

# Colonialism, Colonization, and Land Law in Mandate Palestine: The Zor al-Zarqa and Barrat Qisarya Land Disputes in Historical Perspective

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*This article focuses on land rights, land law, and land administration within a multilayered colonial setting by examining a major land dispute in British-ruled Palestine (1917-1948). Our research reveals that the Mandate legal system extinguished indigenous rights to much land in the Zor al-Zarqa and Barrat Qisarya regions through its use of "colonial law" — the interpretation of Ottoman law by colonial officials, the use of foreign legal concepts, and the transformation of Ottoman law through supplementary legislation. However, the colonial legal system was also the site of local resistance by some Palestinian Arabs attempting to remain on their land in the face of the pressure of the Mandate authorities and Jewish colonization officials. This article sheds light on the dynamics of the Mandate legal system and colonial law in the realm of land tenure relations. It also suggests that the joint efforts of Mandate and Jewish colonization officials to appropriate*

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*land and undertake "development" operations in the area were fueled by neither the interests of colonial rule nor those of Jewish colonization alone, but, rather, by the integrated impact of both forces.*

## INTRODUCTION

This paper focuses on the history of land rights, land law, and land administration within a multilayered colonial setting. It tells the story of a major series of land disputes that commenced during the early years of British rule in Palestine, which began in 1917, and continued until the end of the Mandate in 1948. The disputes at Zor al-Zarqa and Barrat Qisarya, located on the Mediterranean Coast south of Haifa, involved British Mandate officials, proponents of Jewish colonization, and representatives of Palestine's local Arab population. The Mandate legal system quickly emerged as the major arena of confrontation, as British and Jewish colonization officials attempted to use "colonial law" to wrench control of the area from the local indigenous population. By doing so, they set the language and rules of the confrontation and situated it squarely within the realm of law. In defense of their interests, local residents responded to the challenge in kind, mounting a prolonged struggle that quickly found expression in legal terms as well. The resulting conflict splintered into ongoing tripartite confrontations, negotiations, and legal battles, some of which remained unsettled until the British left Palestine in May 1948.

While some important aspects of Mandate Palestine have been relatively well-documented, the legal history and legal geography of the period have not yet been sufficiently studied. This lack of attention is problematic, for, as a recent historiographical article on the period points out, "[t]he legal history of Mandatory Palestine is not only interesting in itself, but also important because it can contribute to our understanding of wider issues that have occupied the attention of historians of Palestine throughout the twentieth century."<sup>1</sup> One such issue is the debate concerning the nature of pre-1948 Jewish settlement in Palestine and its relations with ruling imperial powers, which has occupied a significant number of historians and social scientists. Another is the manner in which law served to shape power relations among different social groups and between rulers and ruled, both in Palestine and in colonial states in general.

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1 Ron Harris et al., *Israeli Legal History: Past and Present, in The History of Law in a Multi-Cultural Society: Israel 1917-1967*, at 7 (Ron Harris et al. eds., 2002).

This case study contributes to our comprehension of these issues in the realm of land. It explores the relations between British authorities, Jewish colonizing agencies, and the indigenous Arab population, highlighting the intricate and often ambivalent interactions between colonizers and colonized, "metropolis" and "colony," and "law in the books" and "law in action." It also touches on the role played by colonizers' legal systems in dispossessing native groups and the extent to which these native groups were able to use this law to further their own interests. As we will see, there are no simple answers to these questions.

## I. THE LEGAL GEOGRAPHY OF COLONIALISM

Recent work on the historical legal geography of colonialism facilitates a better understanding of the Zor al-Zarqa and Barrat Qisarya land disputes.<sup>2</sup> Legal geographers view law and space as significant aspects of one another. They examine, among other things, how spatial ordering influences legal regimes and how legal rules shape social and human space.<sup>3</sup> A critical stream within legal geography explores the role of legal structures in ordering and legitimizing spatial hierarchies.<sup>4</sup> While some legal geographers focus on

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2 Recent recognition of the intrinsic relationship between law and geography has sparked the evolution of a new field of research known as legal geography. For more on the emergence of legal geography, see Alexandre (Sandy) Kedar, *On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda*, 5 *Current Legal Issues* 401 (2003). As late as 1994, Nicholas Blomley opened his study *Law, Space, and the Geographies of Power* with a lament of the scarcity of research on the subject. Nicholas Blomley, *Law, Space, and the Geographies of Power* 7 (1994). In addition to several academic gatherings that have focused on legal geography, the new field has recently been the subject of considerable published scholarship. It was the theme of a special issue of *Historical Geography* (28 *Hist. Geography* (2000)). In 2001, three leading legal geographers (Nicholas Blomley, David Delaney, and Richard Ford) edited a fundamental anthology entitled *The Legal Geographies Reader*. Nicholas Blomley et al., *Preface: Where is Law?*, in *The Legal Geographies Reader: Law, Power and Space* (Nicholas Blomley et al. eds., 2001) [hereinafter *Legal Geographies Reader*]. In addition, the fifth issue of *Current Legal Issues* (2003) was dedicated to "Law and Geography."

3 Blomley et al., *supra* note 2, at 6.

4 Critical legal geographers are influenced by the Critical Legal Studies movement. For details, see Kedar, *supra* note 2. See also David Delaney who provides an explanation of the importance of critical legal geography in *Of Minds and Bodies and the Legal-Spatial Constitution of Sanctuary*, 28 *Hist. Geography* 25, 37 (2000). Benjamin Forest, *Placing Law in Geography*, 5 *Hist. Geography* 12 (2000); Nicholas Blomley & Joel Bakan, *Spacing Out: Towards a Critical Geography of Law*, 30

contemporary geographies, others focus on the historical geographies of the past.<sup>5</sup>

Colonial territories offer fertile ground for such a critical legal-geographical approach. In a recent review essay on "law and colonialism," legal anthropologist John Comaroff asserts that such studies

demonstrate the importance of legalities, broadly defined, in the imposition of control by Europe over its various "others": how law was "the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion" ... how it became a "tool for pacifying and governing ... colonized peoples" ....<sup>6</sup>

Indeed, some South African tribes termed English legalities "the English mode of warfare."<sup>7</sup> In the realm of land tenure and land administration, the construction of colonial land regimes served as standard battleground for this mode of warfare.<sup>8</sup> Institutional arrangements and property systems represented and legitimized power relations within colonial states, and the resulting land regimes constituted legal-cultural orders that reduced the need for overt force in maintaining colonial rule. In such hegemonic systems, legal systems played a central role in constructing and perpetuating colonial socio-spatial power orders.<sup>9</sup> To begin with, legal systems were essential in facilitating and institutionalizing the transfer of land from native populations

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Osgoode Hall L.J. 661 (1992); David Delaney, *Race, Place and Law: 1836-1948* (1998) [hereinafter *Delaney, Race, Place and Law*].

5 See, e.g., Delaney, *Race, Place and Law*, *supra* note 4; Blomley, *supra* note 2; Gerald Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057 (1980); Gerald Frug, *A Legal History of Cities*, in *Legal Geographies Reader*, *supra* note 2, at 154.

6 John L. Comaroff, *Symposium Introduction: Colonialism, Culture, and the Law: A Foreword*, 26 *Law & Soc. Inquiry* 305, 306 (2001).

7 1 John Mackenzie, *Austral Africa: Losing It or Ruling It* 77-78 (1887), *cited in id.* at 306.

8 Peter Russell, *High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence*, 61 *Saskatchewan L. Rev.* 247, 247-48 (1998).

9 See, e.g., Joseph Singer, *Sovereignty and Property*, 86 *Nw. U. L. Rev.* 1, 3 (1992); Joseph Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 *Ga. L. Rev.* 481, 482 (1994); Russell, *supra* note 8; Erica-Irene A. Daes, Special Rapporteur, Commission on Human Rights, *Human Right of Indigenous Peoples: Indigenous People and their Relationship to Land*, Second Progress Report, U.N. Doc. E/CN.4/Sub.2/1999/18 (1999), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/154d71ebbbdc126a802567c4003502bf?Opendocument>. On the approach of American law to Chicanos in the Southwestern U.S., see Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of "Naked Knife"*, 4 *Mich. J. Race & L.* 39 (1998); Guadalupe T. Luna, *Beyond/Between Colors: On the Complexities of Race: The*

to settlers. Simultaneously, they helped conceal this dispossession and legitimized the new land regime.

While colonial state structures were powerful, they also contained genuine internal tensions. Colonial states frequently attempted (though not always successfully) to limit their reliance on overt force and intimidation. They tried to convince inhabitants of their legitimacy, and law often served as an important component of such legitimizing projects. As Assaf Likhovsky suggests, Mandate authorities in Palestine made ardent efforts to paint British colonial law as benign and neutral by constructing a "colonial-type legal education, uniquely adapted to legitimize British colonial legal policy in Palestine at the time."<sup>10</sup> Such legitimation was often based on presenting the rule of law as objectively beneficial, i.e., as offering European "progress," "civilization," and enhanced social "development." This notion bolstered the dominance of British legislators and judges and of the administration in general:

The propagation of an image of law as neutral and transferable, helped convince Palestinians that European legal norms and European legal procedures could be adapted to local use, and that they should be adapted because they did not represent unjustified intervention of the colonial power in native practices but rather were part of a laudable attempt by the colonizer to raise local norms to a higher level of cultural development.<sup>11</sup>

But in order to persuade a meaningful segment of the population (especially those indigenous elites familiar with Mandate law or at least the English language), the legal system and related mechanisms had to make good on some of these promises. In result, genuine tensions and contradictions emerged within the legal system, creating the potential to generate counter-hegemonic challenges within the colonial structures themselves. Indeed, recent studies on law and colonialism show that subjugated peoples have often employed components of the colonizers'

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*Treaty of Guadalupe Hidalgo and Dred Scott v. Sanford*, 53 U. Miami L. Rev. 691 (1999); William Fisher III, *Property and Power in American Legal History*, in *The History of Law in a Multi-Cultural Society: Israel 1917-1967*, at 393 (Ron Harris et al. eds., 2002) [hereinafter *History of Law*].

10 Assaf Likhovsky, *Colonialism, Nationalism and Legal Education: The Case of Mandatory Palestine*, in *History of Law*, *supra* note 9, at 75, 86.

11 Likhovsky, *supra* note 10, at 86; *see also id.* at 76.

legal system in order to challenge existing power structures.<sup>12</sup> The counter-hegemonic, these studies have shown, often arises from deep within colonial legalities: "when they begin to find a voice, peoples who see themselves as disadvantaged often do so either by speaking back in the language of the law or by disrupting its means and ends."<sup>13</sup>

Comaroff explains that such challenges were not always for naught and that colonial justice "in some contexts — although by no means all and certainly not always — has shown itself willing, or found itself compelled, to protect the rights of the colonized against the power of colonizers."<sup>14</sup> The result is the emergence of a compelling dialectic — the use of law as domination and warfare (or "lawfare," as Comaroff terms it) and, to meet this challenge, the "counterinsurgent, contestatory possibilities inherent in even the most oppressive colonial legal regimes."<sup>15</sup>

## II. ACADEMIC RENDERINGS OF COLONIALISM, COLONIZATION, AND BRITISH LAND POLICY IN MANDATE PALESTINE

The conception of British-ruled Palestine as a colonial space has been complicated by the national struggle between Jewish settlers and indigenous Palestinian Arabs that intensified during the Mandate period. While Zionist colonization in Palestine began under Ottoman rule during the late nineteenth century, official British recognition and support endowed the Zionist project with significant new advantages. In contrast to Ottoman opposition, Great Britain declared its support for "the establishment in Palestine of a National Home for the Jewish people" in November 1917, just before occupying the country. This pledge came to be known as the Balfour Declaration.<sup>16</sup> Similarly, Article 6 of the League of Nations' Mandate Charter, 1922, stipulated that the government of Palestine "shall facilitate Jewish

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12 Comaroff, *supra* note 6, at 306 (citing Sally Merry, *Courts as Performances: Domestic Violence Hearings in a Hawat'i Family Court*, in *Contested States: Law Hegemony and Resistance* 40 (Mindie Lazarus-Black & Susan Hirsch eds., 1994) [hereinafter *Contested States*]).

13 Comaroff, *supra* note 6, at 306 (citing John L. Comaroff, *Foreword*, in *Contested States*, *supra* note 12, xii).

14 Comaroff, *supra* note 6, at 307.

15 *Id.*

16 Government of Palestine, *A Survey of Palestine Prepared in December 1945 and January 1946 for the Information of the Anglo-American Committee of Inquiry I* (Institute of Palestine Studies, Washington D.C., 1991).

immigration under suitable conditions and shall encourage ... close settlement by Jews on the land, including State lands and waste lands not required for public purposes."<sup>17</sup> Thus, at the onset of British rule, official documents attested to an Imperial policy of Jewish colonization, facilitating immigration, land acquisition, settlement, development, and elements of sovereignty. In addition to perceived mutual interests, the British-Zionist relationship was based on a discourse of development and modernization.

On the other hand, both the Balfour Declaration and Article 6 of the Mandate Charter included explicit pledges to preserve the rights of Palestine's indigenous population.<sup>18</sup> In this way, the British had undertaken what became known as a "dual-obligation": to help bring about the establishment of the Jewish national home and to safeguard the rights of the Palestinian Arabs in the process. Notwithstanding the twists and turns of British policy toward the Zionist project throughout the Mandate, the monumental expansion of Jewish colonization between 1918 and 1948 reflects that at the end of the day — intentionally or not — government policy was beneficial to Zionist colonization and detrimental to the interests of the country's indigenous non-Jewish population.

In a lively ongoing academic debate, numerous scholars have attempted to assess the extent to which Zionism can historically be considered a component of "colonialism" and whether the British actually facilitated Zionist colonization. Some scholars, including a significant number of Palestinians, have viewed Zionism as a spearhead of Western imperialism and as a typical settler movement working to displace local Palestinians. They stress the close cooperation between British and Zionist leaders in large-scale Jewish immigration and settlement and view Mandate Palestine as the formative period of the future colonial settler state.<sup>19</sup> Some Israeli

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<sup>17</sup> *Id.* at 3-11.

<sup>18</sup> The Balfour Declaration expressed this pledge by assuring that "nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine." Article 6 of the Mandate Charter stipulated that facilitation of Jewish immigration and settlement would be undertaken "while ensuring that the rights and positions of other sections of the population are not prejudiced." Government of Palestine, *supra* note 16, at 1-10.

