

Some Reflections on the Transplantation of British Company Law in Post-Ottoman Palestine

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This Article discusses the transplantation and harmonization of company law legislation in the British Empire in the early 20th century and in Palestine in particular. It describes the displacement of Ottoman law and its replacement by British company law in Palestine, particularly through the Palestine Companies Ordinance 1929. The Article suggests that the transplantation of British company legislation into Palestine was neither straightforward nor all-encompassing. The Article discusses some specific areas of transplantation difficulty in the case of mandatory Palestine, viz. private companies, foreign companies, branch registers, and limits on land acquisition.

INTRODUCTION

Company law is considered a prime field for legal transplantation. Conventional wisdom is that company legislation in Palestine during the majority of the British Mandate was based on the simple importation of the English Companies Act 1929.¹ Reliance is placed on the facts that the Palestine Companies Ordinance was enacted in the same year as the English

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¹ It remained in force in Israel, subject to amendments, until 2000.

Companies Act 1929, that the British Empire gave priority to commercial law transplantation, and that the Palestine Companies Ordinance was the first of several commercial Ordinances that were considered the climax of the legislative anglicization of Ottoman law in Mandatory Palestine.

This Article suggests that the importation of English company law into Palestine was not a simple and technical matter. We suggest a few complicating factors relevant to the transplantation of company law in the British Empire in general, and several factors that were unique to the circumstances of Mandatory Palestine.

The exportation of English company law to the British Empire as a whole was a complicated and barely manageable project. It required constant updating due to the dynamic nature of English company law at the time. It also required the creation of a network of jurisdictions, centre and periphery, which could provide mutual recognition and assistance.

In Palestine things were particularly complicated. The baseline, at the end of World War I, was Ottoman-French law. British Imperial officials were constrained by the fact that Palestine was not a mere colony but, rather, a League of Nations Mandate. And Palestine was a jurisdiction in which foreign corporations and multinationals were or became active.

I. THE TRANSPLANTATION OF COMPANY LAW

Conceptually, commercial law in general and company law in particular can be prime subjects for legal transplantation. First, as Kahn-Freund has suggested, there is a continuum with respect to the likelihood of transplantation.² Fields of law that are more deeply embedded in the social-cultural-political power structures are less likely to be receptive of transplantation.³ The less embedded is a field, the more likely it is to be transplanted. Kahn-Freund examined the embeddedness of fields such as family law, procedural law and labor law and their resistance to transplantation. And commercial law, he mentioned only in passing. However, commercial law is at the other end of this continuum and therefore ripe for transplantation.

Secondly, cross-border uniformity in commercial law has a long tradition

2 O. Kahn-Freund, *The Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974).

3 Kahn-Freund relies expressly on Montesquieu, but in fact continues a long tradition in the sociological and historical study of legal development. *Id.*

going back over many centuries to the European *Lex Mercatoria* and before. This serves as background to an understanding of contemporary views about company law uniformity.

Thirdly, laws which are a key to economic or financial success are obvious models for transplantation. The adoption of the Anglo-American model of company law has been identified, in highly influential studies by Shleifer and his colleagues (known as LLSV), as a key not only to the development of financial markets, but also to the attainment of sustained economic growth.⁴ Policy recommendations by international organizations for institutional and legal reform based on Anglo-American law in emerging and developing economies soon followed.⁵

Fourthly, the notion of legal convergence almost postulates the successful transplantation of company law. In the debate whether law in the modern era is going through convergence or divergence, company law is presented as on the verge of full convergence. It has been said that we have almost reached "the end of history" in company law.⁶ The various legal systems around the globe are in the process of adopting the Anglo-American shareholders' value maximization model. This is achieved through ideological and theoretical consensus, jurisdictional competition and transplantation.

The convergence thesis is criticized by Bebchuk and Roe, who argue that convergence is being blocked by immense powers such as interest groups and the lock-in created by path dependency.⁷ But even the holders of the divergence, or persistence of differences, thesis could not apply their thesis to post-World War I Palestine to the same extent as they apply it to modern U.S.,

4 Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998). *But see* Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003) (criticizing the LLSV project for ignoring the question whether the company law in any given system was developed there originally or was transplanted and, if transplanted, whether this was done receptively or unreceptively; interestingly, this study classifies the transplantation in Palestine/Israel as receptive).

5 For a discussion of the policy recommendations, see KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2006). It is appropriate to note that LLSV did not argue that successful company law transplantation can easily be achieved. The legal origins of modern legal systems determined their current performance and delimited their ability to reform. But LLSV do not preclude successful transplantation. *See* La Porta et al., *supra* note 4; Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q.J. ECON. 1191 (2002).

6 Reinier Hansmann & Henry Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

7 Lucian Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999).

Britain, Germany or Japan. In Palestine at the end of WWI and the start of the Mandate, opposition to legal transplantation from the Empire's centre and to convergence with the English model was insignificant. The then current Ottoman-French company law was not entrenched in later Ottoman law and practice in a manner which would create any serious path dependency. There were no significant interest groups in Palestine who wanted to maintain the status quo in company law (as it there existed), and who would accordingly object to transplantation from England. The structure-driven and rule-driven path dependencies identified by Bebchuk and Roe had no place in Palestine in 1920.

To sum up, various theoretical considerations and historical trends suggest that company law is a field that is particularly conducive to legal transplantation. There is some basis for criticizing this assertion. But this criticism is not valid in the context of 1920s Palestine. Thus transplantation of English company law into Mandatory Palestine ought to have been a simple and straightforward matter.

Indeed, much contemporary and more recent commentary has viewed the Palestine Companies Ordinance 1929 as a simple translation to Palestine of the English Companies Act 1929. The Chief Justice of Palestine, Sir Michael McDonnell, observed judicially in July 1932 that the Palestine Companies Ordinance 1929 was based upon an English Statute which had been "swallowed virtually holus-bolus⁸ by the legislator of Palestine with comparatively small alterations."⁹ And Daniel Friedmann, for example, describes the infusion of English legislation as follows: "Ottoman legislation in the commercial area was based primarily upon French sources. This legislation was replaced almost in its entirety by Mandatory legislation. In 1929 the Companies Ordinance, based upon the English Companies Act of the same year, was enacted."¹⁰

The proximity in time between the enactment of the English Companies Act and the Palestine Companies Ordinance, which were enacted just months apart in 1929, also led later observers to assume that the latter was a carbon copy of the former. The Palestine Companies Ordinance was viewed as one of the first commercial law Ordinances that were almost literally based on English legislation transplanted into Palestine. These included Ordinances

8 Meaning "unmodified."

9 *Eliash v. Director of Lands*, (1932) 1 P.L.R. 735. This comment has to be viewed with caution, however, as the Chief Justice was not a specialist in company law. See also *Gaitanopolus v. Kremer*, (1934-1935) 2 P.L.R. 2, 4.

10 Daniel Friedmann, *Infusion of the Common Law into the Legal System of Israel*, 10 *ISR. L. REV.* 324, 328 (1975).

on bills of exchange, partnerships, bankruptcy, patents and trademarks, all adopted within a few years. Commercial law is seen, for example by Friedmann, as the first and foremost field in which the anglicization of Palestinian law was completed, by way of legislation, just as theory postulates.¹¹ But there are difficulties with this approach.

