An `Irreversible Conquest'? Colonial and Postcolonial Land Law in Israel/Palestine
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AN ‘IRREVERSIBLE CONQUEST’?
COLONIAL AND
POSTCOLONIAL LAND LAW IN
ISRAEL/PALESTINE

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ABSTRACT

The authoritarian and transformative character of modernist utilitarian law, as applied in colonial contexts, has made it a key instrument of state control, and an arena for intercommunity struggle. British colonialism under the Palestinian Mandate (1923–48), deploying the complex land laws and regulations which it inherited and modified from the Ottoman land code, passed to the successor Israeli state the tools for ethnocratic control, through which Israel came to claim public ownership over virtually all its physical territory. The importation into Palestine of ready-made British-style law, drawing upon British colonial experience, contributed building blocks for the Israeli state. The colonialist dual construction of communal and individual land rights, and the power of planning and other regulations for reshaping ownership and land use patterns, are examined in the Israel/Palestine situation through certain rhetorical keywords with shifting interpretations and meanings, i.e. settlement, transfer, partition and absenteeism.

INTRODUCTION

BEFORE BEING supplanted by suicide bombings and the ‘war against terrorism’, the attempts at a peace process in Israel/Palestine were epitomized by the slogan ‘land for peace’. Under the now-aborted Oslo agreements Israel would surrender most of the territory gained by conquest in 1967 and accept the creation of a Palestinian quasi-state, in return for peace and recognition of the state of Israel (McDowall, 1994). While the intifada (uprising) after 2000 has declared the Palestinians’ rejection of Oslo, the ‘land for peace’ slogan still expresses the centrality of territorial control to Jewish/Arab relations in Israel/Palestine. The Palestinian writer, Edward...
Said, has characterized Israel’s aims differently, however, not as ceding land for peace, but as ‘the irreversible conquest of Palestinian land and society’ (Said, 2002). That process has been facilitated by land law and regulations inherited from the British Mandate.

For the Zionists Israel was ‘a land without people for a people without land’. They claimed for themselves a historic and God-given mission to ‘redeem the land from desolation’, and constructed a hegemonic self-perception of Zionism as a story of settlers, pioneers and colonists (Shamir, 2000). Israelis have been reluctant to acknowledge the role of the British Mandate in their state-building project, until revisionist historians and lawyers (Said, 1993; Morris, 2000; Segev, 2000; Strawson, 2002) have relocated the national story of Zionism within a colonial narrative, and exposed the Israeli colonialist assumption of cultural superiority over the indigenous (Arab) Palestinian.

The revisionist debate about Zionism can also be located within a discourse of postcolonial legal theory and indigenous land rights. Colonial states assigned legal rights and duties, attributed identities to individuals and communities, and redistributed social and economic resources. Among colonialism’s most enduring institutions are legal systems: the ‘authoritarian and transformative character of law in the utilitarian rendition was perfectly suited to colonial rule’ (Fitzpatrick, 1992). Colonial law functioned as an instrument of control and an arena of intercommunity struggle, and engendered a social process of legalization and professionalization through which such struggles were mediated (Darian-Smith and Fitzpatrick, 1999). Pre-existing legal structures were overlaid by received law from the colonial power, and postcolonial nation states still carry a legacy of legal pluralism, with conflicting sources of legitimacy, and unpredictable or contradictory outcomes (McAuslan, 2003).

Land was central to colonial projects, as it has been to Zionism. Colonialism (as also postcolonial Israel) demanded state control of territory, achieved through an array of legal instruments. Recent academic work in postcolonial theory, and law and geography is reappraising the place of differentiated territorial jurisdictions in regulating social relationships (McAuslan, 2000; Yeoh, 2000; Blomley et al., 2001), and in excluding and marginalizing unwanted social groups (Sibley, 1995; Jacobs, 1996). European colonizers expropriated land for their benefit, formulating a hierarchy of social and spatial controls to justify and maintain their hegemony over indigenous populations. The colonial state claimed land that was not (or apparently not) in active use, and then transferred it through grant, sale or lease to individuals of its choice (usually from the colonizing group). It guaranteed individual land title through its own registry (the Torrens system) (Simpson, 1976), and planned, built and serviced new settlements (Home, 1997). The indigenous groups that were dispossessed from their communal and ancestral lands by such processes are increasingly pursuing legal challenges and human rights law to assert their claims (Stephenson and Ratnapala, 1993; Brody, 2001).