<sup>19</sup> See, e.g., Elia T. Zureik, *Palestinians in Israel: A Study of Internal Colonialism* (1979); Rashid Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness* (1997); Edward W. Said, *The Politics of Dispossession: The Struggle for Palestinian Self-Determination 1969-1994* (1994); see also Roger Owen, *Economic Development in Mandatory Palestine, in The Palestinian Economy 13* (George Abed ed., 1988).

critical social scientists also have analyzed Zionist settlement in Palestine within the framework of settler states and European colonization.<sup>20</sup>

However, many Israeli scholars have rejected this approach, emphasizing Zionism's nature as a movement of national liberation seeking to "return" to the Jewish homeland in order to solve the problem of Jewish persecution in Europe. Such works often describe Jewish efforts to promote the Zionist project as "anti-colonial," distancing Zionism from British rule over the country. From this perspective, British laws regarding immigration, land, and planning are portrayed as obstacles to Zionist development.<sup>21</sup> Others have emphasized Zionism's deviations from classical models of pure settler colonialism, focusing on the absence of a powerful "metropolitan" state, on minor interest in acquiring natural resources, and the fact that Zionist settlers did not exploit the indigenous population.<sup>22</sup>

In addition, a number of Israeli critical social scientists have focused on the intertwining nature of colonial interests and discourses of modernization, which worked to subjugate and marginalize the indigenous population by rendering them primitive, passive, and devoid of developmental ability or political will. Such discourses were central to providing moral high-ground and effective tools of control for British colonial policies and, in effect, encouraged British-Zionist alliances in a number of realms, including land use and development. While not espousing a critical approach and not commenting on the discursive alliance between modernization and Zionist colonization, historical geographer Gidon Biger cogently identified the practical mechanics of the relationship between colonial "development" and Zionist colonization as early as 1983.<sup>23</sup>

A recent phenomenon among Israeli scholars has been the adoption of special terminology to clarify Zionism's relationship with colonialism. For

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20 Gershon Shafir, *Land, Labor and Population in the Zionist Colonization, General and Particular Aspects*, in *Israeli Society: Critical Perspectives* 104 (Uri Ram ed., 1993) (Hebrew); Amir Ben-Porat, *The Beginning of the Zionist Settlement in Palestine*, in *One Land, Two Peoples* 54 (Dany Jacoby ed., 1999) (Hebrew).

21 See Ran Ahronson, *Settlement in Eretz-Yisrael — a Colonialist Enterprise?*, "Critical" Scholarship and Historical Geography, 1 *Israel Studies* 214 (1996); David Horowitz & Moshe Lissak, *Trouble in Utopia: The Overburdened Polity of Israel* (1990); David Horowitz & Moshe Lissak, *The Origins of the Israeli Polity* (1978); Anthony D. Smith, *Zionism and Diaspora Nationalism*, 2 *Israel Aff.* 1 (1995).

22 See Anita Shapira, *Sword of the Dove: Violence in Labor Zionism* (1992) (Hebrew); Ahronson, *supra* note 21; Arnon Golan, *European Imperialism and Palestine: Was Zionism a Form of Colonialism?*, 5 *Space & Polity* 138 (2001).

23 See Ronen Shamir, *The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine* (2000); Yehuda Shenhav, *The Phenomenology of Colonialism*



instance, Oren Yiftachel, who places Zionist settlement within the realm of settler colonialism, stresses that the movement should be understood within the context of the plight of European Jews and terms it "colonialism of ethnic survival" or "colonialism of the displaced."<sup>24</sup> In contrast, Arnon Golan classifies Zionist colonization as "non-formal colonialism," pointing to the lack of European support for early Zionism and the absence of a formal state power. Ran Ahronson labels it "colonization" rather than "colonialism," emphasizing the micro scale of early Jewish settlement and distancing it from Zionism's subsequent collective expansionist strategies.<sup>25</sup> Ronen Shamir, sharpening and theorizing Biger's observations of the effective use by Jewish colonization officials of the infrastructure provided by the Mandate government, designates the British-Zionist dynamics of Mandate Palestine as "dual-colonialism," arguing that the country's Jewish population "was active in the concrete material practices of colonization," while the British authorities "provided the political, legal and administrative colonial umbrella."<sup>26</sup>

In contrast to the theoretical debate surrounding Zionism and colonialism taking place chiefly in the realm of social science, the historiography of Mandate land policy so far has had little to say about the imposition of a contingent, value-laden colonial system on Palestine. This is surprising, as it was Mandate authorities' Western "colonial" ideas about land that transformed the country's land regime during the thirty years of British rule. Still, with rare exception, historians of land in Mandate Palestine have focused primarily on the sale of land from Arabs to Jews and on the role of

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and the Politics of "Difference": European Zionist Emissaries and Arab-Jews in Colonial Abadan 8 (July 2002) (unpublished manuscript, on file with authors); *but cf.* Assaf Likhovsky, *In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine*, 29 *Israel L. Rev.* 291 (1995); Gidon Biger, *Crown Colony or National Homeland? British Influence upon Palestine, 1917-1930* (1983) (Hebrew); in English, see Gidon Biger, *An Empire in the Holy Land: Historical Geography of the British Administration of Palestine, 1917-1929* (1994).

24 See Oren Yiftachel, *Israeli Society and Jewish-Palestinian Reconciliation: "Ethnocracy" and Its Territorial Contradictions*, 51 *Middle East J.* 505 (1997).

25 Golan, *supra* note 22, at 140. Ahronson, *supra* note 21. See a critique of Ahronson's terminology in Shamir, *supra* note 23, at 18.

26 Shamir, *supra* note 23, at 19. In his recent book on the historical role of violence in the Zionist movement and the state of Israel, Israeli historian Moti Golani also refers to the British Mandate as a protective "umbrella." The Zionist movement's decision to entrust its security in Palestine to the British and to refrain from taking the path of violence at the onset of British rule, he argues, gave the movement "a stable British umbrella that proved itself when put to the test, providing a sheltered environment for the growth and development of 'the state in the making'." Moti Golani, *Wars Don't Just Happen* 123 (2002) (Hebrew).

the Mandate government in facilitating this process, and not on the impact of colonial land law.

For example, Kenneth Stein's 1984 standard *The Land Question in Palestine, 1917-1939* sets out to answer the question "How did the Zionists purchase the core of a national territory by 1939?"<sup>27</sup> Stein forgoes any real analysis or critique of the colonial land regime in Palestine and casts it merely as "a more efficient and watchful administrative structure" than the Ottoman regime it replaced.<sup>28</sup> Instead, he takes the less complex route of following the flow of land from Arab to Jewish ownership and documenting the impact of British policy on this flow. Overall, Stein perceives the Mandate as an attempt to mediate between the nation-building Jews and the poverty-stricken Arabs of Palestine and to carry out its "dual-obligation." It failed due to the incompatibility of the dual-obligation's two contradictory components.<sup>29</sup> Naomi Shepherd approaches the subject in a similar manner in her 1999 book *Ploughing Sand: British Rule in Palestine, 1917-1948*. She regards the local Ottoman land system inherited by Mandate Palestine as inefficient, destructive, and in need of reform. But instead of pursuing beneficial reforms, Shepherd asserts, the British enacted land laws aimed (unsuccessfully) at protecting Palestine's *felahin* (peasant farmers) from their own tendency to sell land to Jews.<sup>30</sup> Warwick Tyler's study *State Lands and Rural Development in Mandatory Palestine* also uncritically adopts the British perspective on the Ottoman land system and, like its predecessors, focuses on the Mandate's dual obligations and the British failure to mediate between Jews and Arabs.<sup>31</sup> In contrast, while noting the Mandate's dual obligation, Muhammad al-Hizrawi depicts the British not as a mediating force but as a force supporting Jewish colonization. According to his analysis in *Land Property in Palestine, 1918-1948*, overall British land policy was ultimately aimed at facilitating land transfers from Arabs to Jews.<sup>32</sup>

In addition to these general policy analyses, the land-dispute case study has emerged as an important genre in the historiography of land relations in Mandate Palestine. Raya Cohen employed this form in her 1986 examination of the legal disputes surrounding the JNF's purchase of Wadi al-Hawarith

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27 Kenneth Stein, *The Land Question in Palestine, 1917-1939* at xv (1984).

28 *Id.* at 5.

29 *Id.* at 213.

30 Naomi Shepherd, *Ploughing Sand: British Rule in Palestine, 1917-1948*, at 100, 103, 105 (1999).

31 Warwick Tyler, *State Lands and Rural Development in Mandatory Palestine, 1920-1948* (2001).

32 Muhammad al-Hizrawi, *Land Property in Palestine, 1918-1948* (1998) (Arabic).

and the eviction of its residents by the Mandate courts.<sup>33</sup> Since then, similar studies have included Dov Gavish's examination of the Ghor Mudawwara Agreement and Warwick Tyler's case studies on the Beisan Lands issue (1989), the Huleh Concession (1991 and 1994), and the Athlit, Kabbara, and Caesarea Concession (2001).<sup>34</sup> While the authors each have their own approach, their studies are similar in that they focus on the details of British-mediated disputes, negotiations, and arrangements and point to the Mandate's overall failure as referee and in fulfilling its pledges to Arabs and Jews. They also adopt British criticism of the Ottoman land system, without asking basic questions about the culturally contingent discourses underlying what they portray as useful policies of modernization and development.

Martin Bunton, the first historian to move beyond analyses of dual obligation and Jewish land purchase, incorporates into his case studies a critique of the colonial underpinnings of Mandate land law and land administration.<sup>35</sup> Although he too identifies British facilitation of land transactions, he understands this policy not as an element of facilitating Jewish land purchases, but, rather, as the work of colonial officials who believed "strongly in the 'modernizing' ideology of a Palestine transformed by the free working of natural economic laws that encourage above all the smooth transfer of property."<sup>36</sup> Bunton makes another significant contribution to the study of land in Mandate Palestine: he departs from the traditional dichotomy of Ottoman law, as retained by the British (according to a policy of retaining the "Ottoman Law in force" prior to occupation), and British-based laws, imported into the country by Mandate officials. Regarding Ottoman land law, he posits,

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33 Raya Adler (Cohen), *Mandatory Land Policy. Tenancy and the Wadi al-Hawarith Affair, 1929-1933*, 7 *Stud. Zionism* 233 (1986).

34 Dov Gavish, *The Ghor Mudawwara (Beit-Shean Lands) Agreement and Land Settlement in Erez Yisrael*, 13 *Mihkarim b'Geografia* 13 (1992) (Hebrew); Warwick Tyler, *The Beisan Lands Issue in Mandatory Palestine*, 25 *Middle Eastern Stud.* 123 (1989); Warwick Tyler, *The Huleh Lands Issue in Mandatory Palestine, 1920-34*, 27 *Middle Eastern Stud.* 343 (1991) [hereinafter Tyler, *The Huleh Lands Issue in Mandatory Palestine*]; Warwick Tyler, *The Huleh Concession and Jewish Settlement of the Huleh Valley, 1934-1948*, 30 *Middle Eastern Stud.* 826 (1994); Tyler, *supra* note 31.

35 See Martin Bunton, *Demarcating the British Colonial State: Land Settlement in the Palestine Jiftlik Villages of Sajad and Qazaza*, in *New Perspectives on Property and Land in the Middle East* 121 (Roger Owen ed., 2000) [hereinafter Bunton, *Demarcating the British Colonial State*]; Martin Bunton, *Progressive Civilizations and Deep Rooted Traditions: Land Laws, Development and British Rule in Palestine in the 1920s*, in *Colonialism and the Modern World* 145 (Gregory Blue et al. eds., 2002) [hereinafter Bunton, *Progressive Civilizations*].

36 Bunton, *Demarcating the British Colonial State*, *supra* note 35, at 121-22.

For Ottoman law in Palestine to become "Ottoman Law in force" during the British Mandate, it had to be discovered, translated, drafted, pleaded, interpreted, and taught. Put simply, the effect of these processes was to present British legal administrators with choices when trying to define the Ottoman legal status quo. A great deal of discretion was left to the British legal administrators to align the rules relating to property rights in Mandate Palestine with the administrative necessities of the colonial state, and to ensure that post-Ottoman land-law should suit the exigencies of colonial rule.<sup>37</sup>

Regarding ordinances enacted by Mandate officials, Bunton rejects the concept of "Anglicization" and instead highlights their particularly "colonial" sources, not to mention aims.<sup>38</sup> The concept of colonial law, therefore, cannot be limited to imported Western concepts alone.

Similarly, we hold that colonial law in Mandate Palestine must be seen as encompassing the overall conglomeration of Ottoman laws, imported legal concepts, and Mandate legislation that functioned as a unified corpus of law during the period. For example, the functional meanings of the legal land categories of *Mawat* (an Ottoman legal category of uncultivated wasteland remote from populated places) and *Matruka* (common land for use of a specifically defined public) during the Mandate (in the context of both the present case study and Palestine as a whole) were based on Western concepts of land use and colonial exigencies. Hence they must not be regarded simply as elements of Ottoman law, but rather as elements of colonial law, in this case, British colonial law as applied in Mandate Palestine.

And this brings us to our case study. As testimony of the impact of archival content and organization on the writing of history, the Zor al-Zarqa and Barrat Qisarya land disputes were the subject of two additional case studies published while this article was under preparation: the first by New Zealander Warwick Tyler in 2001 and the second by Canadian Martin Bunton in 2002.<sup>39</sup> As discussed above, each author applies a different approach to his material. Tyler places the issue within the context of the Mandate's dual obligations and does not discuss the significant dynamics of colonial rule and colonial law in Palestine. Bunton, in contrast, focuses almost solely on the impact of colonial rule on land law and land administration, only briefly noting the major

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37 Martin Bunton, *Inventing the Status Quo: Ottoman Land-Law during the Palestine Mandate*, XXI Int'l Hist. Rev. 29, 56 (1999).

38 *Id.* at 35. On the "Anglicization" approach to Mandate law, see Likhovski, *supra* note 23.

39 See Tyler, *supra* note 31; Bunton, *Progressive Civilizations*, *supra* note 35.

role played by the Palestine Jewish Colonization Association ("PJCA"). The present study incorporates both approaches, examining the British mediated Jewish-Arab contest for land as well as the impact of colonial domination — for both factors were of central importance.

Consistent with this dual historical focus, we have also taken particular interest in Shamir's theory of dual-colonialism referred to above. Shamir conceives Palestine's colonial context as a duality consisting of a British colonial political, administrative, and legal framework and an organized Zionist structure pursuing intensive Jewish colonization, taking advantage of the colonial framework as effectively and efficiently as possible. This included the Zionists' creation of "institutional mechanisms for drawing more Jewish immigration" and developing "self-governing organizations for the explicit purpose of a future takeover of the state."<sup>40</sup> Shamir does not argue that this dynamic was always intentional or that the British intended to facilitate such a Jewish "takeover." Rather, he stresses the "ambiguous relationship" between the two projects and points out the conflict and ambivalence that generally characterized relations between leaders of Jewish colonization and the British administration. In some cases interests coincided, while in others they conflicted.<sup>41</sup>

Colonial law as developed and applied under Mandate rule was a critical part of the British "colonial umbrella," well utilized by proponents of Jewish colonization. As mentioned above, colonial law has been "simultaneously a vehicle of subjection and emancipation, of dispossession and reappropriation."<sup>42</sup> While it would appear that, in such colonial contexts, the repressive side of law has typically carried the day, Comaroff rightly insists upon the importance of investigating such contexts in depth. It is "one thing

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40 Ronen Shamir, *The Comrades Law of Hebrew Workers in Palestine: A Study in Socialist Justice*, 20 *Law & Hist. Rev.* 279, 281 (2002).