II. ATTITUDE TO OTTOMAN AND FRENCH LAW

The law of partnerships in the Ottoman Empire originated in Islamic law.¹² But Islamic law did not recognize the concept of the corporation as an entity with separate legal personality. One of the very first importations of European law by the Ottoman Empire was the translation in 1850 of the French Napoleonic *Code de commerce* of 1807 and its enactment as the Ottoman Commercial Code.¹³ This code enabled the formation of an ordinary partnership (*société en nom collectif*), a limited partnership (*commandite simple*), a share partnership (*commandite par action*), and a corporation (*société anonyme*).¹⁴ While the various forms of partnership could be created through registration with the Commercial Courts, a corporation could only be formed by prior Imperial Decree. The Ottoman Empire did not import the French 1867 law that introduced general and free incorporation.¹⁵ One of the reforms that followed the Young Turks' coup of 1908 was the liberalization of the law of incorporation. The new law permitted the formation of associations without requiring previous Imperial permission. But it required the making of a statement, immediately after formation, to the Ministry of Interior (or, outside Istanbul, to the Chief Administrator of the District) which included basic information about the company, accompanied by its bylaws.¹⁶

Accordingly, when the British conquered Palestine in 1917-18 they found

11 Assaf Likhovski, *Between Two Worlds: The Legacy of the Law of Mandatory Palestine, in* JERUSALEM DURING THE MANDATE 253, 259-62 (Yehoshua Ben Arie ed., 2003) (Hebrew).

12 ABRAHAM L. UDOVITCH, PARTNERSHIP AND PROFIT IN MEDIEVAL ISLAM 14 (1970).

13 ROBERT E. EISENMAN, ISLAMIC LAW IN MANDATE PALESTINE AND MODERN ISRAEL: A STUDY OF THE SURVIVAL AND REPEAL OF OTTOMAN LEGISLATIVE REFORM 35 (1977).

14 OTTOMAN COMMERCIAL CODE (G.G. Amirayan trans., 1906).

15 On 19th century French company law, see CHARLES E. FREEDEMAN, JOINT-STOCK ENTERPRISE IN FRANCE, 1807-1867: FROM PRIVILEGED COMPANY TO MODERN CORPORATION (1979); CHARLES E. FREEDEMAN, THE TRIUMPH OF CORPORATE CAPITALISM IN FRANCE, 1867-1914 (1996).

16 See generally Timur Kuran, *The Absence of the Corporation in Islamic Law: Origins and Persistence*, 53 AM. J. COMP. L. 785 (2005). An English translation of the

a recently modernized organizational law, with a wide menu of organizational choices, even by European standards, much like the French choice.¹⁷ But that organizational law was centred in Istanbul. And it was based on institutions that were not present in Palestine, such as a Companies Registry, a stock market, and functioning Commercial Courts.

The British rulers of Palestine were hostile to Ottoman organizational law not only for practical reasons, as discussed below. They therefore made Ottoman organizational law irrelevant by deciding not to continue the Ottoman French-based Commercial Courts and commercial code, and by abolishing the distinction between civil and commercial law that was central to the continental European law tradition, but entirely foreign to English law.

As early as May 29, 1919, the Chief Administrator of Occupied Enemy Territory (South), later to be named Palestine, issued an Ordinance that required all existing companies and partnerships, Ottoman and foreign, to register within one month with the Courts of First Instance of the District in which they had their principal seat or a branch establishment.¹⁸ The Ordinance also required new companies and partnerships to do the same within one month of the commencement of business. Companies and partnerships with limited liability were required to obtain permission from the Chief Administrator in advance of commencing business. In 1921, still before the creation of the League of Nations Mandate, the Civil Administration of Palestine issued another, more elaborate, Companies Ordinance.¹⁹

Hostility to Ottoman law was augmented in the field of commercial law by hostility to French law. Ottoman law was considered outdated, corrupt, and unsuitable for modern business. British officials and Jewish lawyers in Palestine had an orientalist view of it.²⁰ French law, in turn, represented hostility to the spirit of the common law.²¹ Both could not be integrated into the British Imperial legal system, and hampered harmonization. In a few exceptional cases, e.g., Cyprus, the British rulers were willing to accept the

Ottoman law of associations of 29 Rajeb, 1327 (Aug. 16, 1909) can be found in the Israel State Archive (ISA) 5100/13-M. The relevant articles are 2 and 6.

17 For the wider menu offered in France compared to England, see Timothy Guinnane et al., *Putting the Corporation in Its Place*, 8 ENTERPRISE & SOC. 687 (2007).

18 Registration of Companies and Partnerships Ordinance (Ordinance No. 118), 1919, Official Gazette of the Government of Palestine, Aug. 1919, at 8.

19 Although not all Ottoman legislation concerning companies was repealed at that time. The final repeals took place in the mid-1920s.

20 ASSAF LIKHOVSKI, LAW AND IDENTITY IN MANDATE PALESTINE 52-55 (2006).

21 Alexander Wood-Renton, *Foreign Law in the British Empire*, 23 ROUND TABLE 362 (1933).

status quo.²² But Palestine was not such a place. The Mandatory government in the early 1920s was still committed to Article Two of the Mandate for Palestine: "The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home"²³ The clearest manifestation of this commitment in the field of legislation was expressed by Norman Bentwich. He served as Legal Secretary to the military administration, Palestine (1918-22), and thereafter was the first Attorney-General in the Mandatory government of Palestine (1922-29). He aimed, with some success, at unfolding a large-scale project of modernizing and anglicizing the laws of Palestine.

III. HARMONIZATION OF COMPANY LAW IN THE EMPIRE

The harmonization of company law in the British Empire seemed to be more attainable when compared with other harmonization projects. After all, the Empire was centralized and hierarchical compared to, for example, the U.S. or the EU. Harmonization of law within the British Empire was a project with significant institutional support. The hub was the Colonial Office. The topic was on the agenda of the Imperial Conferences of 1907 and 1911, which were a meeting place for officials from London and from the colonies (primarily the white settlers' dominions). For each of these the Board of Trade prepared a comparative survey, "Company Law in the British Empire." These surveys identified similarities and differences, particularly between the dominions and the UK, and served as a basis for discussion of further harmonization.²⁴ The harmonization project received support from the legal profession and academia, for example from the Society of Comparative Legislation and its *Journal of the Society of Comparative Legislation* (1896-1917).²⁵ The journal published annual surveys of legislation in numerous

22 OLAWALE ELIAS, *BRITISH COLONIAL LAW: A COMPARATIVE STUDY OF THE INTERACTION BETWEEN ENGLISH AND LOCAL LAWS IN BRITISH DEPENDENCIES* 17 (1962).

23 Mandate for Palestine, 1922, *reprinted in* M. WIGHT, *BRITISH COLONIAL CONSTITUTIONS*, 1947, at 99 (1952).

24 *COMPANY LAWS OF THE BRITISH EMPIRE*, 1907, Cd. 3589; *COMPARATIVE ANALYSIS OF THE COMPANY LAWS OF THE UNITED KINGDOM, INDIA, CANADA, AUSTRALIA, NEW-ZEALAND AND SOUTH AFRICA*, 1911, Cd. 5864.