A recurrent theme in postcolonial theory has been those processes of exclusion which express the tensions between colonizer and colonized, the
latter subordinated and defined as the ‘subaltern’ other (Spivak, 1994). Boundaries are created and maintained through dualistic or pluralistic legal structures, especially boundaries in physical space through land laws and regulations. The Lugardian ideology of British colonialism between the two world wars, applied in Palestine under the Mandate, recognized a separation of systems of law and government within a ‘dual mandate’. Lugard (writing of Nigeria) expressed the ideology thus:

The British role here is to bring to the country the gains of civilisation by applied science (whether in the development of material resources, or the eradication of disease, etc.), with as little interference as possible with Native customs and modes of thought. (Lugard, 1919: 9)

Colonialism and postcolonialism thus partake of the ‘recurrent, overlaid dualities of universality and particularity, inclusion and exclusion, sameness and difference’ (Fitzpatrick, 2001: 147). The dual mandate required a strategy of separate development, famously in South Africa (Dubow, 1989), a duality further complicated by immigrant racial groups (such as the Chinese in Malaya, the Indians in East Africa), whose aspirations the British both encouraged and sought to curb in the interests of protecting the ‘natives’. In Palestine the British Mandate administration followed the irreconcilable aims of promoting the Zionist project and acting as ‘trustees’ for the interests of the indigenous Palestinians, and introduced its version of colonial law so as to facilitate land acquisition by the immigrant Jews, as this article will explore.

‘REDEMING THE LAND FROM DESOLATION’

Zionism’s claim, made to the 1919 Versailles peace conference and after, was that it could ‘redeem’ the land of Palestine from ‘desolation’ and, after nearly a century in pursuit of that aim, the state of Israel claims 93 percent of its territory as public domain (Werczberger and Borukhov, 1999). This is the highest percentage of nationally owned land in the world, outside a few city-states such as Singapore and Hong Kong. Even in the West Bank Occupied Territory most of the land (an estimated 73 percent in 1998) has fallen under Israeli state control (Lein, 2002). The Israeli state achieved this dominance by applying and modifying Ottoman and British colonial land law, and the process has isolated and contained the surviving Arab communities within Israel, while relegating the rest of the Palestinian people to peripheral locations (Gaza, the West Bank), which it has held under military occupation since 1967.

Israel/Palestine’s strategic geographical location has brought it under successive colonial regimes during its long history of human settlement. These regimes exercised state control through coercive power, taxation of land and its produce, and bureaucratic structures of land management. Overlaid systems of land law expressed not only colonial imperatives and aspirations, but the sacred status of the territory itself to three major religions
Islam, Judaism and Christianity), whose defining texts have contributed to the territorial claims of their respective faith communities. The territory remains uniquely saturated with religious and symbolic significance, and has become part of the process through which national identities of Palestinians and Israelis are constructed and maintained (Newman, 2002). The Old Testament book of Leviticus framed a Judeaic land code which was expanded and developed within the region over the succeeding three millennia. The Jewish people themselves, however, were displaced from Palestine for nearly two of those millennia, and were absentee while the land code was elaborated by successive Roman, Byzantine and Muslim colonial regimes. The Jews of the diaspora, subjected to the property laws of the lands where they sojourned, developed a body of autonomous law that was concerned less with landed property than with retaining community identity through ritual practice, as have other nomadic groups, notably the Gypsies (Carmichael, 2001). The Jews’ return to Palestine in the 20th century required them to operate under the land code of the Ottomans, which was modified and ‘modernized’ by the British Mandate, and which they transformed for the purposes of the state of Israel after 1948.

When the British expelled the Turks from Palestine in 1918, the League of Nations recognized their expertise in colonial government by granting ‘His Britannic Majesty’ a mandate over Palestine, with the stated aim of putting into effect the Balfour Declaration for ‘a national home for the Jewish people’. The mandate system was intended to give British colonialism a cleaner, more modern look, incorporating international law and the principles of democracy and justice. The British in Palestine, however, brought with them prejudices about Orientalism: ‘despotism, darkness, superstition, ignorance, inability of the Orient to help humanity to progress, the obvious superiority of Europe and the equally obvious decay of the East’ (Strawson, 1999), and saw part of their role as modernizing decadent Oriental law and administration, bringing order to the ‘chaos’ left by the displaced Ottoman Turks, and converting a neglected backward province into a ‘modern’ state.