41 Shamir, *supra* note 23, at 19. Shamir argues,

Palestine in the 1920s may be fairly described as subjected to dual-colonialism: While the British rulers created a political and economic infrastructure in the form of a colonial state, the Zionist immigrants purchased land from Arab owners, created institutional mechanisms for drawing more Jewish immigration, and developed self-governing organizations for the explicit purpose of a future takeover of the state. The Zionist colonizing project, however, was unique because there was no identity between the British political rulers of the land and the actual Jewish colonizing population. It developed within the framework of a hovering colonial state from whose perspective the Jewish colonizers were in themselves natives that had to be reconciled with the Arab population.

Shamir, *supra* note 40. For an earlier version of a similar argument, see Likhovsky, *supra* note 23, at 291.

42 Comaroff, *supra* note 6, at 311. Comaroff explains,

to say that colonial law was both an instrument of domination and a weapon of the weak," he writes, but "quite another to explain when it was the former, when the latter, and in what proportions."<sup>43</sup>

The following exploration of the Zor al-Zarqa and Barrat Qisarya land disputes examines these questions and others. What were the mechanisms of land acquisition and land control employed, and how did they change over time? What does this say about the relationship between Jewish colonization and British colonial rule? How did the use of colonial law impact relations among Jewish settlers, the indigenous Arab population, and the Mandate authorities? With these questions in mind, we turn to the case at hand.

### III. THE KABBARA CONCESSION: LAND, POPULATION, AND COLONIAL INTERESTS

The adjacent areas of Zor al-Zarqa and Barrat Qisarya covered 45,000 dunams (1 dunam = 1000 square meters = .25 acre) and were located on the Mediterranean coastline some twenty miles south of Haifa.<sup>44</sup> Zor al-Zarqa, also known as Kabbara, included 13,000 dunams in the north and was mostly rocky, hilly, and marshland (caused by the blocked flow of the narrow al-Zarqa River), with a few scattered cultivated plots. Barrat Qisarya, to the south, covered 32,000 dunams of sand dunes partially covered by grass, bushes, small trees, and some scattered cultivated plots as well. The coast bounded both areas to the west. The Carmel mountain range constituted the eastern border of Zor al-Zarqa, while Barrat Qisarya extended significantly further inland, roughly to the Haifa-Jaffa rail line (see Figure 1 below).

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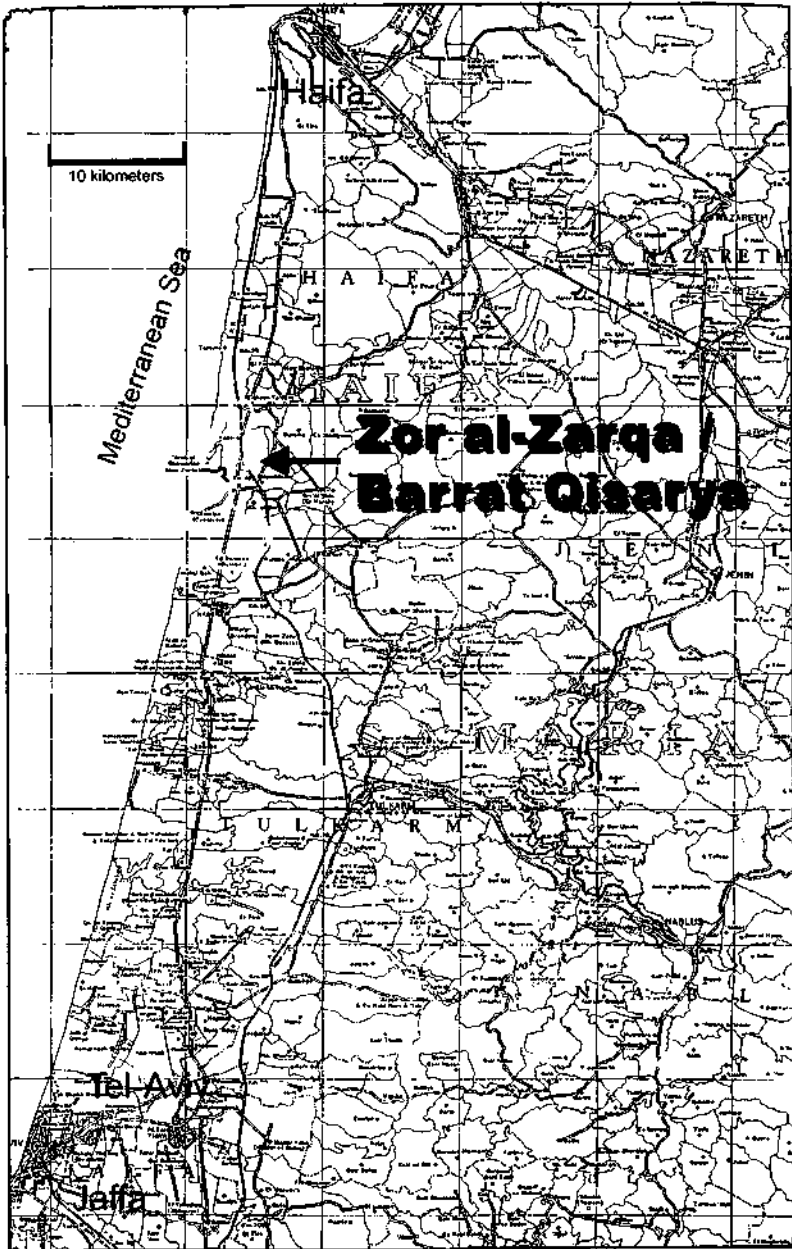
Far from being a crushingly overdetermined, monolithic historical force, colonialism was often an underdetermined, chaotic business, less a matter of the sure hand of oppression — though colonialisms have often been highly oppressive, nakedly violent, unceasingly exploitative — than of the disarticulated, semicoherent, inefficient strivings for modes of rule that might work in unfamiliar, intermittently hostile places a long way from home.

*Id.*

<sup>43</sup> *Id.* at 308.

<sup>44</sup> Government of Palestine, *Village Statistics (1945)*; Survey of Palestine (map), 1:100,000, Zikhron Ya'akov, 1942.

AREA LOCATED IN PALESTINE



At the onset of British rule in Palestine, the Zor al-Zarqa area was home to two sedentarizing (previously semi-nomadic) groups: 'Arab al-Ghawarneh and 'Arab Kabbara. 'Arab al-Ghawarneh comprised seventy-nine families (approximately 400 people), whose livelihood was based on raising buffalo, the sale of dairy products, the chopping and sale of wood, and a basket and mat industry based on the reeds from the marsh.<sup>45</sup> The thirteen families of 'Arab Kabbara raised livestock as well, but also cultivated approximately 320 dunams of land held in non-contiguous parcels. Both groups grazed their herds on portions of the area, lived in tent encampments, and possessed various types of land rights that had been recognized during the 1870s.<sup>46</sup> The language of the Ottoman land records consulted by British officials during the early 1920s, however, suggests that the groups were living on the land before their rights were actually acknowledged.

Barrat Qisarya was home to a semi-nomadic group of forty-one families who, like 'Arab al-Ghawarneh and 'Arab Kabbara, also lived in tents, used the land for grazing herds, and held land rights authorized in the 1870s. In addition to animal husbandry, 'Arab Barrat Qisarya managed to cultivate a significant amount of land in the area, despite its rugged, and mainly barren nature. 'Arab al-Dumayri, a group of thirty-three families, lived outside the lands of Barrat Qisarya to the south. They too cultivated some parcels within the lands of Barrat Qisarya and used other areas for grazing (see Figure 2 below).

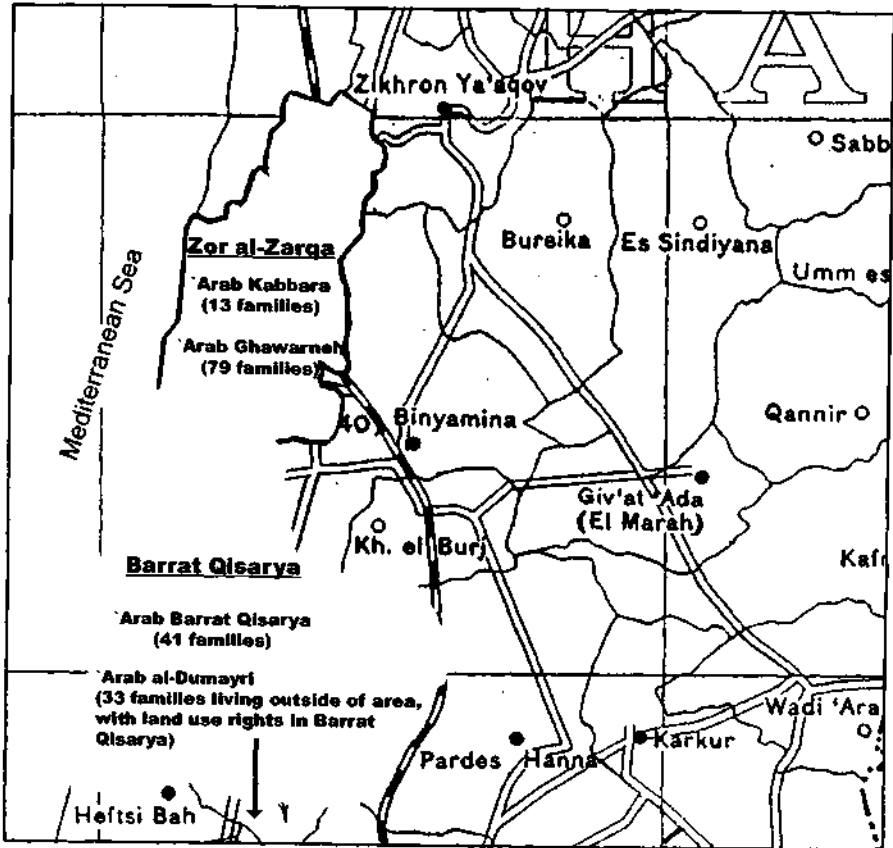
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45 The term "'Arab" used in the case of each of the four groups in this study indicates a tribal or semi-tribal group comprising a varying number of families, depending on the group in question. Suggested Draft Heads of Agreement, June 10, 1924, Israel State Archive (2) 9-mem/231 (1924).

46 *Letter from Wadi' al-Boustany to the Palestine Arab Congress Executive Committee*, Permanent Mandates Commission, Minutes of the 7th Sess. 164-69 (Jan. 25, 1925) [hereinafter *Letter from Wadi' al-Boustany to the Palestine Arab Congress Executive Committee*]; Opinion on the Arab Claims to the Lands Comprised in the Kabbara-Athlit Concession 5-6, 14, Israel State Archive (2) 9-mem/231 (1923).



INHABITANTS OF ZOR AL-ZARQA AND BARRAT QISARYA  
EARLY 1920s



Thus, these four groups, together accounting for between 800 and 850 people and possessing some 3500 animals, made their livelihood from the land and held various types of land rights.<sup>47</sup> Three of the groups — 'Arab al-Ghawarneh, 'Arab Kabbara, and 'Arab Barrat Qisarya — physically lived on the land in question and had been doing so for more than fifty years by the time the dispute erupted.<sup>48</sup> The term "semi-nomadic," as used above and in British reports and correspondences from the Mandate period, refers to the fact that they had previously lived a nomadic lifestyle and that they continued to dwell in tents. In actuality, as explained in May 1922 by the groups' attorney,

though living in tents, the ... tribes of Barrat Caesarea and Zor El Zarka, are in point of fact perfectly settled citizens and by no means nomadic, because they do not have to move about with their cattle, and are never known to cross the boundaries of their limited areas, and if they shift their tents, at intervals, for small distances, it is only for hygenical purposes.<sup>49</sup>

Against this backdrop, British colonial and Jewish colonizing interests came into play in the area shortly after British occupation. The discourse of bringing European "development" and "progress" to indigenous populations, though often not pursued in practice, was an important underpinning of the British colonial ethos.<sup>50</sup> Sir Ernest Dowson, Palestine's chief land reform

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47 The family of Fauzi Bey Sadik, which did not belong to any of the four groups, also held cultivated land in both Zor al-Zarqa and Barrat Qisarya. Population and livestock estimates taken from Note on the Kabbara Concession, Israel State Archive (2) 9-mem/231 (June 18, 1924), and *Letter from Wadi' al-Boustany to High Commissioner (May 31, 1922)*, in Institute for Palestine Studies, Documents of the Palestinian National Movement 261 (1984) (Arabic) [hereinafter *Letter from Wadi' al-Boustany to High Commissioner*].

48 It is not clear how long the population of Zor al-Zarqa and Barrat Qisarya had inhabited the area. The fact that Ottoman authorities confirmed their land rights during the 1870s suggests that their occupation of the land began long enough before this point in order to establish these rights. As noted in a 1922 letter from their lawyer to the High Commissioner, "The lands included in the area of the concession have been their lands for residential and livelihood purposes for the last 150 years after their fathers and ancestors." *Letter from Wadi' al-Boustany to High Commissioner, supra* note 47, at 243.

49 *Letter from Wadi' al-Boustany to High Commissioner, supra* note 47, at 264. This description is consistent with the increasingly sedentary lifestyle of the Bedouin of Ghor Beisan at the onset of British rule. See Iris Agmon, *The Bedouin Tribes of the Hula and Baysan Valleys at the End of Ottoman Rule*, Cathedra Sept. 1987, at 45, 87, 98 (Hebrew); Summary of Es Saqr Bedouin of the Beit Shean Valley, Doc. No. 8/klali/205, Hagana Archive (1943).

50 For some examples of how Mandate officials worked to change (and not to change)

expert, personally regarded the British government as "mandatory of the civilized world" in Palestine, aiming "to establish 'The Land of Three Faiths' as a stable and self-sufficing political entity."<sup>51</sup> Among other things, Dowson envisioned bringing fallow land under cultivation and developing state land. His approach rested on a belief in the superiority of European concepts of land use and development, and he criticized what he regarded as inefficient indigenous elements of Palestine's land system. His program, which aimed to transform Palestine's land regime from one based primarily on usage rights, often communal in nature, to one based on secure individual ownership, must be recognized as culturally contingent and as part of this colonial context.<sup>52</sup>

Marshland drainage was another aspect of development that Mandate authorities deemed critical, primarily to check the spread of malaria, but also to facilitate additional cultivation and development. The Ottoman government had tried to check malaria by draining marshes, but the British went about the task with greater vigor and determination.<sup>53</sup> High Commissioner Herbert Samuel appointed a permanent Anti-Malarial Advisory Commission in 1920, when malaria was the most common infectious disease in Palestine. The country was described as "a country infested by malaria" and a major anti-malarial campaign incorporating a number of international agencies was initiated.<sup>54</sup>

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various aspects of rural Palestinian society, see Ylana Miller, *Government and Society in Rural Palestine, 1920-1948* (1985).