25 Continued by the *Journal of Comparative Legislation and International Law* (1918-1951).

jurisdictions in the Empire and in a few legal systems outside it. Local colonial officials could learn from it about trends throughout the Empire and publish in it their achievements.

Harmonization was advanced by a number of legislative tools employed by three branches of the Imperial governance: Colonial governments, Britain's Parliament, and the Colonial Office. Colonial legislators throughout the Empire were often British officials who were committed to English law and to harmonization. They had the authority to legislate within their colonies. The Westminster Parliament was also an Imperial Parliament and could pass legislation that would apply directly to the Colonies. The Colonial Office was a pivotal player. One of the main tasks of the legal department of the Colonial Office, headed by John Risley in the years 1911-1931, was to promote harmonization. One of the most important contributions of the Colonial Office was in the field of commercial law.²⁶ The Colonial Office had a dual capacity with respect to harmonization. It directed and supervised legislation by local authorities in the Colonies. In addition it drafted Orders in Council, regulations which, once approved by the Privy Council and having received the Royal Assent, through a formal but nominal procedure, were applied directly in the relevant Colonies as part of their local law. The combination of these legislative tools created a framework which allowed harmonization within the British Empire in a manner which is not available to harmonizers in federations such as the U.S. or the EU today.

The policy that was shaped in the Empire's centre was to promote harmonization. The Colonial Office, inspired by the Board of Trade, expected colonies to enact company legislation which closely followed the English model and could be updated in line with changes to that model. The subject matter of company law invited importation from England and consistency across the Empire.

On the demand side, no question of suitability of English company law for the periphery arose. In relation to some fields of law, it was said that English law did not fit with local religion or tradition and should not be transplanted.²⁷ In relation to other fields, it was said that English law was too advanced for the colonies. And with respect to yet other fields, officials desired to use the colonies as a laboratory for experimenting with legal reform before applying it to the core of the Empire.²⁸

²⁶ ELIAS, *supra* note 22, at 37-56, 141-43.

²⁷ One example of unsuitability is family law, where it was appreciated that the imposition of English law would touch upon traditional and religious beliefs and create unrest.

²⁸ Criminal law serves as a good example of a field of law in which the policy and

On the supply side there was no problem either. In some fields, English law was wholly judge-made law and could not be readily packed and exported to the colonies. But here there was no need for the Colonial Office to prepare a code or a digest based on the English common law. A new and relatively comprehensive Companies Act existed.²⁹ Accordingly, in the field of company law a shelf product was readily available which did not conflict with local traditions because it was not intended for the general population but, rather, for a commercial elite and for foreign investors.

A good example of the harmonization policy in action is to be found in East Africa. There the Governor and the Attorney General of Uganda were strongly criticized by the Colonial Office for not maintaining uniformity with Kenya and Tanganyika in relation to the English Companies Act 1929. In an internal memorandum, one senior official commented:

I am not happy about this kind of thing. If there ever is a question on which legislation in the East African bloc ought to be uniform it is this matter of Companies Registration and Company Law generally . . . If you agree, would it not be well to send despatches to Kenya, Uganda and Tanganyika, saying that they now have Companies Laws on the model of the United Kingdom and suggesting that steps be taken to make their legislation absolutely uniform . . . in view of the great advantage to the commercial community that such uniformity would have.³⁰

Despite this, the range of company legislation found throughout the British Empire was a patchwork quilt of regimes. There were colonies, such as Gibraltar, which had no company legislation. There were jurisdictions, such as Malta, the Seychelles, and Cyprus, in which the common law was not in force and no attempt was made to enact English-based company legislation. In these jurisdictions the company law in force was Ottoman-

practice were not to transplant English law throughout the Empire. For the different sources of criminal legislation in Palestine, Africa and India, see Yoram Shachar, *The Sources of the Criminal Code Ordinance 1936*, 7 TEL-AVIV U. L. REV. 75 (1979) (Hebrew); H.F. Morris, *A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935*, 18 J. AFR. L. 6 (1974); Kartik Kalyan Raman, *Utilitarianism and the Criminal Law in Colonial India: A Study of the Practical Limits of Utilitarian Jurisprudence*, 28 MOD. ASIAN STUD. 739 (1994).

²⁹ Companies (Consolidation) Act, 1908, 8 Edw. 7, c. 69; Companies Act, 1929, 19 & 20 Geo., c. 23.

³⁰ Memorandum from J.E.W. Flood (Jan. 24, 1936). A letter was accordingly prepared. See The National Archives of the UK (TNA), Public Record Office (PRO), Colonial Office (CO) 536/189/7, Legislation: Companies Legislation.

or French-based. In many colonies, company law was based on one version or another of the English legislation. In some it was based on the 1862 Act, in others on the 1908 Act, and in still others on the 1929 Act.³¹ This was done by literal copying of the Act into a Colonial Ordinance or by making some adjustments for local conditions. Colonial Ordinance amendments were then based upon amendments to the English legislation. In other colonies, the English legislation was imported by a single clause. In Sierra Leone, the local statute imported the Companies Acts that were "in force in England at the commencement of the local statute." In the Falkland Islands, the importation was of "all laws, rules, and regulations for the time being in force."³² This created an open channel for importation. The Indian Companies Acts, which were based on the English Acts, with some adjustments, were in turn imported in full by Iraq, North Borneo, East Africa and Uganda.³³

The advancement of a seamless and uniform law throughout the British Empire was unachievable. One reason was the dynamic nature of company law in the early 20th century. About every decade, a committee in London was appointed to examine the law and a major piece of company law legislation was passed in England. Minor amendments were passed more frequently. The Companies Acts were of huge and unmanageable size, including hundreds of sections and many lengthy schedules. More general factors, such as the split of responsibility between the Board of Trade in which expertise was centred, the Cabinet Offices in charge of various types of colonies and dominions, and local Administrations throughout the Empire having little or no expertise or knowledge of company law, all made the harmonization project extremely difficult. Just figuring out the state of the law on one issue throughout the British Empire was a time-consuming and only partly successful endeavor. Making company law uniform was a

31 In some Canadian provinces, the pre-1862 charter was maintained as an instrument of incorporation rather than a memorandum of association and registration. This had some practical legal consequences.

32 James Edward Hogg, *Company Law in the Empire*, 17 J. SOC'Y COMP. LEGIS. 102, 104 (1917).

33 *Id.* In Iraq the Ottoman, French-based Commercial Code was in force upon the arrival of the British. In 1919 the Indian Companies Act of 1913 was adopted into Iraqi law, replacing the relevant provisions of the Ottoman Code. The Indian Act was selected because Iraq was reporting, until 1921, to the government of British India and to the India Office in London. See TNA, PRO, CO 730/125/16, Note on the Extent to Which Ottoman Law Is in Force in Iraq (prepared by Hooper in January 1928). Regarding Tanganyika, see TNA, PRO, CO 691/135/8, Companies Ordinance 1929-1935. Regarding Uganda, see TNA, PRO, CO 536/189/7, Legislation: Companies Legislation.

pipedream. The end result at the height of the British Empire was a spectrum including no company legislation, French or other civil law, outdated English legislation, Indian law in Africa, and wholesale importation.

