose around a number of issues (particularly land management and settlement). Forman & Kedar, *supra* note 73, at 511.

during the Mandate period and toward the same overall goal of establishing a Jewish national state.¹⁷²

Based on a document located in the Zionist Archives entitled “Colonies of the Palestine Jewish Colonization Association (PICA) and Other Jewish Institutions’ Land,” it appears that at the time of the document’s drafting, PICA owned 441,693 dunams of land,¹⁷³ of which over 67,000 dunams were in Syria. In total, and without including the lands in Syria, PICA held land in circa 61 settlements in the space of Mandatory Palestine. These settlements were found in the Haifa District;¹⁷⁴ Southern Galilee,¹⁷⁵ and the center of Palestine,¹⁷⁶ where no registration of rights was conducted. Seemingly, the Baron carried out land purchases with the intention of creating a dense settlement that would connect the various parts of the country.¹⁷⁷

Some of these lands were empty, and others were occupied by Arab fellaheen. Despite my efforts, I could not reach the confidential records of PICA and the Zionist Archives in order to find out the exact number of lands occupied by fellaheen and learn of their fate. Also, research conducted on the Baron’s project does not refer to this aspect, nor to any possible disputes around lands, but rather focuses on the Baron’s (indeed, important) contribution to the Jewish settlement.

Nevertheless, I did find a document in French from 1931 entitled “List of Owners of the Caesarea Dunes in Accordance with the Haifa Land Court,” which details the names of Arab owners (effendis) that claimed ownership on

172 *Id.*

173 KK scan of table from the Zionist Archives from JNF detailing all of PICA’s lands; AZ symbol of the document in the Zionist Archives KL5M\5294. *See* appendix 1.

174 Their list is as follows: Zichron Ya’akov (1882); Bat Shlomo (1889); Hadera (1890); Atlit (1903); Givat Ada (1905); Binyamina (1922); Pardes Chana (1929); Shechunat Ya’akov (1932); Ma’ayan Tzvi (1938); Neve Yam (1939); Sdot Yam (1940); Kfar Glickson (1944); Nahalat Jabotinsky (1947).

175 Yavni’el (1901); Kfar Tavor (1901); Seggerah (Ilaniya) (1902); Menachamiya (1902); Beit Gan (1904); Mitzpeh (1908); Kinneret (1909); Ashdot Ya’akov (1933); Mishmar Hashlosha (1937); Sdemot Dvorah (1939); Sirgonya (Hazor’im) (1939); Beit Keshet (1944); Alumot (1946); Ginossar (1937). In Upper Galilee: Rosh Pina (1882); Yessod Hama’ala (1883); Metula (1890); Machanayim (1898); Kfar Giladi – Tel Chai (1916); Ayelet Hashachar (1918).

176 Petach Tikva (1878); Rishon Letziyon (1882); Ness Tziyona (1883); Mazkeret Batya (1883); Gederah (1884); Rehovot (1890); Kfar Saba (1903); Be’er Ya’akov (1907).

177 BARON EDMOND BENJAMIN DE ROTHSCHILD, THE KNOWN BENEFACTOR AND FATHER OF THE YESHUV – A COLLECTION 75 (Azriel Shohat ed., 1953–1954) (in Hebrew).

lands owned by PICA. The total land area that seems to have been in dispute is 2,621.967 dunams.¹⁷⁸ Some of these lands were located within the Arab village of Kaisarieh, (today known as Caesarea, located in the north-central part of the country), which was established in 1882 and inhabited by Arab peasants. The residents of the village (approximately 1,000 in number) fled the country about a month and a half after the 1948 War broke out, in fear of attacks by Jewish paramilitary troops.¹⁷⁹ Moreover, in correspondence from 1949, PICA requests the minority office to evacuate the remaining Arabs immediately. No other documentation was found in this regard, but it can be concluded that the Arab inhabitants of Kaisarieh were displaced and became refugees.¹⁸⁰