The centrality of land to both the Zionist and Mandate project was expressed in Article 6 of the 1922 League of Nations Mandate:

The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish 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. (quoted in Survey, 1946–7: 7)

But how could Jewish settlement on the land be achieved without prejudicing Palestinian rights? Land dominated the efforts of the British Mandate’s lawyers, two of whom prepared for its officials ‘as comprehensive a treatise on the Land Law of Palestine as is possible in the present circumstances’ (Goadby and Doukhan, 1935). The resulting book listed no less than 40 ordinances on land matters passed by the Mandate administration in its first 15 years (some of them amended more than once), and has
been called ‘a master-piece of how colonial regimes occupy legal systems’ (Strawson, 2002). Although Ottoman land law, drawing upon both Islamic roots and colonial imperatives, had been reformed by the Land Code of 1858 and the Civil Code of 1869, the British energetically set about further changes.

For the British, land law in Mandate Palestine ‘embraces the system of tenures inherited from the Ottoman regime enriched by amendments, mostly of a declaratory character, enacted since the British occupation, on the authority of the Palestine Order-in-Council 1922–40’ (Survey, 1946–7: 225, emphasis added). The British brought to Palestine their recent experience of administering Ottoman land law from their colonial protectorates in Cyprus, Egypt and the Sudan. Case law from Cyprus was often cited in Mandate courts (Goadby and Doukhan, 1935, list 65 such cases); the British Surveyor-General of Egypt (Dowson) introduced ‘scientific survey’ to the adjudication of Palestinian land rights (Dowson and Sheppard, 1956); and the Scottish Municipal Engineer of Khartoum (McLean) introduced planning regulations to Jerusalem (McLean, 1930; Home, 1990; Kark, 1991). Among the first actions of the occupying British after 1918, in preparation for their modernizing project, were to close the Ottoman land registers, prohibit all land transactions until a new registry was installed, and transfer jurisdiction in land matters from Islamic sharia courts to new secular land courts.

In its reports to the League of Nations the Mandate administration, drawing upon Benthamite utilitarian traditions, presented a wealth of statistics on land and other matters, which were later published in the Survey of Palestine and provide researchers with a relatively authoritative and neutral source of information. The Survey reported, for example, that between 1920 and 1945 Jews bought and registered 930 km² of land (an estimated further 650 km² had been acquired before 1920, the year when statistics began to distinguish Jewish purchasers), and that in 1944–5 Jewish buyers accounted for 76 percent of land transactions by value (Survey, 1946–7: 243–5). When the Mandate ended, Jews owned about 12 percent of Palestine (excluding the Negev desert). Of this land, 650 km² had been acquired for the Jewish National Fund, established in 1901 by the Zionist Congress to buy land in Palestine and hold it in trust for the Jewish people (Leviticus 25: 23, ‘The land shall not be sold in perpetuity’).

The Mandate was a time of rapid and dramatic population changes. In 1922 Palestine recorded a population of 673,000 Arabs and some 60,000 Jews. By 1946 the total population had grown to 1.9 million, of which 60 percent were Arab and 32 percent Jew; the Jewish population, swelled by refugees from Nazi Germany, had increased tenfold, to 600,000. The British suppressed violent Palestinian opposition to Jewish immigration in 1936–9, but had to acknowledge that their Mandate could not secure the establishment of a Jewish national home and at the same time concede Arab claims to self-government. In 1948 the end of the Mandate and the subsequent war resulted in the partition of Palestine. Some 750,000 Palestinians fled the new state of Israel in the so-called naqbah (catastrophe); the number of their villages abandoned or destroyed has been variously estimated at between 250 and 530
Mandate institutions of administration were absorbed into the new Israeli state, whose boundaries encompassed some 80 percent of the land area of Mandatory Palestine (20,700 km², including the 12,000 km² of the Negev desert). Israel moved quickly to supplement the land already held in trust by the Jewish National Fund, from two other sources. The larger area was land abandoned by the fleeing Arab Palestinians, which in 1950 the Israeli Ministry of Agriculture estimated at 4200 km² in extent (60 percent of the cultivated land area) (Survey, 1946–7; Reichman, 1989). The second was state land, which was estimated by the British as 1700 km² (some in the West Bank), and included forestry land. Thus, the state of Israel shortly after its creation claimed ownership of two-thirds of its land area (excluding the Negev), a figure which rose to 93 percent over the succeeding two decades.