IV. THE DRAFTING OF THE PALESTINE COMPANY ORDINANCES

It appears that Bentwich, the first Attorney General of Palestine, orchestrated the enactment of the Company Ordinances of 1919 and 1921 out of hostility to Ottoman-French company law and a desire to facilitate and encourage the economic development of Palestine. It is not now clear whether he was the prime initiator of the 1929 Companies Ordinance. The Government of Palestine files on the drafting of that Ordinance have been lost, possibly destroyed in the blowing-up of the King David Hotel in Jerusalem, the base of the Government Secretariat, in 1946. The first in a series of four files created at the Colonial Office in London is also lost. The second covers the period from December 1926, a stage at which the third draft of the ordinance was already distributed and a fourth was being drafted. At that stage the Middle East Department of the Colonial Office was the major mover. It corresponded with the Board of Trade on one side, the Government of Palestine on another, and Major Henry Nathan on a third side.

It appears that the Colonial Office assigned to Nathan, in late 1925 or early 1926, the task of drafting a Companies Ordinance.³⁴ Nathan was also instructed to draft several other pieces of commercial legislation, including a partnership ordinance, a bankruptcy ordinance, a maritime commerce ordinance, a bill of lading ordinance and a sale of goods ordinance.³⁵ Harry Nathan was a solicitor and a partner in the firm of "Herbert Oppenheimer and Nathan."³⁶ He served as a major in World War I. Upon returning to London, he formed a close professional and personal relationship with Alfred Mond (later Lord Melchett), a Liberal MP and the chairman of the future giant Imperial Chemical Industries. Through Mond he became acquainted with the Liberal leaders Lloyd George, Herbert Samuel and Lord Reading. Mond, Samuel

34 He was assisted in drafting the Ordinance by the specialist company law barrister Philip Sykes (1901-1985). Sykes was called to the English Bar by Lincoln's Inn in 1925. He became a Bencher of Lincoln's Inn in 1952. Sykes "settled," i.e., approved, the final draft of the Ordinance. Conversation with Iko Meshoulam, Partner in the London law firm Herbert Oppenheimer after World War II (June 16, 2008).

35 See TNA, PRO, CO 733/133/2, Companies Ordinance 1927 (Letter from J.H. Shuckburgh at the Colonial Office to Nathan (Nov. 30, 1927)).

36 Later known as "Herbert Oppenheimer, Nathan and Vandyk."

and Reading were Jewish. Nathan met Zionist leaders and became legal adviser to some of the Zionist organizations based in London. He became a solicitor to the eminent Palestinian entrepreneurs Pinchas Rutenberg and Moshe Novomeysky. He was active in the Jewish community in England. He stood as a Liberal candidate in East London at the 1924 elections, but became an MP for the first time only in 1929.³⁷ Nathan seems to have been an important figure in the story of the exportation of English commercial legislation to Palestine. He was interested in finalizing a draft Companies Ordinance as early as possible.

The Board of Trade, on the other hand, drew the attention of the Colonial Office to the progress of company law reform in England. The Greene Committee was appointed in 1925 and published its report in the following year. A draft bill was prepared by the Companies Department of the Board of Trade based on the Greene recommendations and was awaiting its turn in Parliament. The Board's position was that the Palestine Companies Ordinance should follow the wording of the Companies Bill pending in Parliament and not earlier versions such as the 1908 Act or the Greene Committee Report.³⁸

The third High Commissioner of Palestine, Sir John Chancellor, advocated the position of Attorney General Bentwich vis-à-vis the Colonial Secretary and his officials. Bentwich was generally in favour of advancing English-based legislation for Palestine and was very hands-on. It is not, however, clear whether a new Companies Ordinance was near the top of his priorities, given the introduction of the Companies Ordinance 1921. Bentwich corresponded, through Chancellor, with the Colonial Office and directly with Nathan. He appears to have spent a considerable amount of time on the draft Ordinance. He wrote a 32-page memorandum sent to the Colonial Secretary, suggesting highly detailed amendments to Nathan's draft Ordinance. To these he added a "Note on the Amendments," an "Explanatory Note" and schedules, together an additional 21 pages.³⁹ His principal suggestions were not to follow the Greene Report and the draft English Bill, which was in his view "not suitable to Palestine conditions," to exclude private companies from the Ordinance,

37 H. MONTGOMERY HYDE, *STRONG FOR SERVICE: THE LIFE OF LORD NATHAN OF CHURT* (1968). In 1934, after the collapse of the Liberal Party, he joined the Labour Party. He was made a peer in 1940 and became a cabinet minister in 1946.

38 TNA, PRO, CO 733/133/2, Companies Ordinance 1927 (letter of E. R. Eddison of Board of Trade to Colonial Office dated Sept. 22, 1927).

39 TNA, PRO, CO 733/145/7, Companies Ordinance 1928 (letter of High Commissioner to Colonial Secretary dated May 18, 1928 and attachments).

to regulate the control and the issue of debentures, and to define differently "foreign company."

Bentwich often hinted that Nathan did not understand the conditions in Palestine and that he, Bentwich, represented the views of Arab and Jewish lawyers in Palestine, and as such should be treated as an authority. Nathan on his part opened up direct links with Palestine by consulting Harry Sacher (an English barrister practicing there) and Shalom Horwitz, his firm's correspondent in Palestine. Eventually Nathan's fifth draft, which embodied some of the suggestions made by the Board of Trade, the Colonial Office and the Government of Palestine, was enacted in July 1929.⁴⁰ The Ordinance was different from the English Companies Act 1929 in several important respects, some of which would turn out to be controversial over the coming years.

The next four Parts of this Article discuss four important differences between the English Companies Act and the Palestine Companies Ordinance. These are: the absence of private companies from the Palestine legislation; the different treatment of foreign companies; the different treatment of share branch registers; and the restriction on land acquisition companies in Palestine.

V. PRIVATE COMPANIES

One of the main puzzles with respect to transplantation is why the private company regime was not recognized in Palestine until 1935. The development of a private company regime had been one of the most striking features of organizational law in England in the second half of the 19th century. General incorporation was introduced in 1844. Limited liability was granted to every qualifying company in the Companies Act 1862. The paradigmatic company up until that stage was a large company with hundreds of shareholders, typically in the infrastructure, transportation and finance sectors.⁴¹ The last decades of the 19th century witnessed the rise of smaller and smaller joint-stock companies in manufacturing, wholesale and retail.⁴² Sole traders, partnerships, and family firms were converted into joint-stock companies. In the famous *Salomon v. Salomon* case, a one-man

40 TNA, PRO, CO 733/168/2, Legislation Relating to the Running of Companies.

41 RON HARRIS, *INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720-1844* (2000).

42 JAMES B. JEFFERYS, *BUSINESS ORGANIZATION IN GREAT BRITAIN, 1856-1914*, at 104-05 (1977). The book is a reprint of the author's 1938 University of London Ph.D. thesis entitled "Trends in Business Organization in Great Britain since 1856."

company was recognized as a legal entity separate from that of its sole shareholder.⁴³ A main issue discussed by the Davey Committee in 1895 and the Loreburn/Warmington Committee in 1905 was the legal status of small companies.⁴⁴ The major innovation of the 1907 Companies Act was the introduction of the private company.⁴⁵ The Act allowed the formation of private companies. In exchange for exemption from the more stringent disclosure provisions required of public companies, members of private companies had to accept restrictions on the transferability of their shares. The number of new firms that organized as private companies increased constantly and rapidly after 1907. During the period 1922-1926, private companies constituted fully 93 percent of newly incorporated companies. The number and percentage of public companies plunged accordingly. The public company form was used after 1907 mainly by listed companies and by non-listed companies with a large number of shareholders. By the 1920s most small and medium-size enterprises in England used the private company form. The turn to private companies was a general trend in Europe. The GmbH was introduced in Germany in 1892, and the SARL in France in 1925.⁴⁶

Why then was the private company not transplanted to Palestine in 1929, despite the fact that it was by then a cornerstone of English company law and organizational practices? The short answer appears to be Bentwich's objection. Nathan included it in his drafts. Bentwich asked that it not be introduced. But why? Bentwich was a strong supporter of the modernization and anglicization of the laws of Palestine and provided little explanation for his suggestion to drop the private companies sections from the draft Ordinance.