51 Notes on Land-Tax, Cadastral Survey and Land Settlement in Palestine, Israel State Archive (65) 359-pey/02059 MEC.HJ.2999P.3 (Dec. 7, 1923).

52 See Jeremy Forman, *Settlement of Title in the Galilee: Dowson's Colonial Principles*, 7 *Israel Stud.* 61 (2002).

53 Ottoman authorities granted a concession to Mohammed Effendi Beyhoun and Michael Sursock in June 1914 to drain Lake Huleh and the adjacent marshes and reached advanced stages of negotiations with the Jewish Colonization Association regarding the drainage of the marshes of Zor al-Zarqa and Athlit during the same year. They also recruited experts from Europe to study the disease in Palestine, in hopes of eradicating it. Government of Palestine, *supra* note 16, at 974; al-Hizmawi, *supra* note 32, at 248; Tyler, *The Huleh Lands Issue in Mandatory Palestine*, *supra* note 314; Sandy Sufian, Mapping the Marsh: Malaria and the Sharing of Medical Knowledge in Mandatory Palestine, available at [http://www.parcenr.org/resources/palestinian\\_studies\\_today/studies\\_papers/sufian.html](http://www.parcenr.org/resources/palestinian_studies_today/studies_papers/sufian.html) (paper presented at a PARC-sponsored panel discussion on "Rule by Records: The Impact and Legacy of British Rule in Palestine," at the 2000 Annual Meeting of the Middle East Studies Association).

54 Herbert Samuel, *Report of the High Commissioner on the Administration of Palestine, 1920-25*, 2 *Palestine & Transjordan Administration Reports, 1918-48*, at 10-11 (1995); Sufian, *supra* note 53, at 1.

While plans for Jewish colonization after the First World War were based on different interests altogether, the architects of Jewish colonization endeavored to work within a colonial discourse of modernization — in concert with British authorities — whenever possible. The fact that Jewish colonization officials had a great deal in common with many British officials in terms of socialization and basic concepts of administration enhanced this cooperation. A major area in which Jewish Colonization Association and Zionist Organization officials pursued such cooperation was land acquisition. Based on the Balfour Declaration, Article 6 of the Mandate Charter, and correspondences with British officials, Jewish and Zionist officials believed that state lands and waste lands would be allocated for Jewish settlement as part of Great Britain's commitment to the Jewish national home.<sup>55</sup> They thus had two motivations for taking an active role in draining marshes and swamps: first, to develop land believed to be vacant and state-owned wasteland for future Jewish settlement; second, to locate components of Jewish colonization efforts squarely within the realm of development and public interest.<sup>56</sup>

In addition, while Mandate officials quickly concluded that the majority of state lands were occupied by Arab tenants and could not be allocated for Jewish settlement, Zor al-Zarqa and Barrat Qisarya were designated as exceptions to this policy.<sup>57</sup> In this way, the British-adopted Jewish interest of encouraging "close settlement by Jews on the land, including State lands and waste land not required for public use" played a role in British considerations throughout the evolving disputes. However, Mandate officials acknowledged this fact very rarely.<sup>58</sup>

The combination of British interests of development and Zionist colonization interests had great implications for Zor al-Zarqa and Barrat

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55 Lack of clarity regarding what exactly constituted these types of land was problematic from the outset, as British understandings of land administration and classification demanded a process of settlement of title that was only initiated in 1928. The issue remained problematic throughout the Mandate period and into the period of Israeli statehood. Shim'on Rubinstein, *Land Survey and Locating the Land Registries: Part of the Foundation of Zionist Policy in Eretz Yisrael in 1918-19*, 37 *Kivunim* 115 (1987) (Hebrew).

56 For another example of this phenomenon, see Tyler, *supra* note 31. Sandy Sufian notes that based on the active involvement of Jewish agencies in the Mandate government's campaign against malaria, "the Zionist political leadership made a general political claim that they were the most effective agents in the development of Palestine." Sufian, *supra* note 53.

57 Permanent Mandates Commission, Minutes of the 5th Sess. 78 (Oct. 29, 1924).

58 Government of Palestine, *supra* note 16, at 3-11; see also *id.* at 5 (The Palestine Mandate, Article 6).

Qisarya. In the view of Mandate authorities, the marshland of Zor al-Zarqa needed draining and the inefficiently used sand dunes of Barrat Qisarya would expand if left unchecked. The Jewish Colonization Association regarded the land as waste and state land designated for Jewish settlement according to the Mandate Charter. In contrast, the people of 'Arab al-Ghawarneh, 'Arab Kabbara, 'Arab Barrat Qisarya, and 'Arab al-Dumayri desired to maintain their lifestyle and retain their livelihood. These conflicting interests of British colonial rule, Jewish colonization, and indigenous land rights set the stage for the events that followed.

#### IV. FROM CONCESSION TO CONFLICT

The Jewish Colonization Association ("JCA") was established in 1891 to aid Jews emigrating from Eastern Europe to other parts of the world. In 1900, the JCA assumed administrative responsibility for the Jewish colonies established in Palestine by the Baron Edmond de Rothschild, who retained decisive influence in direction and funding of the Association's Palestine section. Operations of the JCA in Palestine focused on the establishment of Jewish villages of family farmsteads, and this is also true of the Palestine Jewish Colonization Association — or the "PJCA" — into which JCA operations in Palestine were reorganized in the mid-1920s. (For the sake of simplicity, we will refer to this organization as the PJCA throughout the entirety of this article.) By 1945, the Rothschild family and the PJCA had together acquired approximately 450,000 dunams of land for Jewish colonization, two-thirds of which had already been transferred to individual Jewish settlers themselves. Politically, the PJCA was officially "non-Zionist," and it made great efforts to retain its independence and freedom to maneuver. 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 surrounding a number of issues (particularly land management and settlement). Most importantly, PJCA leadership saw itself as working alongside the Zionist movement during the Mandate period and toward the same overall goals.<sup>59</sup>

Just before World War I, the PJCA concluded negotiations with the

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59 Derek J. Penslar, *Zionism and Technocracy: The Engineering of Jewish Settlement in Palestine, 1870-1918*, at 26-27 (1991); Government of Palestine, *supra* note 16, at 374-76; Bat-Sheva Stern, *The Activities of the PJCA from its Establishment Until World War II (1924-1939)* 190-255 (1987) (Hebrew).

Ottoman Governor of the Beirut District to purchase the marshes of Zor al-Zarqa and Athlit from the Ottoman government and drain them within a fixed period of time.<sup>60</sup> This type of agreement, in which a government grants certain rights to a private institution in exchange for provision of a service, is known as a concession. This concession, however, was never confirmed by the required Ottoman Imperial edict from Istanbul and was therefore never officially granted.<sup>61</sup>

British forces entered Palestine in December 1917, just after the British Foreign Secretary issued the Balfour Declaration, and completed occupation of the country by the end of the following year. Herbert Samuel, the first British High Commissioner of Palestine, inaugurated British civilian rule under the auspices of the British Colonial Office in July 1920.<sup>62</sup> One month later, he appointed a three-member Land Commission to assess state land in Palestine, make recommendations for its use, and identify land available for "closer settlement, by which is meant the more intensive cultivation of the soil by a larger agricultural population."<sup>63</sup> The Commission included one Jewish representative (Haim Kalvarisky, a senior, European-born PJCA official who settled in the Galilee in the mid-1890s) and one Arab representative (Feidi al-'Alami, a notable from a leading Jerusalem family and a former Jerusalem mayor). It was chaired by Albert Abramson, a senior British officer who would later serve as Palestine's second Commissioner of Lands. In early autumn, Abramson and al-'Alami traveled by train to the Jewish settlement of Zikhron Ya'akov (located in the hills northeast of Zor al-Zarqa) and rode through Zor al-Zarqa and Barrat Qisarya on horseback in order to survey the area.<sup>64</sup> Abramson later recalled: "We interviewed a number of negro families

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60 *Comments by the British Government on the Memorandum of the Executive of the Palestine Arab Congress, 8 and 12 April 1925*, Permanent Mandates Commission, Minutes of the 9th Sess. 176.

61 While it is unclear whether the concession was even discussed in Istanbul during the few months before the Ottoman Empire joined the War, agreement on the district level in no way ensured confirmation in Istanbul. Wadi' al-Boustany recalled that an offer made by the Baron Rothschild to purchase the Jiftlik lands of Beisan was rejected by the Ottoman cabinet. *Letter from Wadi' al-Boustany to High Commissioner*, *supra* note 47, at 253.

62 Charles D. Smith, *Palestine and the Arab Israeli Conflict* 71 (1988).

63 Letter of Appointment from the Civil Secretary to Albert Abramson, Feidi al-'Alami, and Haim Kalvariski, Israel State Archive (2) 2-mem/80 and 81 (Nov. 12, 1920) [hereinafter *Letter of Appointment*]. While the letter of appointment does not specify the "closer settlement" of Jews, it can be assumed that this was the intention based on use of the term (closer settlement) in other contexts and the political background of the Commission's establishment.

64 Letter from Southern District Governor Albert Abramson to Chief Secretary, Israel

in the swamps who pointed out to us a few buffaloes which they stated was all they possessed and who were grazing in the swamp." He also learned that these families used reeds from the marsh for a basket industry and reclaimed some marshland for growing vegetables and that Bedouin were growing cereal crops on the edge of the sand dunes.

A few weeks later, Abramson submitted a number of proposals for the use of state land to the High Commissioner. Among them was a PJCA proposal to purchase Zor al-Zarqa and Barrat Qisarya (as well as other land at Athlit to the north) from the government in order to drain the marshland, plant fruit trees, implement forestation, and build a settlement.<sup>65</sup> The request was therefore for a concession, similar to that which the PJCA had been negotiating with the Ottoman authorities just before World War I, but different in that it now included Barrat Qisarya. Advising the government to refrain from selling state land as a general rule, the Land Commission recommended granting the PJCA's request in the form of a long-term lease, including the provision for establishing a Jewish settlement.<sup>66</sup>

On November 8, 1921, Abramson and PJCA representatives finalized the agreement. It granted the PJCA a one-hundred-year renewable lease to approximately 40-50,000 dunams, along with rights to "improve and develop" the marshland and sand dunes included therein.<sup>67</sup> Although the lease made no provision for the residents of the area, al-'Alami subsequently asserted that he "always maintained that the individual rights of any persons now living on the area had to be safeguarded."<sup>68</sup> Abramson also later explained that the Land Commission had intended to award any cultivated land within the area to its holders as revived *Mawat* land.<sup>69</sup> But in actuality, local land rights were considered only in retrospect, after the dispute had already erupted.

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State Archive (2) 6-mem/180) (Feb. 21, 1923) [hereinafter Letter from Abramson]. Kalvarisky was in Europe for personal reasons for an unexpectedly extended period of time, and the Commission started its work without him.

65 Letter from Southern District Governor Albert Abramson to High Commissioner, Israel State Archive (2) 2-mem/80 and 81 (Oct. 13, 1920).

66 The Land Commission recommended that "[a]t the end of any one period of lease the Government be free to lease direct to settlers who by that time will have purchased their houses from the JCA and who will have been cultivating the reclaimed swampy lands." *Id.*

67 Lease Agreement of 8 November 1921, Israel State Archive (2) L/24/34 [G-92-1509(1207)] (1921); Bunton, *Progressive Civilizations*, *supra* note 35, at 149 n.15. As the area was not yet surveyed, it was impossible to know the exact area of land included in the agreement. See Tyler, *supra* note 31, at 120.

68 Letter from Wadi' al-Boustany to High Commissioner, *supra* note 47, at 243.

69 Letter from Abramson, *supra* note 64.

As Abramson's comments indicate, Mandate authorities regarded the land in question as, at least partially, constituted by *Mawat*, which, as will be recalled, was an Ottoman term referring to uncultivated wasteland remote from populated places. Despite the Ottoman roots of *Mawat* as a legal category, its complete transformation, based on British conceptions of land administration and on supplementary Mandate legislation, now placed it squarely within the realm of colonial law. Prior to 1921, *Mawat* had served as an important and legitimate source of auxiliary land for rural agricultural expansion.<sup>70</sup> On the one hand, the state held ultimate title to *Mawat* in perpetuity. On the other hand, Article 103 of the Ottoman Land Code, 1858, stipulated that any person who "revived" *Mawat* by bringing it under cultivation (even if the act had been unauthorized) immediately acquired rights to the usufructuary title characteristic of most land in Palestine at the time (*Miri*).<sup>71</sup>

British officials regarded this absence of formal control as an obstacle to Western "order" and state control of the country's land affairs.<sup>72</sup> Thus, one of the first changes that the British made to the country's land regime was to amend legislation regarding *Mawat*. The 1921 Mewat Land Ordinance prohibited all future unauthorized use of *Mawat* land. It stipulated that all previously revived *Mawat* land had to be registered within two months of the Ordinance's publication in order to guarantee the rights of the holder.<sup>73</sup>

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70 Jeremy Forman, *The Transformation of Eastern 'Emeq Yizre'el/Marj Ibn 'Amer and 'Emeq Beit Shean/Ghor Beisan: Changes in Population, Settlement and Land Tenure due to the 1948 Palestine War and the Establishment of the State of Israel 14-15* (2000); Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder, 1948-1967*, 33 N.Y.U. J. Int'l L. & Pol. 923 (2001).

71 The Ottoman Land Code defines *Mawat* in the following manner:

The expression dead land (mevat) means vacant (khali) land, such as the mountains, rocky places, stony fields, permallik and grazing ground which is not in the possession of anyone by title-deed nor assigned ab antiquo to the use of inhabitants of a town or village, and lies at such a distance from towns and villages from which a human voice cannot be heard at the nearest inhabited place.

Ottoman Land Code, 1858, ch. II, art. 103, *reprinted in* The Ottoman Land Code 33 (Stanley Fisher trans., 1919). Commentators on the law regarded *Miri* land as

land which at the time of the Ottoman conquest of a country, was assigned to the Beit al-Mal [treasury], or land which has been granted out since by the Sultan for purposes of cultivation, on condition that the "servitude" (raqabe) vests in the Beit al-Mal.

*Id.* art. 1, at 3 n.1. For an analysis of these rights, see Kedar, *supra* note 70, at 923.