Also, Forman and Kedar present a case study of a dispute between the British Mandate and the inhabitants over "the Zor al-Zarqa and Barrat Qisarya Land," which comprised 45,000 dunams and was occupied by about 133 families.¹⁸¹ They use the case to explore the power of colonial law and demonstrate the way British colonial and Jewish colonizing interests came into play.¹⁸² By regarding Zor al-Zarqa and Barrat Qisarya as *Mawat* land, and therefore as state-owned, the Mandate authorities leased it to PICA without taking into account the impact on the local population, eventually causing their

178 Liste des Propriétaires dans les Dunes de Cesarea Suivant Sentence du Tribunal des Terrains de Haifa [List of the Owners in the Dunes of Cesarea Next Sentence of the Court of the Land of Haifa] (Zionist Archives, No. 14/28 du 13/4/31).

179 On 20 February 1948, the village was conquered, and the remaining residents were evacuated or ordered to leave. Caesarea was the first village whose residents were expelled according to a planned and organized expulsion by the Haganah. See BENNY MORRIS, LEIDATA SHEL BEAYAT HAPLITIM HAFALASTINIM 1947–1949 [THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947–1949] 81–82 (1991) (in Hebrew); BENNY MORRIS, 1948: TOLDOT HAMILCHMA HAARAVIT-ISRAELIT HARISHONA [1948: HISTORY OF THE FIRST ARAB-ISRAELI WAR] 114–15, 138–39 (2010) (Hebrew).

180 See a letter from the Attorney General to the Minister of Finance regarding the "Caesarea Lands" (May 31, 1955). The Attorney General, Chaim Cohen, wrote:

It became clear to me that regarding the Caesarea Lands, there are lawsuits pending for the regulation of the lands between the state and PICA on one hand, and between the Custodian of Absentee Property and Koshan owners and different claims on the other. The evidence in order to prove these claims is so complex and intricate, and the legal problems arising are so numerous and complicated, that there is no reasonable chance to bring these claims to a close within the next five years.

181 Forman & Kedar, *supra* note 73, at 504–06.

182 *Id.* at 508.

displacement.¹⁸³ This constitutes another example of the consequences of the Baron's project for the fellaheen.

Although there is no official data on the status of the lands purchased by the Baron, it may be assumed that PICA sought to evacuate from the lands it purchased any fellaheen that may have occupied them in favor of settling Jews. Furthermore, the Baron was also committed to the implementation of the Hebrew labor policy, preferring to hire Jewish workers despite the fact that they were paid higher salaries than the fellaheen.¹⁸⁴ He clearly stated in 1930: "I could have chosen cheaper farmers, but instead I chose Jewish ones",¹⁸⁵ data provided by Schama on Jewish workers confirms this statement.¹⁸⁶

In summary, a study of the Baron's settlement project illustrates the central role that he played in the creation of a national home for the Jewish people, as it established the territorial base of the future state. His actions, conducted in the private sphere, were well-organized, similarly to those of other Zionist institutions. The Baron did not operate in a vacuum, but rather under a set of rules that dictated his strategy of manipulating the existing regulations in order to realize the Jewish state project. Akin to other private actors, he operated under ordinances enacted by the authorities that ruled the space of Palestine, and his project was realized within the marketplace and the framework of private law. Was this project just? The following Part seeks to explore the normative account of his project.

IV. NORMATIVE IMPLICATIONS OF THE BARON'S SETTLEMENT PROJECT

The practice of using private entities, companies, or organizations for settlement enterprises was quite common during the late nineteenth century.¹⁸⁷ Despite the fact that the notion of statehood was affiliated with public authority, the involvement of private entities in settlement and colonial endeavors was not considered illegitimate. In that sense, the Baron's settlement project may not seem exceptional or unusual and hence does not excite any particular normative interest.