Bentwich expressed his objection to the inclusion of the private company in the Ordinance in a memorandum intended for the High Commissioner of Palestine and for the Colonial Office. In May 1928 he wrote that a measure of control to be found in the disclosure and filing requirements applicable to

43 *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.).

44 DEPARTMENTAL COMMITTEE, REPORT OF THE DEPARTMENTAL COMMITTEE TO INQUIRE WHAT AMENDMENTS ARE NECESSARY IN THE ACTS RELATING TO JOINT STOCK COMPANIES INCORPORATED WITH LIMITED LIABILITY, 1895, C. 7779; COMPANY LAW AMENDMENT COMMITTEE, REPORT OF THE COMPANY LAW AMENDMENT COMMITTEE, 1906, Cd. 3052.

45 Companies Act, 1907, 7 Edw. 7, c. 50.

46 See Guinnane et al., *supra* note 17; Timothy Guinnane et al., *Pouvoir et Propriété dans L'entreprise: Pour Une Histoire Internationale des Sociétés à Responsabilité Limitée*, 63 ANNALES. HISTOIRE SCIENCES SOCIALES 73 (2008).

public companies was needed.⁴⁷ Public companies were required to include a balance sheet in their filings to the Companies Registrar. Did Bentwich intend to control companies by an executive review of their balance sheets? Does his brief statement offer a complete explanation for his objection?

The size of enterprises in Palestine was much smaller than in England, and likely to remain so. The number of large enterprises was negligible. The Potash Company and the Electric Company were the only exceptions. There was no stock exchange in Palestine until 1935, and even then the shares of only a handful of companies were traded on an infant exchange. Palestine needed a companies law that would facilitate and encourage the creation of small private companies much more than a law that would facilitate the incorporation of public companies. Excluding private companies from the Ordinance made no commercial or corporate sense. And excluding the private companies' provisions ran contrary to the policy shaped in the Empire's centre. So was there another (unarticulated) reason?

The partnership is a less formal organization. Lawyers are not needed to form it. There is no requirement for written documents. The costs of setting up a partnership are minimal. Did Bentwich intend or predict that his objection to the introduction of the private company would motivate more small businesses in Palestine to initially organize, or maintain their organization, as partnerships rather than companies? This would result in a lower level of control by the government over enterprises than could be achieved by allowing them to organize as private companies.

Did Bentwich believe that the absence of private companies would be beneficial to the Zionist movement or to Jewish businesses in Palestine? This might have been the case if he believed that only Jews would utilize the public company form, while the private company might cater to Arabs. But there is no empirical reason to believe that Arabs would indeed have organized, if given the opportunity, in private companies, or that most Jewish enterprises could have crossed the threshold from the private to the public company. When examining legislation on cooperatives that was drafted at about the same time one finds no indication that the intention was to design a framework that would exclude Arabs.⁴⁸ Was Bentwich cynical enough to intend that Jewish companies should bypass Palestinian law and organize in England as private companies? This would have been quite an expensive

⁴⁷ TNA, PRO, CO 733/145/7 (Note on the Amendments of the Companies Bill (May 17, 1928)).

⁴⁸ Avital Margalit, *Law, Organization and Corporate Structure in the Workers' Society*, 26 TEL-AVIV U. L. REV. 451 (2002) (Hebrew).

bypass.⁴⁹ There is no evidence in Bentwich's numerous publications that his objective was to raise hurdles in the path of Arab development.

So, did Bentwich perhaps try to undermine Nathan's suggestion on a personal basis? Nathan was six years younger than Bentwich. Both came from wealthy Jewish families and studied at St. Paul's, a prestigious London public school. Bentwich went to Cambridge and studied law. Nathan did not get a scholarship to Oxford and therefore went straight into private practice, becoming an articled clerk and eventually being admitted as a solicitor in 1913. Bentwich was called to the English Bar five years earlier. Both served as military officers in WWI. Bentwich, an ardent Zionist, spent most of his time from 1912 until the enactment of the Companies Ordinance in 1929 in the Middle East, whereas Nathan, who had some sympathy towards Zionism, maintained London as his base. Bentwich became a civil servant. Nathan was a practising lawyer and a Liberal politician in the 1920s. Ironically, Bentwich was working in a colony while Nathan was providing services to the Colonial Office. As it turned out, the older and more senior Bentwich witnessed Nathan take over much of his main project, transplanting English commercial law to Mandate Palestine.

It is possible that Bentwich wanted to demonstrate to Nathan his ability to influence the content of the Palestine Companies Ordinance. And the private company was introduced in Palestine in 1935, a few years after Bentwich's retirement from the colonial service. By that time, the then Attorney General H. H. Trusted QC felt constrained to comment that the need had been felt for some time for legislation allowing the formation in Palestine of private companies.⁵⁰

Bentwich's 1928 correspondence with the Colonial Office reflected the control argument referred to above. He seems to have preferred that small companies in Palestine should register as public rather than private companies. He said:

[T]he objection which was raised originally by the Government to the

⁴⁹ Companies formed in England as private companies sometimes had business in Palestine and registered there as foreign companies. It was not clear whether they were subject to the full disclosure requirements in existence in Palestine that were similar to the disclosure requirements that applied only to public companies in England. In particular, the question was whether they should make their balance sheets public. The Government of Palestine wanted to allow them the same exemptions from disclosure that they enjoyed in England. But it was not clear whether there was a legal basis for such a practice.

⁵⁰ TNA, PRO, CO 733/283/8, Companies Ordinance (Memorandum from Attorney General H.H. Trusted, Q.C. (Sept. 17, 1935)).

recognition of a special class of private companies is still maintained. In the conditions of the country where the great majority of the population have no understanding or experience of trading with limited liability, it is considered desirable that companies should be subject to a measure of control.⁵¹

By "measure of control," Bentwich must have meant the stricter disclosure and filing requirements placed on public companies. He added that

there is certainly some force in the submission that the English Bill, on the basis of the recommendation of the Greene Report, included heavier regulation of public companies and will be embarrassing to many of the Palestinian Companies which are small associations of the nature of private companies in England.⁵²

However, this approach is a little contradictory. On one hand Bentwich accepted that the 1921 Palestinian Ordinance was not satisfactory, but on the other hand he was arguing that English Company law was too advanced and sophisticated.

At this stage, the disappearance of the private company sections from the 1929 Palestine Ordinance accordingly remains something of an enigma. We are able to offer some conjecture but no conclusive explanation.