The transfer of land into Israeli public domain was facilitated by the selective use of the existing land law and regulations (meticulously explored in Kedar, 2001), and is best understood by reference to the five Ottoman tenure types, which were as follows:

- **Mulk** land (fully owned urban freehold property). The 7 percent of the land of Israel still in private ownership is mostly former mulk land, located within Arab villages.
- **Miri** land. This had heritable use rights, and could revert to the state if not cultivated after three years (mahlul), and then be auctioned to anyone prepared to cultivate it. Ottoman law required users to register their land, but much was held ‘without registration or under imperfect and obsolete registration’ (Goadby and Doukhan, 1935: 231). Miri land represented most of the cultivable land and, where not forfeited by the refugees of 1948, was mostly acquired by the Israeli state through various means, particularly strict application of the three-year rule. Any land shown by aerial photography as not cultivated for a sufficient period was forfeited, not back to the village but to the state, by means of an official declaration in words: ‘I hereby declare that the area specified in the appendix is government property’, the appendix being a rough boundary line on the aerial photo. This declaration was sent to the village head and posted on the land (usually left under a stone), or made orally. The onus of proof for any counter-claim then fell to any prior owner, who had 45 days to commission a cadastral survey and lodge an appeal, but many owners would be unaware of the declaration, and few could afford to mount a defence, especially when they had little hope of success in court (Bowring and Chome, 1990; Kedar, 2001).
- **State land** required for public purposes (in Turkish, matruka, meaning withdrawn) and registered with the state or local authority. This included military bases, roads, forest land and public open spaces within villages.
- **Dead land** (mawat), i.e. uncultivated, unirrigated and vacant land, needing government consent to bring into cultivation. Islamic law defined ‘dead land’ as sufficiently far from an inhabited place (a distance regarded as in practice a mile and a half) that a human voice could not be heard (Abu’l-Hasan ‘Ali ibn Muhammad al-Mawardi, 1996). Mawat included the Negev.
desert and the 3000 km² of mountain and desert east of Hebron, Jerusalem and Nablus. Article 6 of the Mandate made it and matruka land available for Jewish settlement.

- Wakf land, held in trust for Muslim religious and charitable purposes. This was confiscated by the state of Israel after 1948, when it comprised a sixth of the country (Dumper, 1994). As the Palestinian refugees put it, ‘God is an absentee too.’

In 1969, at a time of Israeli euphoria after their 1967 victory, a new Real Estate Law cancelled Ottoman land classifications in both Israel and the Occupied Territories: they had served their purpose for the Zionist cause. Matruka land was registered with state or local authority, mawat with the state, and land outside individual ownership was reclassified as either public real estate or designated real estate (for public benefit, e.g. coastline, road networks).

In the 1967 war Israel occupied virtually all of the remaining land of Palestine (5858 km² of the West Bank from Jordan, 360 km² of the Gaza Strip from Egypt), and the Occupied Territories have remained under military rule ever since, with most of the land under state control (Sara, 1995; Home and Kavanagh, 2001). Meanwhile the population of Israel grew from 1.3 million in 1948 (after the naqbah) to 5.8 million by 1997, the latter at a density higher than the Netherlands (550 persons per km², excluding desert) (Werczberger and Borukhov, 1999). The total number of Palestinians had risen by 1998 to an estimated 7.8 million (3.8 million of those being registered refugees): 953,000 lived inside Israel, 1 million in Gaza (766,000 of those being refugees or their descendants), 1.6 million in the West Bank (653,000 of them refugees, compared with a 1967 population of 670,000 which included 120,000 refugees from 1948), 2.3 million in Jordan, and the rest in other countries (SHAML, 2002).