Transitional justice scholars have recently been developing an interest in normative discussions regarding the actions of non-state agents, mainly

183 *Id.* at 515.

184 SCHAMA, *supra* note 7, at 16.

185 *Id.* at 19.

186 *Id.* at 172–173.

187 PHILIP J. STERN, *THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA* (2011).

corporations, during times of transition from armed conflict to peace and democracy.¹⁸⁸ This novel strand of scholarship examines the unjust implications of corporations’ involvement in repressive regimes and has led to the development of a concept of corporate accountability for human rights violations in times of transition.¹⁸⁹ The research is twofold, both theoretical and practical. The theoretical aspect connects the study of corporate accountability to transitional justice and discusses the various questions that arise around this relationship. The practical aspect aims to provide victims with remedies for human rights violations in order to prevent their reoccurrence. Such a remedy was recently acknowledged and implemented in South Africa, by applying transitional justice mechanisms of truth and establishing reconciliation commissions.¹⁹⁰

Unlike corporations, wealthy philanthropic individuals operating within private law, such as the Baron, have been largely absent from the historical justice narrative of states in transition, as well as from normative discussions regarding the justification for their actions under the auspices of the market. One explanation for this vacuum is that the public-private divide restricts discussions regarding the normative implications of private agents’ actions. Private individuals are conceived as free agents whose actions are protected and justified under property law.¹⁹¹ Moreover, their actions are perceived as separate and distinct from state actions and are not affiliated with them; thus, in the context of a state-building project, individuals are not considered relevant in normative discussions.

The previous Parts have delineated the central role the Baron played in the creation of the Jewish state. The Baron, who as mentioned above became known as the “Father of the Jewish Settlement,” established the future infrastructure of the state, built Jewish settlements and public institutions, and employed Jewish workers by implementing the Hebrew Labor policy. While scholars disagree on the number of Arabs who were dispossessed as a result of land purchase and the implementation of the Hebrew Labor policy by Jewish institutions and individuals, including the Baron, the consensus is that these acts displaced a distinct group of the local population—the fellaheen. However, the discussion on the normative implications of the Jewish settlement

188 For general reading, see CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE (Sabine Michalowski ed., 2013).

189 *Id.* at 1.

190 See Charles P. Abrahams, *Lessons From the South African Experience*, 153 in CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE (Sabine Michalowski ed., 2013).

191 Eric Mack, *Robert Nozick’s Political Philosophy*, in STAN. ENCY. PHILOSOPHY, 1–10 (2018).

in Mandatory Palestine has focused on the actions of Zionist institutions and companies.¹⁹² This Part seeks to open a new window for an understanding of the normative implications of Jewish settlement, by shifting the discussion towards the actions of the Baron and of other private individuals, and their role within historical justice processes.

I argue that the Baron's settlement project should be addressed in a multidimensional manner. On the one hand, it can be argued that the settlement project intended to provide shelter for the Jewish immigrants who fled Europe, or to realize the Jews' right of self-determination. On the other hand, based on Margaret Moore's territorial rights theory,¹⁹³ I argue that there is another normative aspect to his project. The displacement of the fellaheen was coercive, and infringed on their territorial rights; therefore, it was unjust. Thus, even though the Baron was a private actor, he should be held historically accountable for these wrongs. This argument is based on two premises, presented in detail below. The first is that the fellaheen had territorial rights on the lands purchased by the Baron, and these rights were harmed by his settlement project. The second is that the fellaheen were coercively displaced from their lands through the market sphere.