VI. FOREIGN COMPANIES

Private international law recognizes two basic choice of law regimes in the field of company law. The first is the place of incorporation (registration) regime. The second is the real seat regime, also known as the place of management and control regime. In an empire as vast and diverse as the early 20th century British Empire, companies frequently had shareholders and officers and conducted business in many jurisdictions. The basic approach of the English Companies legislation was that the law of the place of incorporation (registration) applied to a company. English company law applied to English companies wherever they went in the far-flung British Empire, on which the sun never set! To avoid the application of English company law, a company had to be incorporated elsewhere. To enjoy the benefits of the elaborate and sophisticated English Companies legislation,

⁵¹ TNA, PRO, CO 733/145/7, Companies Ordinance (Note on the Amendments of the Companies Bill (May 17, 1928)).

⁵² *Id.*

the incorporators of a company anywhere in the Empire could register it in England, if they could afford to do so. The Empire did not give rise to American-type jurisdictional competition over chartering because its various jurisdictions were all controlled by the London centre. This centre was not monolithic, however, because company law in Britain was controlled by the Board of Trade, in India by the India Office, in other colonies by the Colonial Office, and in the Dominions (from 1926) by the Dominions Office. But the advantages that could be gained by incorporators selecting another place of incorporation within the Empire were limited.

As we have seen, the transitional 1919 Registration of Companies and Partnerships Ordinance issued by the military authorities required that "any commercial partnership or company carrying on business in O.E.T. (South) [Palestine] . . . whether established in the Ottoman Empire or abroad shall be registered within one month . . ." ⁵³ The 1921 Companies Ordinance was somewhat exceptional in the Imperial company law system. It stated that no association of more than 10 members shall carry on any business in Palestine unless it is registered as a company under the Ordinance. ⁵⁴ It defined "Foreign Company" as any company incorporated outside Palestine whose management and control was in fact directed and exercised from outside Palestine. ⁵⁵ The 1921 Ordinance seems to have adopted the real seat regime rather than the place of incorporation regime. But why? This was probably, in part, to supervise existing companies in Palestine which had been incorporated in the Ottoman era either in Istanbul or in civil law European countries.

Many Jewish companies active in Palestine at the time of the British conquest were registered in London, a centre of Zionist activity. ⁵⁶ These included the Jewish Colonial Trust (1899), Anglo-Palestine Company (1902), and Palestine Land Development Company (1908). Other companies registered in England in the 1920s included Neshet, a large cement manufacturer (1922). The wide net of the 1921 Ordinance ensured that many of

53 Registration of Companies and Partnerships Ordinance (Ordinance No. 118), 1919, § 1, Official Gazette of the Government of Palestine, Aug. 1919, at 8.

54 Companies Ordinance, 1921, § 2, Official Gazette of the Government of Palestine, Aug. 1921, at 2.

55 *Id.* § 89(2).

56 Due to its political ties with the Ottoman Empire, Germany was another popular place of incorporation for bypassing the Ottoman law. Other companies were registered in France and the United States. See TAMAR GOZINSKI, *THE DEVELOPMENT OF CAPITALISM IN PALESTINE* (1986) (Hebrew); JACOB METZER, *THE DIVIDED ECONOMY OF MANDATORY PALESTINE* (1998); Nachum T. Gross, *Jewish Banking and Economic Growth During the Mandate Period*, in *ECONOMY AND SOCIETY IN MANDATORY PALESTINE 1918-1948*, at 217 (Avi Bareli & Nahum Karlinsky eds., 2003) (Hebrew).

these companies would have to reregister in Palestine as domestic companies or as foreign companies.

The 1929 Companies Ordinance abandoned the real seat regime and adopted the place of incorporation regime which was the prevalent regime in the Empire. This may have resulted from the fact that incorporated companies simply ignored the 1921 real seat rule, or from the fact that just three years earlier the British Foreign Ministry assisted British nationals who complained that Syria and Lebanon, then under French mandate, applied Ottoman-French law to foreign associations that did business in these territories even though they were registered in common law jurisdictions.⁵⁷

It seems that the wide net of the 1921 Ordinance did not cause all companies active in Palestine to reincorporate or originally incorporate according to its laws. This might also explain the abandonment of the real seat regime in favour of the place of incorporation regime in 1929. The practice of establishing Jewish companies outside Palestine that began in the late Ottoman period continued into the 1920s and beyond. It is interesting to note that some of the major Jewish companies that were formed in the 1920s decided to incorporate in Palestine, while others decided to incorporate in England. These included land acquisition companies, financial companies and industrial companies.

Two famous and interesting examples are the Palestine Electric Company, which was incorporated by Rutenberg in Palestine in 1923, and the Palestine Potash Company, which was incorporated by Novomeysky in 1929 in England. The two had much in common, yet they selected different jurisdictions for incorporation. They planned projects that were to be constructed on the borders of Palestine and Transjordan (the Jordan River and Dead Sea, respectively). Support for their formation was considered politically sensitive. The first company was intended to electrify the whole of Palestine. The second was intended to be the major extractor of potash, used in agricultural fertilizers, anywhere in the British Empire. Both entrepreneurs needed concessions from the British government and lobbied actively in London. Both needed huge amounts of capital. The Electric Company's financial scheme relied on raising £1,000,000 for construction of the power plant and the network. The Potash Company had a minimum capital of about £750,000. These were huge sums for private undertakings in the Middle East

⁵⁷ TNA, PRO, CO 371/11517, Syria, the Application of Ottoman Company Law (1926). The affair was settled once the consulate in Beirut reported that French companies did not receive preferential treatment and that the Ottoman law was being replaced.

of the 1920s. But the concession, the raising of capital and the incorporation could be separated geographically; for example, the first in London, the second in the U.S., and the third in Palestine. The question why each of the entrepreneurs decided to incorporate in different jurisdictions cannot easily be explained by the financial needs of the enterprise or the need to obtain a concession.

Other foreign and multinational corporations were active in Palestine. These companies included oil (production, pipelining and distribution) companies, banks, insurance companies, and a few industrial and commercial companies. The number of non-British companies that were registered in Palestine as foreign companies was larger (in 1934) than the number of British companies, 118 foreign companies compared with only 96 British companies. This was not typical of other colonies. It may be explained by the fact that many European powers had holdings in Palestine in the late Ottoman period, or by the fact that the League of Nations Mandate prohibited discrimination by the British rulers against foreign companies (including Jewish-owned or Zionist companies).

VII. BRANCH REGISTERS

The company law sections on branch registers may seem to be one of the most technical and insignificant sections in any company law legislation. But, in fact, it opens an interesting window into the relationship between the centre and the periphery in the British Empire, to the reciprocal network formed between company laws in the various jurisdictions within the Empire and, in the case of Palestine, also to its highly unusual constitutional status in the Empire — a Mandate.⁵⁸

A company registered in England (or any other part of the United Kingdom) may have had shareholders in British possessions overseas.⁵⁹ This could come about in at least one of two ways. First, because colonial subjects wished to invest in English companies, for example, a Canadian purchasing shares of listed companies on the London Stock Exchange. Second, because English companies decided to raise capital in overseas dominions or colonies. This was likely to happen where the company intended to conduct business

⁵⁸ The registering of shares in branch registers in other jurisdictions also had consequences with respect to stamp duty liability and probate proceedings.