72 See Sally E. Merry, *Law and Colonialism*, 25 Law & Soc'y Rev. 889, 912-15 (1991).

73 The Mewat Land Ordinance, 1921, 38 Official Gazette 5 (Mar. 1, 1921). The Mewat



However, it is improbable that authorities believed that such quick registration would actually take place, as the largely illiterate rural Arab population did not read the Official Gazette and were undoubtedly not immediately aware of this change. In practice, the Mandate administration continued to recognize rights acquired to *Mawat* before 1921, regardless of when they were registered.<sup>74</sup>

Mandate authorities regarded Zor al-Zarqa and Barrat Qisarya as *Mawat* and therefore as state owned. They therefore felt free to lease it to the PJCA without assessing impact on the local population and without informing them of their plans. In fact, according to Wadi' al-Boustany, the local residents' attorney, the agreement was first published only in January 1923, as an appendix to a report on land rights in the area.<sup>75</sup> Regardless, local residents learned of the agreement in December 1921 and early January 1922, soon after it was signed, when PJCA workers attempted to deny the people of 'Arab Barrat Qisarya access to their traditional grazing lands based on the concession lease.<sup>76</sup> With the local population's subsequent protest, the dispute over Zor al-Zarqa and Barrat Qisarya — or the "Kabbara Concession" — began.<sup>77</sup>

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Land Ordinance repealed the last paragraph of Article 103 of the Ottoman Land Code of 1858, substituting the following in its stead: "Any person who without obtaining the consent of the Administration breaks up or cultivates any waste land [*Mawat*] shall obtain no right to a title-deed for such land and further, will be liable to be prosecuted for trespass." For a detailed analysis of the change introduced by this ordinance, see Kedar, *supra* note 70, at 952-69.

74 See Kedar, *supra* note 70, at 936-37, 937 n.40.

75 Letter from Wadi' al-Boustany to the Palestine Arab Congress Executive Committee, *supra* note 46, at 164-69.

76 Letter from Wadi' al-Boustany to the Palestine Arab Congress Executive Committee, *supra* note 46; Open Petition from Wadi' al-Boustany and Signatories to High Commissioner, Israel State Archive (2) 9-mem/231 (May 18, 1923) [hereinafter Petition from Wadi' al-Boustany].

77 The dispute also concerned the land of Muhamad as Sa'adi, which was included in the Athlit portion of the concession. This area, however, lies outside the scope of discussion in the present paper.

## V. 1922-1923: THE COLONIAL DEFINITION OF LOCAL LAND RIGHTS

The Zor al-Zarqa and Barrat Qisarya land disputes were at once a Jewish-Arab contest for control of land and a struggle between the British colonial regime and the indigenous population over territorial control within the Mandate state. To a significant degree, the visions and interests of British and PJCA officials coalesced, especially in their discourse of development and modernization. From the earliest stages of British rule in Palestine, colonial law and legal definitions played an important role in British and Jewish efforts to acquire land from the local population.

The Mandate legal system was also an important site of indigenous struggle and resistance. The colonial apparatus was by no means homogenous and contained fissures and inconsistencies (such as discrepancies among British authorities on various levels and the employment of Arab and Jewish residents of Palestine), and this dynamic served to intensify local resistance.<sup>78</sup> Furthermore, al-Boustany, the local residents' representative, was not only a lawyer but an activist in the evolving Palestinian-Arab national movement as well.<sup>79</sup> Under his leadership, the indigenous population was able to employ colonial legalities in order to struggle for and negotiate their rights with Mandate authorities, as well as with Jewish colonization activists. It was therefore not simply a case of the unilateral imposition of colonial interests, but one that also involved the rise of counter-hegemonic forces working within colonial legalities. Law served as both an instrument of domination and a weapon of the weak, albeit most of the time more successfully as the former than as the latter.<sup>80</sup>

In 1921, Mandate and PJCA officials assumed that all land in question was legally state domain, either *Mawat* or *Mudawwara* (*Miri* land that had been transferred to the full ownership of the Ottoman Sultan 'Abdulhamid during

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78 Cf. John L. Comaroff, *Reflections on the Colonial State, in South Africa and Elsewhere: Factions, Fragments, Facts and Fictions*, 4 Soc. Identities 321, 335-36 (1998). Here, he stresses the importance of distinguishing between the various spheres and levels of the colonial state, such as between the metropolitan and the colonial state. "Often cadres and functionaries 'at home' and 'abroad', and in different ministries and departments, fell into bitter conflict with one another ... . Conflicts of this kind ... affected the ways in which the state exercised its authority ... ."

79 See *infra* Section VIII.

80 Cf. Comaroff, *supra* note 6, at 307-09.

the last few decades of Ottoman rule and was subsequently appropriated by the Ottoman treasury) and that the rights of local residents, if they had any, were strictly "moral" — an imported non-Ottoman term indicating a lack of legal basis.<sup>81</sup> The use of the concept "moral rights" was foreign to the pre-1917 legal system of Palestine and, as employed by Mandate officials, served to transform Ottoman law into colonial law. Official discussion of the nature of local land rights began when opposition to the concession emerged a few months later.<sup>82</sup> In this context, al-Boustany countered the demand that local residents relocate in order to facilitate marshland drainage and sand dune reclamation, by arguing that his clients' rights were not moral, but legal.<sup>83</sup>

The first phase of the dispute, therefore, revolved around defining the rights of the various groups living in the area. This process took place during 1922 and 1923 and involved officials in Haifa, Jerusalem, and London. The task initially was the focus of various levels of governmental commissions of inquiry staffed primarily by regional government officials. Three inquiries were undertaken during 1922 but, in the end, generated only guidelines.

The first inquiry was performed in February by district Mandate officials following the issue of an interim order by the District Governor's Office that allowed the families of 'Arab Barrat Qisarya to temporarily retain their land.<sup>84</sup> The commission of inquiry estimated that local residents had rights to 1000 dunams of cultivated land, but acknowledged no rights to grazing lands or land that had been used for other purposes. Based on these conclusions, the Haifa District Governor proposed settlements to local residents, which were summarily rejected. At this point, local residents retained the services of al-Boustany, and his line of argument forced the issue of their legal rights.<sup>85</sup>

A second inquiry was undertaken in June 1922. The commission of inquiry consisted of the three members of the Land Commission (Abramson, al-'Alami, and Kalvarisky), a number of senior district officials, and Jules Rosenheck, a senior PJCA official in Palestine.<sup>86</sup> Rosenheck's inclusion on the commission, in addition to Kalvarisky who was also a PJCA official at the time, is indicative of the close cooperation between Mandate officials and the PJCA that characterized the dispute at this point. In contrast, although al-Boustany was permitted to observe the commission's deliberations, no

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81 For a definition of *Mawat*, see the previous section.

82 Letter from Abramson, *supra* note 64.

83 Letter from Wadi' al-Boustany, *supra* note 47.

84 Petition from Wadi' al-Boustany, *supra* note 76; Note on the Kabbara Concession, *supra* note 47.

85 *Id.*

86 *Supra* note 68.

representative of the local residents sat on the commission. Residents were, however, permitted to testify before the commission, where they argued that the concession would interfere with their recognized rights to live, farm, graze their herds, and produce their wares on the land. They were excluded from participating in the deliberations that followed.

Abramson began the deliberations by stating that all cultivated lands within the concession area would be granted to its respective holders as "revived" *Mawat* land, thereby acknowledging that some local residents possessed well-based rights.<sup>87</sup> Employing a discourse of modernization and development, Abramson, al-'Alami, and Rosenhek all argued the necessity of the residents' compensated departure, due to the overriding public interest of draining the marshland and reclaiming the sand dunes. Al-Boustany's counter-argument rested on the premise that his clients possessed legal rights to the area as a whole, and not only to the cultivated lands therein. The inquiry ended pending further consideration by the commission and never generated any substantial conclusions.

The Luke Commission, appointed in December 1922, was the third and most senior inquiry into local land rights in the area. It was chaired by Harry Luke (Assistant Governor of the Jerusalem District) and consisted of a number of senior Mandate officials. The Luke Commission report, submitted in February 1923, had important ramifications. Firstly, it affirmed local rights to all cultivated land and recommended its removal from the concession. Secondly, and more importantly, it acknowledged that claims to some uncultivated land might be justified as well. This bolstered the position of the local residents, who rejected settlements based on moral rights alone and, in result, greatly weakened the government's ability to maneuver.<sup>88</sup>

This acknowledgement troubled some officials in Palestine and London, who felt that proceeding in such an ambiguous situation would be both inefficient and ineffective. They therefore began calling for a clear resolution

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87 Abramson held that the land in question included both *Mawat* and *Mudawwara*, and recognition of rights to *Mawat* that had been revived through cultivation would have served to acquire land rights for the cultivators.

88 Letter from Chief Secretary to Assistant Governor of the Jerusalem District Harry Luke, Israel State Archive (2) 6-mem/180 (Dec. 14, 1922); Note on the Kabbara Concession, *supra* note 47; Letter from Northern District Governor George Symes to Chief Secretary, Israel State Archive (2) 6-mem/180 (Mar. 3, 1923) [hereinafter Letter from Symes]; Letter from Jabr al Damiri, Deeb al Ayat, Mahmoud al Abd, Shteivi al Mahmoud, Said al Khamis, and Mohamed al Saadi to Herbert Samuel, Israel State Archive (2) 6-mem/180 (Feb. 24, 1923) [hereinafter Letter from al Damiri et al.].

of the local residents' legal rights in order to clarify matters.<sup>89</sup> Those found to have no legal rights could be evicted, and all compensation would appear "an act of grace."<sup>90</sup> If legal rights were to be discovered, the government would be able to either remove the land in question from the concession or expropriate it under law.

Despite some Mandate officials' desire for a judicial decision as a basis for further action, the government and the PJCA continued joint efforts to reach a settlement based on the recommendations of the Luke Commission until late spring 1923, when the Colonial Office intervened.<sup>91</sup> On April 17, the Colonial Secretary instructed High Commissioner Samuel to proceed no further, until the legal or moral basis of all claims was established and all legal claims removed from the concession. Residents contesting the classification of their claims as moral would be free to seek recourse through arbitration or in the land courts.<sup>92</sup> The Secretary's instruction, however, did not stem from a concern for the rights of the Arab residents of the area to retain their homes and livelihood, but, rather, from a desire for proper administration. If legal claims were established, he specified, the PJCA would be able to purchase pieces of land from their Arab owners; or if necessary for public utility, the government would be able to undertake expropriation.<sup>93</sup>

The definition of local rights was eventually entrusted to a small group of senior Mandate legal officials headed by Norman Bentwich, who was not only the Mandate government's Attorney General, but an active and enthusiastic Zionist as well.<sup>94</sup> The Mandate administration's

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89 Letter from Northern District Governor George Symes to Chief Secretary, Israel State Archive (2) 6-mem/180 (Feb. 28, 1923; Mar. 26, 1923) [hereinafter Letter from Symes].

90 Letter from Symes, *supra* note 88.

91 Letter from Attorney General Norman Bentwich to Northern District Governor George Symes, Israel State Archive (2) 6-mem/180 (Feb. 25, 1923) [hereinafter Letter from Bentwich]; Letter from Chief Secretary to Northern District Governor George Symes, Israel State Archive (2) 6-mem/180 (Feb. 27, 1923) [hereinafter Letter from Chief Secretary]; Letter from Northern District Governor George Symes to Chief Secretary, Israel State Archive (2) 6-mem/180 (Apr. 20, 1923).

92 Letter from Colonial Secretary the Duke of Devonshire to High Commissioner Herbert Samuel, Israel State Archive (2) 6-mem/180 (Apr. 17, 1923).

93 Letter from Colonial Secretary the Duke of Devonshire to High Commissioner Herbert Samuel, Israel State Archive (2) 9-mem/231 (May 24, 1923) [hereinafter Letter from Duke of Devonshire]. Samuel's first reaction to this instruction was to clarify the legal bases of expropriation available to the Mandate authorities.

94 Letter from Acting High Commissioner Gilbert Clayton to Colonial Secretary the Duke of Devonshire, Israel State Archive (2) 9-mem/231 (Aug. 24, 1923) [hereinafter Letter from Clayton]; Smith, *supra* note 62, at 82.

policy of retaining the pre-war "status quo" dictated that all discussion of land rights was to be grounded in "Ottoman law in force" in conjunction with any new British-issued ordinances, a conglomeration that we have referred to as colonial law. However, by 1922, Ottoman land law had not been sufficiently researched to serve as a sturdy foundation for such a discussion.<sup>95</sup> And, as we have pointed out, Bunton has shown that the processes of accessing Ottoman law involved significant translation and interpretation, leaving Mandate legal officials a great deal of discretion.

We must keep this situation in mind when discussing the definition of local land rights to Zor al-Zarqa and Barrat Qisarya. The impetus for the process was the government's desire to appropriate the land, and the same people charged with defining the inhabitants' rights were simultaneously searching for a suitable method of expropriation. Expropriation, then, was the context within which their land rights were defined.

Bentwich's assessment was grounded in Ottoman law, and his August 1923 report served as the cornerstone of future British policy regarding land rights in the area. The Bentwich report, based primarily on Ottoman land records from the 1870s, affirmed residents' legal rights to all cultivated land, but rejected the claim that Zor al-Zarqa marshland, and parts of the Barrat Qisarya sand dunes, constituted land of the *Matruka* category.<sup>96</sup> According to Articles 91-110 of the Ottoman Land Code of 1858, *Matruka* was land designated for a variety of public or community uses, including grazing.<sup>97</sup> 'Arab al-Ghawarneh's claim to Zor al-Zarqa was based on records that stated that the area had "been left ... Mash'a [communal] amongst the Ghawarneh Arabs for the grazing of their cattle."<sup>98</sup> Legally, *Matruka* could not be held in exclusive possession with a title deed, and the government's capacity to expropriate it was thus questionable. However, Bentwich focused on the fact that *Matruka* was customarily defined in relation to a specified locality. As he did not consider tent encampments a village, he concluded that the land in question was not *Matruka*. "If there existed a village of the Ghawarneh

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95 Sir Ernest Dowson, *Preliminary Study of Land Tenure in Palestine*, British Public Records Office CO 733 50095/25 (Dec. 5, 1925). In his second report on the land regime in Palestine, submitted in December 1925, Dowson complained of "an inability to acquire any complete text of the laws, public orders, regulations and instructions that are or have been in force." *Id.* at 4.

96 Opinion on the Arab Claims to the Lands Comprised in the Kabbara-Athlit Concession, Israel State Archive (2) 9-mem/231 (Aug. 1923) [hereinafter *Opinion on the Arab Claims*].

97 Fisher, *supra* note 71.

98 Opinion on the Arab Claims, *supra* note 96, at 3-4.

Arabs," he reasoned, "they would, I think, be clearly entitled to maintain those rights in the Zor, on the ground that the lands were constituted *Matruka* for the benefit of the inhabitants of the village..."<sup>99</sup> It was thus *Mawat* and, after the enactment of the Mewat Land Ordinance, 1921, should, therefore, have been categorized as state owned. But Bentwich did not ignore the Ghawarneh Arab's rights completely; rather, he interpreted and recognized those rights as "rights of common" — an English common law concept of communal landholding that differed from the Ottoman legal concept of *Matruka*. This assessment served to acknowledge the residents' rights, but in a way that permitted the expropriation of their land. In this way, Mandate officials' use of the concept of rights of common served to transform Ottoman law into colonial law, as did use of the concept of moral rights.