In 1960 the merging of Zionist land objectives with those of the Israeli state was achieved by the creation of the Israel Land Authority (ILA) through legislation and a covenant between the state and the Jewish National Fund (KKL). That covenant resolved ‘to concentrate the administration, conservation and care of these lands in the hands of the State and to strengthen the hands of KKL in fulfilling its mission of redeeming lands from desolation’ (KKL [Jewish National Fund], 1960). The 93 percent of the total land of Israel administered by the ILA derived from either state property, KKL or the Development Authority (which managed the land of Arab refugees). This state near-monopoly of the land resource combined socialist ideology that land as a factor of production should not be owned, and the Zionist ideology that land belonged to the Jewish people who had redeemed it from desolation. Two-thirds of (Jewish) households now live on nationally owned land, yet a strong ethos of private property persists, and the state protects property rights through leases for renewable jubilee periods of 49 or 98 years.
FOUR KEYWORDS: SETTLEMENT, TRANSFER, PARTITION AND ABSENTEEISM

It was Raymond Williams (1976) who explored the concept of ‘keywords’: defining elements in a concept or theory, with particular significance for a group of people. The keywords of settlement, transfer, partition and absenteeism recur in the narrative and literature of land and politics in Israel/Palestine, and frame the processes of marginalization, exclusion and dispossession. Through their rhetorical and hegemonic weight they offer prisms through which colonial and postcolonial state objectives can be seen. They offer shifting and alternative meanings, deployed for different, sometimes hidden, objectives by different interests.

The first keyword is settlement, with its alternative meanings in Mandate Palestine. Article 6 of the Mandate allowed ‘close settlement on the land’ by the Jews. The Zionists established hundreds of new agricultural settlements (moshavim and kibbutzim), spreading their ownership and control widely over the territory, and after the 1967 war extended them into the Occupied Territories. Defensive imperatives were reflected in the ‘stockade-and-tower’ design of the settlements, and the mythology of the American westward movement was consciously borrowed in the term ‘spearheads of the frontier’ (Reichman, 1989; Troen, 1992; Aronson, 1996). The settlement keyword under the Mandate was a Zionist political instrument, and has remained so with the ‘new settlements’ in the Occupied Territories.

‘Settlement’ to the British Mandate administration had another meaning: the systematic settlement of rights in land under the 1928 Land (Settlement of Title) Ordinance. This was presented as a major benefit to the Palestinians of British colonial rule, registering title on a cadastral map base through systematic adjudication, village by village (Goadby and Doukhan, 1935: 269–93). The procedure, based upon British experience in the Sudan, started with a Ministry of Justice decree setting the location and boundaries of the settlement area, which was then divided into registration blocks. The mosaic of land parcels was plotted, a cadastral survey plan superseded verbal description as the authoritative definition of land parcels, and new survey points were physically fixed on the ground. State land rights were identified, with a local committee to represent the community’s interests. The Mandate Settlement Officer (usually a British colonial official) combined administrative and judicial powers, functioning as a summary land court (with rights of appeal to the statutory land court). After adjudication a new register for each settlement would ‘bring records into conformity with the facts of occupation’; the community’s unofficial land registers ceased to be binding, and were supposed to be handed over to the central land registry. The newly registered titles were thereafter declared to be ‘indefeasible’, the courts being extremely reluctant to find against them. Goadby and Doukhan claimed that land settlement ‘has been warmly welcomed by all sections of the population’ (Goadby and Doukhan, 1935: 237), but in reality the Arabs opposed it, and the deteriorating security situation in the Arab uprising made surveyors...
working in the open countryside vulnerable (Gavish and Kark, 1993). By 1945 about half of the cultivated land, mostly in northern Palestine, had been processed, including 660 km² of public land (mostly unusable land, forests or village uses) (Survey, 1946–7). After 1948, with the abandonment of hundreds of Arab villages, most of the ‘settled’ land passed into Israeli state control.