⁵⁹ This section refers to English companies, but for most practical purposes companies registered in other parts of the UK were in the same position.

in such territories, or where a company formed in a territory, say Kenya or Hong Kong, to do business there, decided to register in England in order to apply to it English company law rather than the company law of that colony. In this case, the company was English for company law purposes, but was in fact owned by shareholders in one of the colonies and managed and operated there.

The English Companies Acts required that each English incorporated company should hold a shareholders' register at its registered office.⁶⁰ Applying this requirement to shareholders who resided elsewhere in the Empire would have created administrative difficulties. The solution offered in the legislation, for example the Companies Act 1929, was to allow the formation of Dominion Registers. These were considered in law to be an integral part of the main shareholders' register. Obviously, the expectation was that most non-UK shareholders in English companies would come from the white settlers' dominions. The 1929 Act also authorized the extension of the application of branch registers to other colonies.⁶¹ Companies registered in England could thus open branch registers in Palestine if an Order in Council permitted this. Such an Order would have dual application, both as part of the English Companies legislation and as part of the companies legislation of Palestine (or of any other possession).⁶² Allowing English companies to open branch registers abroad was not a technical matter. It facilitated the migration of colonial companies to England by allowing them to opt into the English company law regime.

Could colonial companies open branch registers in England? The need to open branch registers in England was more than just a matter of administrative convenience. A colonial company wishing to raise capital in the London primary share market could not do this without offering potential English-based shareholders the facility to register and transfer their shares locally. English underwriters refused to lead share issues in London unless a branch register could be opened in England. Once allowed to establish branch registers, the colonial company would be able to issue stock. The rules and regulations of the Stock Exchange would apply to it, but not state regulation in the form of the regulatory elements of company law. Permitting the creation of branch registers in England facilitated the access of colonial

⁶⁰ Companies Act, 1929, 19 & 20 Geo., c. 23, §§ 95-102.

⁶¹ Section 106 of the Companies Act, 1929, permitted this by way of issuing Orders in Council based on section 5 of the Foreign Jurisdiction Act, 1890, 9 & 10 Vict., c. 37 (which was amended by section 106(1) to include in its first schedule sections 103-05 of the Companies Act).

⁶² Companies Act, 1929, § 106.

companies to the London stock market without subjecting them in full to English statutory regulation.⁶³ This was a meaningful and substantive matter, not just a technical one.

The Companies Act 1929 empowered the Crown by Order in Council to permit the formation of branch offices in Britain by dominion and other colonial companies, including companies formed in League of Nation mandates.⁶⁴ The Palestine Companies Ordinance 1929 did not mention the possibility for English companies to form branch registers in Palestine, or for Palestine companies to form branch registers in England. But the Crown could, at the Colonial Office's discretion, permit the formation of branch offices in England by Palestinian companies.

In the context of Palestine, the issue of forming branch registers was raised by Pinhas Rutenberg, the Zionist entrepreneur who received the concession from the British government to construct a power plant on the Jordan River. Rutenberg had registered the Palestine Electric Company in Palestine based on the Companies Ordinance 1921. He wished to raise an additional £1,000,000 in England in order to construct the second stage of his electricity project. He was advised by his underwriters that they would be willing to underwrite the shares only if they could be registered in London. The Palestine Electric Company accordingly corresponded with the Attorney General and the High Commissioner of Palestine in the spring of 1934. But when a positive reply did not arrive, Rutenberg himself wrote to the Undersecretary for the Colonies for the Middle East, explaining the obstacles and the importance of the project for which finance was sought. His letter was supported by the company's solicitor, none other than Harry Nathan. Nathan, familiar with the complexity of the issue, made a concrete suggestion — adopt the measures taken in Kenya a year earlier.⁶⁵

63 The Colonial Office was concerned that empowerment in colonial law without empowerment in English law would result in the English Companies Registrar and the courts not being able to supervise branch registers in England. After correspondence with the Board of Trade and the Dominions Office, it was recommended to include in the draft Companies Bill clauses that would provide such authority. *See* TNA, PRO, CO 323/996/13, Companies Act (1928) (see particularly Letter from E.R. Eddison of the Board of Trade to the Colonial Office (Feb. 16, 1928)).

64 Companies Act, 1929, § 107. It does this by applying sections 98 and 100 of the Act to branches of colonial companies. For the issuing of an Order in Council that made use of this authority with respect to colonies and protectorates in East and South Africa, see TNA, PRO, CO 323/1265/6, Companies Act 1929.

65 TNA, PRO, CO 733/267, Companies (Amendment) Ordinance 1934 (Letter from Nathan (May 7, 1934); Letters from Rutenberg and Nathan (Oct. 31, 1934)).

The Colonial Office sensed that this was a delicate request. It consulted with the Foreign Office and the Board of Trade (which consulted with the English Companies Registrar). The Board of Trade favoured placing Palestine in line with other territories within the Empire by introducing the option of forming branch registers in England and Palestine. But the Foreign Office was concerned over the international implications of such a bilateral arrangement between England and Palestine.⁶⁶ The League of Nations Palestine Mandate prohibited discrimination in favour of the Mandatory State and against any member of the League of Nations. It expressly prohibited discrimination against foreign companies.⁶⁷ The Foreign Office was concerned that allowing English companies to have branch registers in Palestine without allowing the same to other League member states might amount to discrimination against states such as France and Germany (then still a member state) in violation of the mandate terms. Allowing Palestine companies to have branch registers in England was not so clearly an act of discrimination. Article 18 prohibited discrimination in Palestine. England could in its jurisdiction favour companies of one state over another without violating the Palestine Mandate. But Palestine could not allow its companies to have branch registers only in England, but not in other member states. This would be a prohibited act of discrimination. There appeared to be no way to fully integrate Palestine into the Imperial company law system due to the fact that it was held by Britain as a Mandate.

But then an ingenious solution was conceived by one of the Colonial Office officials:

I have read this further letter. Of course the proposal is a thoroughly sound one which ought to be adopted, but we are always up against this absurd mandate point. A way has occurred to me of getting around the difficulty. It is rather farcical, but then farce is ever present when you are dealing with this mandate.⁶⁸

⁶⁶ As mentioned above, the Foreign Office had already encountered discrimination claims a few years earlier with respect to the application of French-Ottoman law to foreign companies in Lebanon and Syria that were subject to the French mandate.

⁶⁷ Article 18 stated that: "The Mandatory shall see that there is no discrimination in Palestine against the nationals of any State Member of the League of Nations (including companies incorporated under its laws) as compared with those of the Mandatory or of any foreign State in matters concerning taxation, commerce or navigation"

⁶⁸ TNA, PRO, CO 733/267, Companies (Amendment) Ordinance 1934 (Internal Memoranda (Nov. 2, 1934), at 1-5).