Bentwich's report also denied the *Matruka*-status of the grazing lands of 'Arab Barrat Qisarya and 'Arab al-Dumayri, based on his position that "a sand dune, although it may be covered with rough grass, is not a pasture ground." He also chose to disregard Ottoman records from the 1870s, which stated that "the sand dune is left *mash'a* among the Arabs camping (that is, living) in the land," clearly indicating that local residents had long held communal rights in the area. Instead, he relied on other Ottoman records, which referred to the land as "waste and sand dunes" and made no reference to local inhabitants.<sup>100</sup> On this basis, he asserted that even if Barrat Qisarya had been designated as village pastures, rights to the land would not belong to the Arabs living in tent encampments, but, rather, to those living in the nearby village of Qisarya.<sup>101</sup> In Bentwich's eyes, encampments were not legitimate residences, and lands used for grazing, in both the past and the present, were not grazing lands. Needless to say, a belief in the superiority of Western concepts of social organization and land tenure and a disregard for

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99 Opinion on the Arab Claims to the Lands Comprised in the Kabbara-Athlit Concession, Israel State Archive (2) 9-mem/231, at 5, 9 (Nov. 1923).

100 Opinion on the Arab Claims, *supra* note 96, at 10-13.

101 A similar assertion — that a tent encampment does not constitute a settlement — was employed by Israeli authorities in their determination of what did and did not constitute *Mawat* land. On the Negev Desert, see Ronen Shamir, *Suspended in Space: Bedouins Under Israeli Law*, 30 *Law & Soc'y Rev.* 231, 238-42 (1996). On the Galilee region, see Kedar, *supra* note 70, at 952-69. This approach can be contrasted to British policy in Ghor Beisan in the early 1920s, when semi-nomadic Bedouin living on state-owned *Jiflik* land were granted ownership rights. As noted further on in this article, al-Boustany represented the villages and tribes of Ghor Beisan as well. See Gavish, *supra* note 34, at 13; Al Hizmawi, *supra* note 32, at 99-103.

local norms were crucial in enabling Mandate officials to reach and accept such conclusions.

Bentwich's selective approach to investigating local land rights served the British Mandate government's ultimate aim at the time, which was gaining control of the land. Clearly, so did his skewed interpretation of Ottoman law, employing foreign, Western concepts in order to arrive at the desired outcome. Overall, the Bentwich report limited the local population's legal claims to cultivated lands and the rights of common of 'Arab al-Ghawarneh.<sup>102</sup> As we have seen, grazing rights and all other rights were classified as "moral" and defined out of existence.

Thus, all cultivated land was removed from the concession. And with this legal assessment in hand, the Mandate government returned to the expropriation of 'Arab al-Ghawarneh's rights of common. In late August 1923, Acting High Commissioner Clayton informed the Colonial Secretary of both the Attorney General's assessment and the Palestine government's position that the portion of Zor al-Zarqa occupied by 'Arab al-Ghawarneh was indispensable to the draining of the marsh. "I therefore suggest, if your Grace concurs, that the Government should exercise on behalf of the Jewish Colonization Association, the power of expropriating the Arab rights of common, if the Arabs will not accept the terms of settlement which will be offered to them."<sup>103</sup> In response, the Colonial Office authorized the line of action proposed by the High Commissioner — to make great efforts to reach a settlement with 'Arab al-Ghawarneh, but, if all failed, to move forward with expropriation.<sup>104</sup> As the grazing rights of 'Arab Kabbara, 'Arab al-Dumayri, and 'Arab Barrat Qisarya were now officially classified by Mandate colonial law as "moral" and not "legal," their expropriation was unnecessary. Attempts would be made to reach a settlement regarding moral claims, and if this were to fail, the inhabitants would be offered arbitration. As a last option, the PJCA's lease would be activated and the Association would be free to pursue their eviction in the land courts.<sup>105</sup>

Despite its characterization as a last ditch effort, the threat of litigation emerged as an important component of the Mandate authorities' approach to the land disputes in the area. In candid discussions, officials revealed an assumption that local residents would rather accept a negotiated

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102 'Arab Barat Qisarya and 'Arab al-Dumayri were also granted a "legal" right to water their animals in the *Khirbet Zarnugia*, a nearby water source.

103 Letter from Clayton, *supra* note 94.

104 Letter from Colonial Secretary the Duke of Devonshire to High Commissioner Herbert Samuel, Israel State Archive (2) 6-mem/180 (Nov. 19 1923).

105 Letter from Duke of Devonshire, *supra* note 93.



settlement than assume the risks and expenses of going to court.<sup>106</sup> They were therefore "bargaining in the shadow of the law," or using the threat of litigation as pressure on the local population to accept a settlement and vacate their lands.<sup>107</sup> Furthermore, if any local residents did take the risk, as some eventually did, it was clear that the cards were stacked against them. After all, according to the classic terminology later coined by Marc Galanter, both the government and the PJCA were archetypal "repeat players": wealthy entities with great litigation experience and the ability to litigate strategically and allocate resources accordingly.<sup>108</sup> In his landmark 1974 article *Why the "Haves" Come Out Ahead*, Galanter highlights the advantages that repeat players enjoy in litigation and shows how these advantages enable them to use litigation and the overall legal system to their advantage. On the other hand, litigation still served as a legitimate and often useful implement in the local population's struggle to retain control of their land. This dual role of litigation — as an implement of the state and the forces of colonization as well as of the indigenous population — was critical in shaping the evolution of the land disputes in question during the years and decades that followed.

## VI. NEGOTIATION, INTIMIDATION, AND 'ARAB AL-GHAWARNEH'S ACCEPTANCE OF SETTLEMENT

The Luke Commission's acknowledgement that local claims to uncultivated land might have legal basis increased the residents' determination to refuse settlement. This, in turn, increased local government and PJCA efforts to negotiate their departure from the area. During the month following the report's submission, British and PJCA officials worked closely to reach a settlement based on its recommendations, without first assessing the Arabs' legal rights.<sup>109</sup> Again, British and Zionist interests overlapped, resulting in

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<sup>106</sup> Letter from Franck to Chief Secretary Gilbert Clayton, Israel State Archive (2) 6-mem/180 (May 13, 1923) [hereinafter Letter from Franck]; Letter from Attorney General Norman Bentwich to Chief Secretary Gilbert Clayton, Israel State Archive (2) 9-mem/231 (Dec. 9, 1923); Letter from Attorney General Norman Bentwich to Chief Secretary Gilbert Clayton, Israel State Archive (2) 9-mem/231 (July 18, 1924) [hereinafter Letter from Bentwich].

<sup>107</sup> This phrase was first used by Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979).

<sup>108</sup> Mark Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y 95 (1974).

<sup>109</sup> Letter from Attorney General Norman Bentwich to Chief Secretary, Israel State

efforts to prevent local residents from acquiring land rights in the contested area.

By late February 1923, however, it was becoming clear that all such efforts would be in vain. A written rejection of the Luke Commission recommendations, submitted on February 24 by six local Arab representatives, called for an annulment of the PJCA concession. They asserted that the Commission's findings substantiated their claim that the "agreement, above referred to, was indefinite, incomplete and inoperative."<sup>110</sup> Northern District Governor George Symes argued that efforts to reach a quick settlement, as prescribed by Jerusalem, would be futile. The report, he explained, suggested that the Arabs' case was at least an arguable one and that they would therefore reject any proposals for settlement.<sup>111</sup> In this context, the Chief Secretary instructed Symes to begin using the threat of expropriation to intimidate local residents into giving up their claims:

The point of view of the commission is that, if the Arabs should make out their claim to legal rights, the Government would have the right of expropriation of the lands; and if that right were exercised the compensation which the Arabs would be entitled to receive for the extinction of their rights would be considerably less than what is being offered to them in terms of settlement. Every attempt should be made to make the Arabs understand this position.<sup>112</sup>

Still, despite Symes' belief in the need for a legal assessment of the Arabs' land rights and the futility of attempting to reach an agreement, efforts continued during the next few months. In this way, officials of the state and the PJCA were attempting to use the "shadow of the law" to their advantage.

As will be recalled, the Colonial Office instructed the Mandate government in mid-April 1923 to halt negotiations with local residents, pending the legal assessment of local claims that would be completed by Bentwich a few months later. In response, District Governor Symes empowered the PJCA to initiate direct negotiations at the end of the month.<sup>113</sup> This step most likely resulted from the Mandate government's desire to activate the

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Archive (2) 6-mem/180 (Feb. 22, 1923); Letter from Bentwich, *supra* note 91; Letter from Chief Secretary, *supra* note 91.

110 Letter from al-Damiri et al., *supra* note 88.

111 Letter from Symes, *supra* note 88; Letter from Symes, *supra* note 89.

112 Letter from Chief Secretary Wyndham Deedes to Northern District Governor George Symes, Israel State Archive (2) 6-mem/180 (Mar. 24, 1923).

113 Letter from High Commissioner Herbert Samuel to Chief Secretary, Israel State Archive (2) 6-mem/180 (Apr. 29, 1923).

eighteen-month old PJCA concession and to bring the dispute to an end. The PJCA made repeated requests throughout the spring to begin work as soon as possible, and in mid-May, a second method of intimidation was proposed in order to encourage local residents to reach a settlement: initiating drainage work before achieving a settlement. "The Bedouins will not fail to bow before the accomplished fact," theorized a local PJCA official. "Fully aware that their pretended rights are far from being firmly established, they would fear to allow the possibility of being compensated to escape from them and would ask immediately to come to an agreement with the Government with regards to their claims."<sup>114</sup> Attorney General Bentwich later endorsed this method on two occasions: in December 1923 and, again, in July 1924, when negotiations finally broke down and the PJCA was given authorization to begin drainage work.<sup>115</sup>

Based on Bentwich's legal assessment, the Colonial Office instructed Symes to reopen negotiations at the end of November 1923. From the outset, Symes was extremely skeptical about the possibility of reaching an agreement. He laid down his guidelines for settlement with the different groups as follows.<sup>116</sup> The water source claimed by 'Arab al-Dumayri should be removed from the concession, and title deeds and long-term leases should be offered for all cultivated lands. However, the *moral* grazing rights of both groups in Barrat Qisarya, he asserted, should eventually be restricted. For him, the government's position that it "should provide 'other grazing grounds of equal value' is impossible in practice to fulfill." Symes was even more pessimistic about the acknowledgement of the legal status of the claims of 'Arab al Ghawameh: "I have little hope that a settlement with these Arabs by mutual agreement (the solution evidently preferred by the Secretary of State [Colonial Secretary]!) can now be made. If my conjecture proves correct there will be no alternative to the institution of proceedings of expropriation."<sup>117</sup>

Negotiations progressed slowly until May 1924, due in part to an unrelated outside legal matter involving the local resident's attorney, Wadi al-Boustany. Apparently, the Haifa District Court reached an unfavorable decision against al-Boustany in a February 1924 libel case against the

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114 Letter from Franck, *supra* note 106.

115 Letter from Attorney General Norman Bentwich to Chief Secretary Gilbert Clayton, Israel State Archive (2) 9-mem/231 (Dec. 9, 1923); Letter from Bentwich, *supra* note 106.

116 Letter from Northern District Governor George Symes to Chief Secretary Gilbert Clayton, Israel State Archive (2) 6-mem/180 (Dec. 3, 1923).

117 *Id.*

newspaper *al-Anafir*, in which he was involved.<sup>118</sup> Al-Boustany immediately brought an appeal. In the meantime, while he was permitted to continue representing local residents in negotiations with the government, he was barred from appearing in court as an attorney. The fact that it was up to Attorney General Bentwich to decide whether or not the case would be appealed and to coordinate such a hearing complicated matters for al-Boustany. While Symes proposed scheduling al-Boustany's appeal as early as possible in order to prevent a delay in negotiations, Bentwich instructed Symes to proceed with negotiations anyway, despite the fact that the judgment of the Court of Appeal might be delayed significantly. In renewed negotiations then, not only did al-Boustany not want to enter into litigation as a last ditch effort — he was barred from doing so even if he had so desired. Clearly, this situation served the interests of the British Mandate authorities.

In this context, al-Boustany's attitude appears to have changed suddenly and completely. In December 1923, before the *al-Anafir* verdict in the Haifa District Court, Symes described al-Boustany as "having publicly announced and given repeated evidence of his determination on political grounds by hook or by crook to prevent the execution of this Agreement between the Government and JCA."<sup>119</sup> Shortly following the *al-Anafir* verdict, however, this hard-line position was transformed. In mid-March 1924, Assistant District Governor Eric Mills was charged with speaking informally with al-Boustany in order to advance negotiations. During this new phase, al-Boustany was extremely cooperative, making significant efforts to reach a settlement. When the undertaking ended in failure in mid-June, Mills prepared a detailed report outlining the final proposals made to each group. In his cover letter to the Chief Secretary, Mills praised al-Boustany's efforts:

Since the completion of the report a drastic effort by Mr. Boustany has been made to convince the claimants of the wisdom of accepting my proposals. This attempt has failed and Mr. Boustany has resigned his agency on behalf of these people on the grounds that they have refused to be advised by him. I understand from Mr. Boustany that he will take no further interest in the case except perhaps on behalf of Fauzi Bek Sadik who has a very minor claim ... I have to place on record my belief that Mr. Boustany has done his utmost to cause

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118 Letter from Northern District Governor George Symes to Chief Secretary, Israel State Archive (2) 6-mem/180 (Feb. 20, 1924); Letter from Attorney General Norman Bentwich to Chief Secretary Gilbert Clayton, Israel State Archive (2) 6-mem/180 (Mar. 4, 1924).

119 *Supra* note 116.

his principals to accept my proposals. I should like also to add that he conducted their case with great skill; he did not minimize it but at the same time he endeavored to be scrupulously fair to the taxpayer in so far as the latter was affected.<sup>120</sup>

No definitive evidence indicates that Bentwich intentionally exploited al-Boustany's legal vulnerability in order to pressure him into reaching a settlement. However, even if he did not, both the dynamics of the situation in and of themselves and the complete (but temporary) transformation of al-Boustany's approach to the negotiations must be duly noted.

Local residents rejected the proposals offered to them in mid-June 1924.<sup>121</sup> 'Arab Kabbara were offered a ninety-nine-year lease for 400 dunams of cultivated land. 'Arab al Ghawarneh were offered assistance in converting their existing industries to mixed farming, ownership of 2500 dunams of land in Zor al-Zarqa and their drainage, replacement of their cattle with Damascus dairy cows, and government provision of an expert to direct the entire project for its first three years. 'Arab Barrat Qisarya were offered title to all cultivated land, dedication of part of Barrat Qisarya to extensive grazing with no rent, and implementation of a scheme for fodder crop cultivation (in order to relieve the grazing pressure on Barrat Qisarya) with nominal rent. 'Arab al-Dumayri were offered the same arrangement as 'Arab Barrat Qisarya, as well as government provision of a pumping plant at a local water source — to be removed from the concession area — in order to facilitate the irrigation of lands to the south.