Transfer is the second keyword with variable meanings. Among the earliest Mandate legislation was the 1920 Land Transfer Ordinance, which required all transfers of land to be state registered. Regional state registries had existed under Ottoman law, but were not widely used: title brought with it unwelcome liabilities to tax and conscription, while land owned by the state or sultan was not required to be registered. The incoming British found such practices unsatisfactory, and criticized the condition of the registries that they found (not to mention the missing registry books removed by the retreating Turks) (Goadby and Doukhan, 1935: 294–314). The new registry followed the Torrens system, devised in South Australia in the 1850s and used across the British Empire (Simpson, 1976; Larsson, 1991). With only registered transactions recognized by the courts, it provided the legal framework for purchase of land. Within a decade the scale of transfers to Jews, and the accompanying evictions of Palestinian agricultural tenants, were revealing the contradictions in the Mandate, and making the British uneasy. The Mandate administration passed new regulations (the Cultivators Protection Ordinances 1929 and 1933, and the Land Transfers Regulations 1940), with the intention of protecting indigenous (Palestinian) rights. The Zionists objected, claiming that tenant protection would be ‘a serious obstacle to the reasoned development of the country’ (Survey, 1946–7: 289–94). With tenant indebtedness exposing Palestinian cultivators to dispossession by Jewish purchasers or their intermediaries, the Mandate administration offered to resettle the dispossessed onto other registered land, but they generally refused to collude with this palliative measure. After 1948 the keyword transfer acquired a different and more sinister meaning, associated with a potential policy of systematic physical expulsion of the Palestinians from the state of Israel (Katz, 1992; Nur Masalha, 1992). Thus transfer, in whichever sense it was used, was a keyword that served the Zionists’ ‘irreversible conquest’ of the territory.

Partition is the third keyword with variable meanings. The Ottoman land code contained sophisticated provisions for what Goadby and Doukhan called partition, an Islamic version of the Levitical concept of jubilee, allowing jointly owned village land to be periodically reallocated. Land might be held in uneconomic sizes and shapes, with inherited shares of an estate expressed in fractions of no real value; periodic land readjustment could be achieved through application by two-thirds of the owners of shares in undivided land, and was recorded in a formal partition schedule (Goadby and Doukhan, 1935: 279–81).

But partition in Palestine came to acquire another, more political meaning: the partition of the territory between Jews and Arabs, first proposed in the
1930s. At that time the international community was prepared to accept the forced transfer of populations as a pragmatic, utilitarian method of conflict resolution, following the recent precedent of the exchange of Greek and Turkish populations in the eastern Mediterranean by the 1923 Lausanne Treaty. The Jewish Agency (the accredited representative body of the Palestinian Jews to the Mandate and the League of Nations) prepared its plans for partition, but reluctantly concluded that transfer of the Palestinian population (which comprised then some 45 percent of the population of the proposed Jewish state) would have to be forcible, and could only be achieved with the support of the British Mandate (Katz, 1998). The alternative was to grant equal status and rights to the large Palestinian minority, with municipal self-government in towns and villages, and this became official Israeli policy after 1948, although the earlier partition concept has profoundly affected the land policy of the successor state of Israel (Newman, 2002).

The fourth keyword is absenteeism. Colonialism results in the displacement of populations, functions for the benefit of an imported population who move between the colony and the parent state, and therefore necessarily has to manage legal issues arising from absenteeism and abandoned estates. Communal or customary land tenure systems allow land not in active use to be reclaimed and redistributed, and colonial states have taken advantage of such provisions to take land for themselves. The Ottoman land code provided for special commissions to record abandoned villages and reclassify vacant land lying idle and ‘exposed to the sun’ (shamsieh) as state domain. Ottoman law also distinguished various categories of absenteeism: simply not present, of unknown abode, uncertain if alive or dead, absent under conditions of absolute disappearance, absent and known to be alive, absent on a journey. While miri land uncultivated for three years could be reclaimed by the state, absentees were not presumed dead until 90 years after their date of birth, and property was theoretically held in suspense or trust (Goadby and Doukhan, 1935: 297, 351–3).

Subsequently ‘absentee’ came to refer to the Palestinians displaced from Israel in 1948 (usually over relatively short distances, into Arab-controlled territory) (Nasser Abufarha, 2002). The new Israeli state reformulated regulations that had been devised in 1939 by the British for wartime conditions as the 1949 Emergency Regulations on Property of Absentees, creating a Custodian of Absentee Property similar to the British Custodian of Enemy Property. But custodianship did not in this case mean that the land was held in trust against a possible future return: it was forfeited to the state. In 1950 further legislation created a Development Authority with powers to dispose of absentee landed property, made such disposals not challengeable under Ottoman land law, and empowered the authority to provide physical infrastructure for new (Jewish) populations, after the style of a British new town development corporation. Absentee land could be restored in only very restricted circumstances: if the absentee could prove that it was ‘for fear that the enemies of Israel might cause him or her harm’ or ‘otherwise
than by reason of fear of military operations’ (McDowall, 1994; Cernea and McDowell, 2002). After 1967 such powers over absentee property were extended by Military Order No. 58 of 1967 to the newly Occupied Territories, but residents there who had been refugees from the 1948 or 1956 wars still could not claim their former land back – and it had mostly been developed in the meantime for Jewish settlement (Luping and Johnson, 2002). There was even an Orwellian category of ‘present absentees’ (in 1997 75,000 of them), who were Palestinian residents of Israel displaced from their land, but debarred from getting their land restored (SHAML, 2002). By contrast to this treatment of Palestinian ‘absentees’, the 1950 Law of Return gave every Jew a right to settle in Israel, leading to successive waves of immigration, and a fourfold increase of the Jewish population of Israel in 30 years (Morris, 1987).