The ingenious solution was to grant the High Commissioner a discretion to approve the creation of branch registers for other states upon their request, but only if they offered mutual registration on a reciprocal basis to the extent necessary to satisfy the High Commissioner. The intention as revealed in the correspondence was that the High Commissioner would exercise his discretion in a manner that would favour England and its companies, and would not allow other states to form branch registers in Palestine (or Palestinian corporations to form legally binding branch registers in other states)! An equally ingenious idea raised by another official was not to bring the matter to the approval of the Foreign Office, and work on the details only with the Government of Palestine.⁶⁹ Orders in Council were drafted and approved accordingly.⁷⁰ Rutenberg had his way. The Palestine Electric Company was given access to the London stock market.

VIII. LAND ACQUISITION BY FOREIGN AND PALESTINE COMPANIES

The 1919 Companies Ordinance did not refer to the issue of land acquisition. The 1921 Companies Ordinance stated that "The Registrar shall not register any Company formed for the purpose of land development in Palestine or which has among its objects any object involving power to hold more land than is needed for its enterprise, plant, and works, unless it produced a certificate under the hand of the High Commissioner that it is recognized as having purposes of public utility."⁷¹

The 1929 Companies Ordinance included a similar prohibition. It also empowered the High Commissioner to revoke the certificate enabling a company to hold land if the company did not develop and cultivate it, and

⁶⁹ The official noted that the Foreign Office was acquiescent to inclusion of reciprocal tax relief in the Palestine Income Tax Ordinance.

⁷⁰ TNA, PRO, CO 733/283/8, Companies Ordinance. Three measures were taken, an Order in Council of December 20, 1934 that allowed the formation of branch registers of English companies in Palestine, an amendment to the Palestine Companies Ordinance enacted on February 28, 1935 that provided that Palestine companies could keep branch offices in the UK, and an Order in Council of March 6, 1935 that applied the relevant sections of the English Companies Act to the branch registers of Palestine companies held in Great Britain.

⁷¹ Companies Ordinance, 1921, § 8, Official Gazette of the Government of Palestine, Aug. 1921, at 2.

to wind up the company.⁷² The Ordinance also extended the prohibition to foreign companies.⁷³

There was no parallel to this legislation in the English Companies Acts. While the restriction in Palestine was not a transplanted English restriction, it may have been a colonial transplant. The restriction on land acquisition by companies was not unique to the Palestine Companies Ordinance. Similar prohibitions were included in the company ordinances of a few other colonies.⁷⁴ But this does not necessarily mean that the prohibition was imposed or suggested by the Colonial Office or that Palestine imported it from another colony. One indication of the possible domestic origin of the prohibition can be found in a resolution made by the Executive Council of Palestine in September 1928. The Council dealt briefly with the prohibition on the buying of land by companies and resolved: "It is decided to recommend to the Secretary of State . . . that companies should be empowered to acquire the land only under the conditions prescribed by the Credit Banks Ordinance, 1922 for the acquisition of land in similar circumstances by credit banks."⁷⁵

Although this paragraph is cursory, and does not provide the rationale for the recommendation, it may suggest that the initiation of the restriction did not come from the Colonial Office in London, but was rather recommended to the Colonial Secretary by the government of Palestine and possibly initiated by Bentwich, who was one of the participants in the Council meeting. Be that as it may, in the early 1930s Jewish companies frequently complained that they could not properly function due to the prohibition. In particular, complaints were made by banks and savings and loans companies. These argued that they could not extend loans because they could not be secured by effective mortgages, because obtaining possession of the land could not be guaranteed.

A better understanding of the source of this prohibition and its reasons requires further research both into the diffusion of similar prohibitions throughout the Empire and into the history of restrictions on land acquisition in British Palestine. After all, redemption of land was a cornerstone of Zionist ideology and policy, a major bone of contention between Arabs and Jews in

72 Companies Ordinance, 1929, § 15, Official Gazette of the Government of Palestine, May 1929, at 379.

73 *Id.* § 249.

74 For instance, section 16 of the Companies Ordinance, 1946 (No. 13) of the Malayan union. *See generally* MALAYA AND SINGAPORE, THE BORNEO TERRITORIES: THE DEVELOPMENT OF THEIR LAWS AND CONSTITUTION (L.A. Sheridan et al. eds., 1961).

75 ISA 4753/2-M (Resolution of the Government of Palestine, Executive Council Decision (Sept. 18, 1928)).

Palestine, and a major concern for the British governments in London and Jerusalem.⁷⁶

IX. SOME CONCLUDING THOUGHTS

Company law is a constitutive and facultative law. It was essential for the inhabitants of some colonies, but it might be unimportant for the inhabitants of others. However, unlike criminal law, contract law or property law, it could not just be ignored, bypassed or not enforced. At least in some of the colonies, company law was not just a game colonial officials in the centre and periphery played amongst themselves. Those segments of the society, very thin in some colonies, wishing to organize companies had to do so based on the colonial law, usually the transplanted colonial law.

Company law transplantation was a complicated, even discouraging, project because of the ever-changing nature of company law in the era discussed here, and because of the lengthy and technical nature of company laws. It was made even more complicated and frustrating because harmonization was essential for its success. Companies wandered around the British Empire in various ways. They could be formed in one place, do business in another, raise capital in a third place, and form a subsidiary in yet another. What was sought was a network of company laws that did not just resemble each other, but also recognized and complemented each other.

In Palestine there existed unique factors that further complicated matters on top of the general complications that prevailed throughout the Empire. But they also make the Palestinian case fascinating. Upon arrival, the British encountered Ottoman-French company law, not a vacuum as was the case in many colonies. They also encountered an exceptionally high number of companies that were incorporated in England and in other foreign jurisdictions. They had to deal with the effects of globalization and of multinational corporations as early as the 1920s. At first sight, the fact that Palestine was a Mandate did not seem to be relevant for company law legislation. But there were contexts in which transplantation was constrained by the Mandate. In Palestine, the British also encountered zealous Zionist political leaders and lawyers who used the corporate form in order to promote settlement, employment and land purchase. The British also had to deal with entrepreneurs and lawyers who bypassed the colonial

⁷⁶ We shall pursue the inquiry into the sources and motivations of the prohibition in the context of company legislation in a later stage of our larger research project.

administration and directly lobbied influential sources in London. They had to manoeuvre through the debate between the Zionist Attorney General in Palestine and the Zionist lawyer who served as an adviser to the Colonial Office. Distinctions between colonizer and colonial subject were blurred.

This Article contains an introduction to aspects of company legislation in Mandatory Palestine. Company law transplantation needs to be studied in the wider context of commercial law, particularly partnership law, secured transactions law and bankruptcy law. And this Article does not deal with case law. In England of the Mandate period, much of the statutory law was technical and procedural. Much of the substantive law, e.g., the fiduciary duties and duties of care of directors and minority shareholder protection law, was specialist judge-made common law. One of the purposes of the harmonization of company legislation was to allow the application of English case law throughout the Empire. The laws of Mandatory Palestine allowed the importation of English case law by two methods. The first was through article 46 of the Palestine Order in Council, 1922, the de-facto constitution of Palestine. This permitted the Palestinian Courts to have recourse to the substance of the common law and the doctrines of equity in force in England. The other was through section 258 of the Companies Ordinance 1929, which provided that it should be interpreted by reference to the law of England relating to companies. And there were indeed a number of Palestine Mandate Court decisions on a variety of company law topics. The extent to which these two channels for anglicization, gap-filling and interpretation, were used by the courts of Mandatory Palestine in the field of company law will be reviewed in the next stage of our wider project.