A. Theory of Territorial Rights and Livelihood: (Un)Just Settlements

Margaret Moore provides an innovative view of the wrongs attributed to settler-colonialism, where territory was settled as part of the colonialism project.¹⁹⁴ She shifts the focus from the concept of domination as the wrong of colonialism to the meaning of territory-taking and the relationship between indigenous groups and land, and shows how particular land-use patterns can give rise to entitlements to land.¹⁹⁵ To make her argument, Moore explains that already-settled people are related to each other and to land in morally significant ways that constitute what she defines as "territorial rights."¹⁹⁶ She states that "People live their lives and make choices and decisions against a background context and that land or place is such a context which people assume as part of the fabric of their lives."¹⁹⁷

192 RAN AARONSOHN, ROTHSCHILD AND EARLY JEWISH COLONIZATION IN PALESTINE 280–81 (2000).

193 Moore, *supra* note 9.

194 *Id.* at 89.

195 *Id.* at 90.

196 *Id.* at 91.

197 *Id.* at 94.

According to Moore, territorial rights are based on two foundations. The first is that people have a legitimate expectation and interest in stability of place and context regarding their residency on land, which gives value to their lives. The idea is that indigenous people develop expectations of land-use that give rise to claims of justice to entitlements in case access to land or resources is disturbed by the arrival of an incoming group.¹⁹⁸ Moreover, depriving them of access to these things, which matter to them and give meaning to their lives, is wrong and unjust. The second foundation, which is connected to the first and makes it sufficient, is the legitimate expectation of land-use incompatibility, which justifies control over territory, including rights of exclusion.

Therefore, groups that have territorial rights have the right to use, control, and exclude potential settlers from the land. Settlement practices (such as some settler-colonialism ones, but not necessarily all) that forcibly settle the land and disable the previous-indigenous group from exercising their entitlements are wrong and unjust, as they prevent this group's members from practicing their livelihood; their territorial rights.¹⁹⁹ Despite the fact that Moore's argument can be applied on other groups, she focuses on indigenous people who she perceives as a self-governing community, but one that does not take the form of a state. Moore claims that this kind of indigenous people can have territorial rights on a particular geographical area, and that the taking of territory from them is wrong.²⁰⁰

During the period of the Ottoman rule, the Arab community (both the effendis and the fellaheen) in the rural and urban areas of Palestine were self-governed by a local administration of tribal chiefs and influential family heads.²⁰¹ Their control and autonomy over their local jurisdictions continued also during the British Mandate period.²⁰² Therefore, according to Moore's definition, the Arab population, including the fellaheen, constituted an indigenous group.

Based on Moore's insight, I argue that the fellaheen had territorial rights on their lands, and that these rights were unjustly infringed upon. As presented in Part I, despite lacking ownership rights, the fellaheen had occupancy rights under the *Miri* land-category of property rights. Following the enactment of the OLC, the effendis became the legal owners of the lands cultivated by the fellaheen. However, as long as they were not evacuated by the effendis, the fellaheen continued to dwell in the space. The fellaheen cultivated the

198 *Id.* at 93.

199 *Id.* at 106.

200 *Id.* at 91.

201 STEIN, *supra* note 34, at 7.

202 *Id.* at 8.

land that was not only their sole source of income, but also constituted their livelihood, in which they had place-related interests.²⁰³ Land transactions between the effendis and Jewish buyers, who demanded that the land be free of dwellers in order to settle Jewish settlers, caused a collective displacement and infringed on the territorial and occupancy rights of this distinct group. These transactions forestalled the fellaheen from living on and using the land they had occupied for years, in favor of the settlement of another group.

However, there is another premise to Moore's argument. She adds that not all infringements on territorial rights that accompany settlement projects are unjust. Indigenous groups can willingly waive their territorial rights, whereupon this would not be considered unjust. According to Moore, only forcible and coercive displacement is wrong and unjust. However, she also notes that much of the land-taking occurred via unfair treaties between unequal and non-reciprocal parties.²⁰⁴ That being the case, the question arises as to what makes an act coercive.