A few days after negotiations broke down, the government initiated the expropriation of 'Arab al-Ghawarneh's rights of common.<sup>122</sup> Apparently, the threat of expropriation and the PJCA's authorization to begin drainage work at Zor al-Zarqa convinced 'Arab al-Ghawarneh to agree to settle in principle and to begin working out the details.<sup>123</sup> In this way, the two elements of intimidation discussed months earlier by Mandate and PJCA officials — the threat of expropriation and the initiation of drainage operations — were effectively employed in order to pressure local residents into reaching a settlement. This outcome highlights the unequal power dynamics that characterized the dispute

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120 Letter from Assistant Jerusalem District Governor Eric Mills to Chief Secretary Gilbert Clayton, Israel State Archive (2) 9-mem/231 (June 13, 1924).

121 Suggested Draft Heads of Agreement, Israel State Archive (2) 9-mem/231 (June 10, 1924).

122 Letter from Attorney General Norman Bentwich to Chief Secretary Gilbert Clayton, Israel State Archive (2) 9-mem/231 (Apr. 16, 1924).

123 Letter from Officer Administering the Government Gilbert Clayton to Duke of Devonshire James Thomas, British Public Records Office CO 733/72/41507 (Aug. 19, 1924).

at this point. The British and the PJCA were on the side of "law," whereas the indigenous population-turned-trespassers were branded as obstacles to the public interest.

## VII. DIVIDING THE OPPOSITION AND DIVIDING THE CONCESSION — LAND DISPUTES AND LEGAL PROCEEDINGS UNTIL THE END OF THE MANDATE

While not a stated goal of the process, defining the rights of each group living in Zor al-Zarqa and Barrat Qisarya also served to divide the claimants and to decrease the strength of their opposition. If in February 1923 the groups submitted a joint petition to the High Commissioner regarding the entire area, after the summer of 1924, the various groups had individual relationships, agreements, and disputes with the government and the PJCA. 'Arab al-Ghawarneh was singled out as the only group with legal rights to uncultivated land in the concession area and, in the face of imminent expropriation of these rights, eventually made a deal. The PJCA paid them a considerable amount of cash, employed their able-bodied men in drainage operations, and transferred to them free-title to approximately 2500 dunams of cultivable land, which came to constitute the core of the modern-day village of Jisr al Zarqa.<sup>124</sup> The PJCA, however, by no means walked away empty-handed. In return for its payment to 'Arab al-Ghawarneh, the PJCA was compensated by the government with full ownership of 2500 dunams of the marshland that would be reclaimed elsewhere in the concession area.<sup>125</sup>

In May 1925, 'Arab Kabbara entered into a separate agreement with the government, receiving a ninety-nine-year lease for 416 dunams of *Miri* land.<sup>126</sup> Like the settlement implemented with 'Arab al-Ghawarneh, the

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124 Sources differ regarding the exact amount of land with which the PJCA compensated 'Arab al-Ghawarneh. An April 1925 report to the Permanent Mandates Commission speaks of 3500 dunams, while a 1947 document quotes a figure of 950 dunams. However, *Village Statistics, 1945* (Government of Palestine, *supra* note 44) lists 2531 dunams in Arab ownership. Warwick Tyler also documents PJCA's transfer of 2614 dunams to 'Arab al-Ghawarneh near the concession area, the direct payment of £2000, and payment of £400 in land conveyance fees. *Comments by the British Government on the Memoranda of the Executive Committee of the Palestinian Arab Congress*, Permanent Mandates Commission, Minutes of the 9th Sess. 177 (Apr. 8, 12, 1925); Letter from Director of Land Settlement and Water Commissioner to Chief Secretary, Israel State Archive (2) 1/24/34 (Nov. 3, 1947); Tyler, *supra* note 31, at 128.

125 Letter from Bentwich, *supra* note 106.

126 Agreement Between High Commissioner and Said al-Khamis, Ali al-Hussein,

terms of agreement were largely identical to the government's offer that had been rejected one year earlier. Settlement of title was initiated at Kabbara in 1934; by 1936, 383 dunams had been registered in the name of the Mandate government and 2500 dunams in the name of the PJCA. The rest of the area remained in dispute until settlement of title was completed in late 1940,<sup>127</sup> and this tenuous situation meant the recurrence of minor land disputes.<sup>128</sup>

But the eventual relative agreement between the government and the residents of Zor al-Zarqa was markedly different from the continuing disputes with 'Arab Barrat Qisarya and 'Arab al-Dumayri. It is very possible that this was an important factor in causing Mandate and PJCA officials to begin trying to split the original concession into three separate leases during the mid-1930s: one for Athlit, one for Kabbara, and one for Qisarya.<sup>129</sup> A new lease for the Kabbara lands was signed by the PJCA and the government in the fall of 1941 and included a detailed schedule of land.<sup>130</sup> In contrast, the majority of Barrat Qisarya remained in dispute until the end of the Mandate.

Following the June 1924 breakdown in negotiations, 'Arab Barrat Qisarya and 'Arab al-Dumayri reached agreements with neither the PJCA nor the government. Instead, they continued to graze their herds and to take other actions to formally establish their rights to the land (such as reviving uncultivated land and building stone houses). In fact, in February 1927, attorney Wadi' al-Boustany himself led a group of local Arab residents in uprooting trees planted as part of state-sponsored, PJCA-implemented forestation operations in Barrat Qisarya.<sup>131</sup>

After failed efforts to induce 'Arab Barrat Qisarya and 'Arab al-Dumayri

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Mohamed Salameh, Ali al-Hassan, and Hussein Nubeishi, Israel State Archive (2) L/126/36 (May 25, 1925).

127 Report of the Commissioner of Lands and Surveys, Israel State Archive (2) L/92/36 (301) (May 9, 1936); Letter from the PJCA to High Commissioner Arthur Wauchope, Israel State Archive (2) L/92/36 (301) (Mar. 15, 1936) [hereinafter Letter from PJCA]; Agreement between High Commissioner and the PJCA, Israel State Archive (74) 5662-gimel/12 (Sept. 19, 1941).

128 Letter from Sa'id Khamis and Four Others to the High Commissioner, Israel State Archive (2) L/126/36 (Mar. 15, 1943); Letter from Haifa District Commissioner to Chief Secretary (Dec. 27, 1943). See also Ya'akov Salomon, *In My Own Way* 54-56 (1980) (Hebrew); Tyler, *supra* note 31, at 134-45.

129 Division of the One Lease for the Kabbara, Caesaria and Athlit Regions into Three Leases, Israel State Archive (2) L/92/36 (301) (Mar. 30, 1935); Letter from MN to Chief Secretary, Israel State Archive (2) L/92/36 (301) (June 1, 1935); Letter from PJCA, *supra* note 127.

130 Agreement between the High Commissioner and PJCA, Israel State Archive (74) 5662-gimel/12 (Sept. 19, 1941).

131 Tyler, *supra* note 31, at 130.

to initiate legal action regarding their land claims (presumably so that they would assume the burden of proof), the government took action in the Haifa District Court in May 1928. Hearings and an on-site inspection were undertaken over the next three years, and the Court's verdict was delivered in September 1931.<sup>132</sup> Based primarily on Ottoman records of 1875, as well as on Bentwich's 1923 report, the government again asserted that Barrat Qisarya was not *Matruka* but rather *Mawat* in its entirety. As such, residents had rights only to the cultivated portions.

The British District Court President, Judge Plunkett, limited the scope of his judgment to "the right of ownership and not the right of grazing" and ruled that the 2655 dunams of cultivated land should be registered to the cultivators. He ruled that the remaining 6470 dunams in dispute were in fact *Mawat* and should be registered in the name of the government. In contrast, Arab Judge Ali Hasna ruled that the two Arab groups possessed rights to an additional 7417 dunams for the purposes of grazing, camping, and collecting wood. Judge Said Tuqan, called in to break the deadlock and also an Arab, rejected the government's claims to the grazing areas of Barrat Qisarya as well. "As to the remaining portions shown on the said plan as cultivable lands and pastures," he ruled, "they cannot be considered as Mewat lands within the definition of Art. 6 of the Land Code."<sup>133</sup>

In summary, two of the three rulings upheld the original claims of 'Arab Barrat Qisarya and 'Arab al-Dumayri to their pasturelands, which had been negated by Bentwich's 1923 report. The subsequent actions of Robert Drayton, who was just completing his service as the government's Solicitor General at the time of the 1931 rulings, are therefore very interesting. Instead of informing the government of this reversal, he actively intervened in the process by presenting the Court's findings to the government as if the majority of judges had supported the government. In this way, by distorting the Court's decision, he concealed what was clearly a great blow

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132 Caesarea Land Cases, Israel State Archive (3) 703-mem/7/10 (Nov. 7, 1946); Moshe Doukhan, Statement of Government Claim, Israel State Archive (3) 703-mem/7/10 (May 16, 1928).

133 Judgement of O. Plunkett, Apr. 13, 1931, Judgement of Ali Hasna, Dec. 1, 1930, Judgement of Mohamad Said Tokan, Dec. 1, 1930, Israel State Archive (3) 703-mem/7/10. This dynamic of two Arab judges ruling against the British President of the Court and against the Attorney General's interpretation from 1923 attests to the complex multiple layers within the administration itself. It is also one instructive example of ways in which the indigenous population used the colonial legal system to challenge colonial policy.



to the government's position on Barrat Qisarya.<sup>134</sup> Perhaps this explains why the Crown Counsel stated in 1946 that "nobody has admitted understanding exactly what was the effect of the Judgment ... ." It also lends credence to the 1945 assertion of H.C. Weston Sanders, the residents' attorney at the time, that the courts had dismissed the government's claims to the area and granted the defendants rights to over 9000 dunams. The PJCA's insistence that errors in procedure justified throwing out the entire judgment is also telling.<sup>135</sup>

In any case, after the 1931 judgment, the government granted the PJCA a concession to 10,000 dunams of land in Barrat Qisarya, to which no Arab claims were subsequently made. The rest of the land remained in dispute, and local residents continued to fortify their presence during the 1930s, cultivating, building, and digging wells. The fact that the PJCA possessed no detailed lease for the lands under concession prevented them from taking any legal action to secure the areas that they had planned to develop.<sup>136</sup> When negotiations between the government and Weston Sanders broke down in early October 1945, Mandate land authorities considered the process of settlement of title as a means of resolving the dispute.<sup>137</sup> Despite continuing PJCA pressure to assert state authority over the land in question, the government made clear its lack of desire to invest additional effort. It was therefore decided to put off the matter for a few months.<sup>138</sup>

In June 1946, a settlement officer finally secured an agreement by which the PJCA would provide alternative land elsewhere in exchange for the rescinding of Arab claims. 'Arab Barrat Qisarya and 'Arab al-Dumayri accepted this proposal but insisted that the deal be carried out quickly and quietly, presumably due to the volatile atmosphere that characterized Palestine at this point and the extremely sensitive nature of land issues.<sup>139</sup> The PJCA then officially applied for a lease regarding the portion of Barrat Qisarya

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134 *Caesarea Land Cases*, *supra* note 132; Letter from Solicitor General Robert Drayton to Chief Secretary, Israel State Archive (2) L/92/36 (301) (Oct. 21, 1931).

135 Letter from Weston Sanders to Chief Secretary, Israel State Archive (2) L/92/36 (301) (Aug. 13, 1945); *Caesarea Land Cases*, *supra* note 132.

136 R.F. Jardine, *Caesaria Sand Dunes — Concession to PJCA*, Israel State Archive (2) L/92/36 (301) (Jan. 3, 1937); Letter from Commissioner of Land and Surveys R.F. Jardine to Chief Secretary, Israel State Archive (2) L/92/36 (301) (June 11, 1937).

137 Letter from Acting Director of Land Settlement to Chief Secretary, Israel State Archive (2) L/92/36 (301) (Oct. 10, 1945) [hereinafter Letter from Acting Director].

138 Letter from Chief Secretary to Attorney General, Israel State Archive (2) L/92/36 (301) (Nov. 1, 1945).

139 Letter from Cecil Kenyon to Director of Land Settlement, Israel State Archive (2) L/92/36 (301) (June 1, 1946).

in which settlement of title had been completed. The terms and structure of the lease, which would constitute the third and final separate lease for the area covered by the 1921 concession agreement, were based on the two separate leases that had already been signed for Athlit and Kabbara. As mentioned above, the lease covered about 10,000 dunams of the 32,000 dunams that comprised Barrat Qisraya. It was officially approved by the authorities in Jerusalem at the end of October 1947 and signed in April 1948, long after the British began withdrawing their forces from Palestine and long after public order had given way to civil war.<sup>140</sup>

### VIII. THE PJCA CONCESSION IN THE CONTEXT OF JEWISH COLONIZATION

British and PJCA officials placed their draining and reclamation projects in the area within the context of public interest and public health.<sup>141</sup> However, the Kabbara Concession also aimed at advancing Jewish colonization. Mandate authorities were aware that the PJCA intended to use the area for Jewish colonization. To begin with, this could be surmised by the area's location between Zikhron Ya'aqov, Pardes-Hanna, and Hadera, three PJCA-affiliated Jewish colonies.

In addition, one of the responsibilities of the Land Commission, which recommended approving the concession, was to assess what lands were available for "closer settlement" (foreshadowing Article 6 of the Mandate).<sup>142</sup> Furthermore, the actual 1920 recommendation of the Land Commission explicitly referred to a future situation in which the area would be populated by "settlers who...will have purchased their houses from the

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140 Letter from Director of Land Settlement and Water Commissioner to Chief Secretary (Oct. 8, 22, 1947); Letter from Chief Secretary to Director of Land Settlement, Israel State Archive (2) L/24/34 (Oct. 31, 1947); Tyler, *supra* note 31, at 139.

141 For example, a May 1923 letter from the PJCA to Gilbert Clayton (then Chief Secretary) read:

You are aware that all this undertaking is not aimed at any lucrative character; it has no other purpose than public utility. The reclamation of an area entirely dominated by malaria will result of this work, and we can only hope that the Government who on many occasions showed his interest to this undertaking will lend us all his support in bringing this task to successful completion.

Letter from Franck, *supra* note 106.

142 Letter of Appointment, *supra* note 63.

PJCA and who will have been cultivating the reclaimed swampy area."<sup>143</sup> Finally, the 1921 agreement required the PJCA to "submit to the leaser [the government] a scheme of the building requisite for industrial purposes and the business of any undertaking and the housing of the persons to be employed," when it was well-known that the PJCA maintained only exclusively Jewish settlements.<sup>144</sup> Thus, by granting the concession and trying to implement it, the British were working in concert with the PJCA to expand Jewish settlement. State and PJCA officials acknowledged this fact, albeit discreetly. The High Commissioner repeatedly made statements to the effect that "the concession to the Jewish Colonization Association contemplates the close settlement of the large area between Caesarea and Athlit ..."<sup>145</sup>

An instructive example of the manner in which British policy in the area was grounded in the dual interests of development and Jewish colonization appears in Samuel's report for the period 1920-1925. The issue was mentioned twice. The first instance came under the heading of "Public Health." "Palestine," he wrote, "is a country infested by malaria." Among the numerous steps being taken to remedy the situation, Samuel listed the work of the PJCA in draining the "large swampy area — the Kabbara — in the plain between Jaffa and Haifa, together with other minor works."<sup>146</sup> Later, in the context of Jewish agricultural settlement, Samuel reported,

Apart from some areas of minor importance, the only instance in which it has been possible as yet to apply this provision of Article VI of the Mandate has been in the case of the swamps of Kabbara, to which reference has already been made; a stretch of sand dunes adjoining is also included.<sup>147</sup>

This is not to say that Jewish colonization was of intrinsic value to British interests. In fact, just as Herbert Samuel quickly learned that very little land in Palestine was completely vacant, Mandate authorities soon learned that,

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143 Land Commission Recommendations Regarding the JCA Proposal, Israel State Archive (2) 2-mem/80, 81 (Oct. 13, 1920).

144 Agreement Between High Commissioner and the JCA, Israel State Archive (2) L/24/34 (Nov. 8, 1921).

145 Letter from High Commissioner Herbert Samuel to Colonial Secretary the Duke of Devonshire, Israel State Archive (2) 9-mem/231 (Oct. 19, 1923). Interestingly enough, such comments were made at the height of stormy negotiations with local Arab residents, in which the only premise employed was that of the "public utility" of draining the marsh and reclaiming the sand dunes.

146 Samuel, *supra* note 54.

147 *Id.* at 32.

in many cases, furthering Jewish colonization was working against their interests.

A number of British officials raised doubts regarding the use of Zor al-Zarqa and Barrat Qisarya for the purposes of promoting Jewish colonization in the area. John Risley, a legal advisor to the Middle East Department of the Colonial Office, noted that "the expropriation of these people would have been a much simpler matter if the work of the public utility were going to be carried out by the Government and not by the ICA" and that "public utility is a term which should include the Arabs in its scope."<sup>148</sup> The Colonial Secretary, too, commented on the problematic nature of the PJCA's implementation of the project for its own purposes and added that

even if it can be maintained that the draining of the marshes is "for the benefit of the public" as a whole, it must be remembered that the section of the public most nearly concerned are the Arabs living in the Zor al-Zarka, who might fairly contend that they and their ancestors have always lived near these marshes without prejudice to their health or welfare, and that a state of affairs from which they, as the section of "the public" most immediately interested, have derived no harm, cannot reasonably be regarded as an evil which, "for the benefit of the public" it is necessary to remove. In brief, it might be contended that the draining of the marshes not only is not exclusively for the benefit of the public but is likely to benefit incidentally only a portion, and that a comparatively small portion of the public resident in or visiting the vicinity of these marshes.<sup>149</sup>

In the context of the present case study, however, Mandate authorities rebuffed these concerns and worked together with the PJCA in attempting to implement the 1921 lease well into the 1940s. This discrepancy between the positions of British officials in Palestine and in London is a good expression of the non-homogenous nature of the colonial state. Different officials, departments, and centers of power often held and expressed varying positions on different issues, including the Jewish national home policy.

It should also be noted that, from very early on, the dispute was viewed by the indigenous population as part and parcel of the evolving Jewish-Arab national struggle that would come to increasingly plague the Mandate period.

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148 File minutes by John Risley, British Public Records Office CO 733/48/43834 (Sep. 8, 1923).

149 Letter from Colonial Secretary the Duke of Devonshire to High Commissioner Herbert Samuel, Israel State Archive (2) 9-mem/231 (Sept. 29, 1923).

The PJCA, though not part of the official Zionist movement, was identified solely with the interests of Jewish settlement. In this case, PJCA officials attempted to use the legal umbrella provided by British rule (until 1940) to acquire land for future Jewish settlement, regardless of the adverse affect this had on the local residents.

For his part, al-Boustany was active in the Palestinian national movement that was evolving at the time. He was a vocal delegate at the third Palestine Arab Congress in 1920 and a member of its Executive Committee at the sixth Congress in 1923. He also served as secretary of the Congress Executive's delegation to London the same year.<sup>150</sup> Copies of al-Boustany's numerous petitions regarding the dispute were routinely sent to the Executive, which, in turn, regularly inquired at the Chief Secretary's office regarding the case's progress. In one instance, a letter that al-Boustany had written to the Palestine Arab Congress' Executive regarding the dispute was inserted verbatim into a petition submitted by the Executive Committee to the Permanent Mandates Commission in Geneva.<sup>151</sup>

At the same time, al-Boustany also served as the representative of the villages and tribes of Ghor Beisan in their dispute and subsequent agreement with British authorities regarding their lands. In an extensive report submitted to the High Commissioner in May 1922, al-Boustany framed the Barrat Qisarya and Zor al-Zarqa land disputes within the overall negative impact of British land policy on the rights and interests of the Palestinian Arabs, to the benefit of colonizing Jewish groups.<sup>152</sup>

This dynamic caused a decrease in the Mandate authorities' willingness to pursue the matter. However, the PJCA continued to make efforts to employ the state apparatus in order to gain possession of land in Barrat Qisarya until the end of the Mandate. In 1945, the government suggested that the PJCA

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150 Personalities in Eretz-Israel 1799-1948, at 74 (Yaacov Goldstein & Yaacov Shavit eds., 1983) (Hebrew); Institute of Palestine Studies, *supra* note 47, at 50.

151 For example, Wadi' al-Boustany's letter from January 25, 1925, was included in an April 8, 1925, petition submitted by Jamal Hussein, Secretary of the Executive Committee, to the Chairman of the Permanent Mandates Commission. Letter from Jamal Hussein, Secretary of the Executive Committee, to Chief Secretary, Israel State Archive (2) 6-mem/180 (Jan. 10, 1923); Letter from Jamal Hussein, Secretary of the Executive Committee, to Northern District Governor George Symes, Israel State Archive (2) 6-mem/180 (Feb. 24, 1923); Petition of the Palestine Arab Congress Executive Committee, Permanent Mandates Commission, Minutes of 7th Sess., Annexe 7B, at 164.

152 This report discussed disputes regarding lands at Ghor Beisan, Jisr al-Majami', Barrat Qisarya and Zor al-Zarqa, and Obeidieh. Documents of the Palestinian National Movement, *supra* note 150, at 251-71.

begin using its own attorneys to remove residents from Barrat Qisarya. The PJCA objected, fearing that this would further emphasize the Jewish-Arab component of the dispute. Instead, they argued unsuccessfully that state legal machinery should retain the burden and make it a high priority.<sup>153</sup> Thus, from the beginning of British rule in Palestine until virtually the end of the Mandate, the PJCA attempted to utilize the British "political, legal and administrative colonial umbrella" in Palestine described by Shamir,<sup>154</sup> in order to acquire the lands of Zor al-Zarqa and Barrat Qisarya.

### CONCLUSION

The story of the Kabbara Concession in Mandate Palestine is not at all straightforward. On one hand, the legal system extinguished most indigenous rights to uncultivated land through its use of colonial law — the interpretation of Ottoman law by Western colonial officials, the use of foreign legal concepts like moral rights and rights of common, and the transformation of Ottoman law through supplementary legislation such as the Mewat Land Ordinance of 1921. On the other hand, eviction was never carried out. Some residents made deals with the Mandate authorities or the PJCA and vacated their lands. Others, primarily in Barrat Qisarya, remained and actually intensified their hold on the land until settlements were reached at the tail end of the Mandate.

The struggle is a good example of the complexity of the relations among the British, the Zionists, and the Palestinian Arabs when it came to land. Shamir provides us with the helpful theoretical tool of "dual colonialism," emphasizing that Jewish colonization worked effectively within the British colonial framework based, among other things, on mutual interests of modernization and development. In the case of Zor al-Zarqa and Barrat Qisarya, a concession was awarded to a Jewish colonizing body to "improve" and "develop" a large territory inhabited by semi-sedentary Arabs, under the auspices of the Mandate government. Despite the internal fissures among

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153 According to a British report on the issue,

They asked in fact that the Attorney General himself or the Solicitor General or the Crown Counsel should represent Government in person and that if this cannot be arranged at present the hearing of the disputes by the Settlement Officer should be held up until such time as any of them is able to take on the more important of the twelve cases concerned.

Letter from Acting Director, *supra* note 137.

154 Shamir, *supra* note 23, at 19.

British officials on the spot in the Northern District where the dispute took place, in Jerusalem, and in London, which reflected the ambiguity and ambivalence often characteristic of the colonial authorities' attitude toward Jewish colonization, cooperation on the concession continued. Finally, the colonial legal umbrella described by dual colonialism helps explain why law and legal actors played such a significant role in the struggle to control land in Zor al-Zarqa and Barrat Qisarya specifically and in Mandate Palestine in general.

Throughout the Mandate, Jewish colonization officials continuously lobbied Mandate authorities to intensify their efforts to appropriate the disputed land, often working closely with them to coordinate strategy and action. Jewish colonization officials also pursued rigorous out-of-court negotiations with the local population that amounted to "bargaining in the shadow of the law." On the other hand, the local population quickly learned that the battle to control its land would be waged in legal terms and therefore attained professional legal counsel. The local inhabitants struggled, quickly securing title to their cultivated land and, in the case of 'Arab Barrat Qisarya and 'Arab al-Dumayri, even winning a majority decision regarding usage rights to an extensive area of uncultivated lands (although this outcome was obfuscated by the Solicitor General at the time). This dynamic is a good illustration of Comaroff's portrayal of colonial law as a tool of both colonizers and the colonized.

Jewish colonization-related operations moved forward in the area during the Mandate. The PJCA drained the Kabbara marshes during the 1920s and forested parts of Barrat Qisarya (even though the project never appeared in official documents as a state concession), and two new settlements were established on the periphery of the area: Ma'ayan Tzvi in 1938 (adjacent to Zikhron Yaa'akov) and Sedot Yam in 1940 (just south of the town of Qisarya).<sup>155</sup> Attorney Wadi' al-Boustany, who had similarly (and more successfully) represented other semi-sedentary groups in comparable disputes in other parts of the country, was all too aware that this dispute was more than just a mere legal squabble about land. For him, it was another element of the indigenous population's struggle against colonial rule and colonization. In fact, as time passed, it appeared to al-Boustany and to like-minded Palestinian

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155 Tyler, *supra* note 31, at 131, 140; List of Localities, Geographical Characteristics and Population (Jerusalem: Central Bureau of Statistics 1995) [hereinafter List of Localities]; Ella Bauer, *The Path to Memory* (2002) (Hebrew) (unpublished manuscript, on file with authors).

nationalist leaders that the interests of Mandatory rule and the interests of Jewish colonization were one and the same.<sup>156</sup>

Still, Zor al-Zarqa and Barrat Qisarya were not totally transformed under British rule, and until the end of the Mandate, Jewish colonization never penetrated their core. Complete "Judaization" was facilitated by the 1948 War (known to Israelis as "the War of Independence" and to Palestinians as "the Catastrophe") and the establishment of the State of Israel, when the area was depopulated of virtually all of its Arab residents. Only 'Arab al-Ghawarneh, who had accepted land at Jisr al-Zarqa as part of a settlement agreement reached with the PJCA over twenty years earlier, remained on their land.<sup>157</sup> The three years following 1948 witnessed the quick appearance of three new settlements in the area: Ma'agan Michael in 1949; Beit-Hananya in 1950; and Or-'Aqiva in 1951.<sup>158</sup> The rapid pace of Jewish settlement expansion, in conjunction with the quick overall development of the area, stood in stark contrast to the drawn-out disputes that characterized the Mandate period, during which some local residents had successfully used the colonial legal system to defend their rights and remain on the land.

But through this haze of contradictions that characterized the Zor al-Zarqa and Barrat Qisarya disputes prior to 1948, two overall conclusions can be drawn. Firstly, we can conclude that state and PJCA efforts to appropriate land and to undertake development operations in the area were fueled by neither the interests of colonial rule nor those of Jewish colonization alone, but, rather, by the integrated impact of both forces. Even if total transformation of the area did not take place until 1948, the overall structure and policy of the Mandate state allowed proponents of Jewish colonization to make slow but sure progress in the area throughout British rule. At the end of the day, the government acquired legal title to the vast majority of the land in question, and the PJCA secured its concession(s).

Secondly, we can conclude that colonial law played a central role in

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<sup>156</sup> For this reason, al-Boustany submitted a 166-page document to the High Commissioner in Jerusalem and the Colonial Secretary in London in 1936, entitled *The Palestine Mandate — Invalid and Impractical*. This document argued that a solution to the instability in Palestine at the time demanded a rethinking of the fundamental terms of the mandate. Wadi' al-Boustany, *The Palestine Mandate — Invalid and Impractical: A Contribution of Arguments and Documents towards the Solution of the Palestine Problem* (1936).

<sup>157</sup> Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949*, at 216 (1987); see also the chapter entitled "The Case of Abu Gosh and Beit Naqquba, Al Fureidis and Jisr Zarka in 1948 — or Why Four Villages Remained" in Benny Morris, *1948 and After: Israel and the Palestinians* 257 (1994).

<sup>158</sup> Tyler, *supra* note 31, at 144; List of Localities, *supra* note 154.



advancing Jewish colonization and the land-oriented aims of the Mandate government. In the case at hand, a legal assessment of local land rights was only seriously undertaken by the authorities after the land had been leased to the PJCA and after efforts to arrive at an informal solution failed. Colonial law was employed as a means of achieving the local residents' removal and thus became the location of repeated efforts by mandate authorities to achieve their goals and by some local residents to struggle for their land. But even when actions were taken out of court — as most were — they were taken "in the shadow of the law" and were therefore also inseparable from the colonial legalities that governed land tenure in Mandate Palestine.

However, just as the positions of British officials regarding the Kabbara Concession were not uniform, neither were the approaches of Mandate land and legal officials to land tenure in Palestine as a whole. For instance, as some Mandate officials sought to extinguish indigenous land rights in the case of the Kabbara Concession, others were busy designing and implementing a process aimed at providing small Palestinian Arab cultivators with secure title to their land.<sup>159</sup> And while we will refrain at this stage from expanding our conclusions beyond the case in question, it is clear that legal and spatial practices in Mandate Palestine were shaped against this complex colonial backdrop, which, despite its inconsistencies, strengthened the Zionist policy of land acquisition and development.

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<sup>159</sup> See Forman, *supra* note 52.