The case of the fellaheen's displacement is extremely challenging in this respect, as it resulted from free and willing land transactions between the effendis and the Baron, of which the fellaheen were not part. In this sense, land acquisition can be divided into two layers. One is an individual-private layer, meaning that the effendis sold their private property.²⁰⁵ The second layer is collective, which means that by selling their lands, the effendis actually gave up the national land and the aspiration for political independence. There was a clear dissonance between the effendis' actions, the sale of land in the private sphere, and their public demand for self-government and independence. Palestinian Arab land-sales meant the absence of true commitment to Palestinian nationalism, and that individual priority and economic survival came before an emerging political movement.²⁰⁶

It could be argued that by selling the land, the effendis willingly waived their territorial rights, but effectively the effendis had legal ownership rights and not territorial rights as conceived by Moore. As presented in Part I, the effendis did not dwell on the land they owned and did not have any connection to it. For them, land was a mere commodity. However, the fellaheen did have territorial rights and a strong connection to the land, and therefore the effendis were not at a liberty to waive the territorial rights of the fellaheen, since these were not theirs to waive in the first place.

203 See Part I.B.

204 Moore, *supra* note 9, at 102.

205 RASHID KHALIDI, *PALESTINIAN IDENTITY: THE CONSTRUCTION OF MODERN NATIONAL CONSCIOUSNESS* 113–14 (1997).

206 STEIN, *supra* note 34, at 70.

However, the fact that in some cases the fellaheen received financial compensation also raises questions regarding the coercive aspect of the purchase. In the following Part, I add another layer to Moore’s argument, as applied to the Jewish settlement on land in Palestine that was neither stolen nor taken by the Baron, but rather acquired within the market.

B. Land Transactions within the Market

Robert Hale argues that the action of acquiring property rights is a form of “private governing power,” which gives property owners tremendous coercive power over non-owners.²⁰⁷ He explains that existing property rights, and consequently market transactions, may be an illegitimate form of “unplanned government intervention which restricts economic liberty... drastically and ... unequally.”²⁰⁸ Moreover, where there are extreme inequalities of wealth and property-ownership, the private governing power granted to property owners is “as capable of destroying individual liberty as is public government itself.”²⁰⁹ Thus, he explains that the exercise of power by one private individual over another is in itself disturbing, regardless of its actual implications.

According to Hale, in a manner similar to the infringement of rights by the state/public, which is usually structured within the legal system, private agents also act under a legally regulated and structured yet elusive and coercive market system. More importantly, he states that transactions made by two free parties can be coercive towards third parties, especially the underprivileged, since the latter lack extensive property and have relatively little influence on the marketplace. Wealthy individuals, such as the Baron and the effendis, control the market and in this way apply coercive means towards the less fortunate, such as the Fellaheen.

Hale’s insight allows us to examine the actions of private agents and the dynamics of the market through a wider lens: that of third parties that are not part of the transactions, yet are affected by them, such as in the case of the fellaheen, who were dwellers with no ownership rights. Moreover, his main contribution is that the marketplace is not so free after all, and can be

207 Warren J. Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 399–401 (1973).

208 ROBERT HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER*, at vii (1952).
Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472 (1923).

209 HALE, *Supra* note 208, at vii.

as coercive as other systems. In this way, he problematizes the distinction between the public and the private, uncovers the coercive power of the market, and opens a new channel for the examination of the true meaning of private transactions. Based on Hale's theory of the marketplace as a coercive arena, I would like to argue that the market transactions between the Baron and the effendis were coercive towards the fellaheen, and in this way, to lay the ground for the second premise of Moore's argument.

In the case of the sale of Arab land to Jewish purchasers, both the Baron and the effendis benefited. The Baron gained more land for the implementation of the Jewish settlement project, and the effendis profited financially. At first glance, it seems that all parties involved in the transaction were better off in the new situation, and furthermore, these seemed to be classic lucrative business deals between two free and profit-maximizing private individuals. However, effectively, these transactions involved and affected a third party: the fellaheen, who had territorial and occupancy rights but no ownership rights on the land. As a result of these transactions, the tenants were evacuated in order to be replaced by Jewish settlers and workers. So in cases where land was occupied, the transaction meant automatic displacement. Was that coercive, though? I believe it was.

The fellaheen were an underprivileged group with minimal access to political power; they lived from the cultivation of the land and inhabited the lands they worked. The enactment of the OLC, which sparked the privatization process of public land and promoted a modern property land regime of private ownership, left the fellaheen with no legal protection against the infringement of their rights.²¹⁰ Moreover, the implementation of the Hebrew labor policy in agriculture had tremendous economic consequences for them, as they were left with few work opportunities. Even when they agreed to monetary compensation upon evacuation, they did not have much choice but to accept the offer presented by the Jewish buyers via the effendis, because they were usually in deep debt, in most cases to the effendis.

These circumstances made them a powerless group, with no ability to oppose land transactions that affected them, first and foremost. Thus, their displacement, which was brought on by the economic inequality between them and the effendis, together with the aims of the Jewish purchasers regarding Jewish settlement and the employment of Jewish workers, in which they did not have any say, was coercive. Disturbingly, this was not a random or anecdotal forced dispossession of powerless and underprivileged individuals, but of a distinct group.

210 See discussion in Part I.

To conclude, the settlement of Jews on lands owned by effendis and cultivated and occupied by Arab fellaheen resulted in the unjust displacement of the fellaheen, harming their territorial rights through coercive eviction from *their* land. The fellaheen lost their stability, and were no longer able to make plans in relation to the land they had occupied all their lives. Note that this normative conclusion is relevant insofar as the acquired land was settled by the fellaheen, and as long as they were displaced. I do not argue here that all market transactions are necessarily always unjust, even when coercive, nor do I argue that all settlement projects are inherently unjust and wrong. But following Moore's argument, settlement projects that *coercively* displace indigenous people who *already occupy* the space are unjust. As long as the settlement of immigrants who come into the country does not cause the displacement of the local population, it is not unjust. In this sense, I am not asserting that the Baron's settlement project as a whole was unjust, but only that its aspect of displacing and replacing the fellaheen with Jewish settlers and workers indeed was.

CONCLUSION

This Article has presented Baron Rothschild's contribution to the Jewish settlement in Palestine during the Ottoman and Mandate periods and explored its normative account. The Baron played a central role in establishing the physical structure of the future state. His influence is felt to this day in almost every geographic area of Israel due to his support of existing settlements and the construction of new ones, and more importantly, the construction of public buildings through PICA long before the establishment of the state.²¹¹

Nonetheless, the Baron's settlement enterprise had enormous repercussions for the local Arab population of Palestine, known as the fellaheen. The latter were coercively and unjustly displaced from their space of residence; their territorial rights were infringed upon in favor of Jewish settlement, and they were excluded from working in Jewish land due to the implementation of the Hebrew labor policy that favored Jewish workers.

A study of the Baron's settlement project sheds a new perspective on the role of private individuals in constituting the historical (in)justice narrative of the Palestinian/Israeli space, and reveals the way in which market mechanisms served the national project. It opens a new normative discussion, and invites us to rethink classic configurations regarding the public/private divide; it

211 SCHAMA, *supra* note 7, at 251–63.

complicates our conceptions of complex governance regimes, and provides a methodological window we could not have opened before.

As Ruti Teitel argues, “historical truth, in and of itself, is justice. Historical Justice, collective history and transitional justice regarding a repressive past or a period of political transition, is both a teacher and a judge.”²¹² There is, and will always be, a debate regarding the two differing narratives of the Israeli state-building and the Palestinian catastrophe—the “Nakba.” However, the 1948 War and its consequences cannot be regarded as a onetime event, but rather should be seen as an evolving process that began in the Ottoman period and continued until the establishment of the state, during which legal regulations and public and private agents, including wealthy philanthropic individuals, were all an integral part of the political and social transformation of the Palestinian/Israeli space.

212 RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 69 (2000).