These four keywords, with their shifting interpretations, sustained in the Mandate period an assault by the modernizing colonial state upon the communal land tenure systems of the Palestinian village (where two-thirds of the Palestinian population lived), preparing the way for the massive land confiscations by the successor Israeli state. Communal land tenure had ancient roots. Old Testament land law associated individual property rights with the town, and communal rights with the country:

A house in a village - a settlement without fortified walls - will be treated like property in the open fields. Such a house may be redeemed at any time and must be returned to the original owner in the Year of Jubilee . . . The strip of pastureland around each of the Levitical cities may never be sold. It is their permanent ancestral property. (Leviticus 25: 29–34)

The 1858 Ottoman land code reforms granted peasants possessory land rights directly from the state (rather than through a feudal intermediary), but the British Mandate land settlement and land transfer laws of the 1920s worked to undermine communal land tenure and local land registers, encouraging instead private property rights supposedly guaranteed by the state through ‘scientific survey’ and land registration. After the mass exodus of Palestinians in 1948, the existence of state-registered individual and communal land records facilitated the identification of ‘absentees’ and the confiscation of their land.

A founding father of Zionism wrote in about 1920 that the Arab Palestinians should learn to live ‘lives of possessions and property and established boundaries’ (Mordechai Ben-Hillel Hacohen, quoted in Segev, 2000). But in practice colonialist and postcolonialist law and ideology, while ostensibly creating structures to support ‘lives of possessions and property and established boundaries’, were the means of dispossessing them from their land. The British enclosures movement, which consolidated land and extinguished communal use rights in the interests of productive efficiency (Neeson, 1993), provided a paradigm that Zionism and the Israeli state could apply under the rubric of ‘redeeming the land from desolation’, extinguishing Palestinian communal use rights in the process.
It was the Israeli general/politician Moshe Dayan who is usually attributed with urging Israel to make ‘facts on the ground’. Mandate land regulations facilitated the process, providing an array of legal instruments for capturing and controlling land which were subsequently applied in Israel (and after 1967 in the West Bank). The new laws of land use planning were regarded by the British as a toolkit for excluding and managing different colonial ethnic groups (e.g. in Malaya and Kenya) (Home, 1993, 1997), and in Palestine contributed to depriving Palestinians of their land use rights and redefining them as contravenors of planning control. The Mandate Planning Acts of 1921 and 1936 provided the framework, and were incorporated into Israeli law as the Planning & Building Law of 1965 (amended in 1990), which created a British-style system of development plans, control over development, managed by local authorities and the National Planning & Building Board (Coon, 1992). Land could be declared a closed area, security zone, green area or nature reserve, all of which allowed Palestinian use rights to be extinguished. The discriminatory use of land regulations can be traced in many applications: compulsory purchase, defence, highways, development plans, zoning and development control.

Compulsory purchase was provided for under the Ottoman land code (Goadby and Doukhan, 1935: 315–31), and the Mandate administration imported British compulsory purchase law and procedure in the 1924 Expropriation of Land Ordinance. The procedure was accelerated in the Acquisition of Land for the Army and Air Force Ordinance 1925 (consolidated in 1926), and further streamlined by the Land (Acquisition for Public Purposes) Ordinance 1943, which allowed the state to make rapid expropriation with minimal compensation. These sweeping powers were incorporated by the Israeli state in the Land Acquisition (Validation of Acts and Compensation) Law 1953, followed by massive confiscation of land for Jewish settlement and defence, until compulsory purchase is now rarely needed, since the Israeli state owns most of the land.

With the rise of intercommunal violence in the later stages of the Mandate the Defence (Emergency) Regulations 1945 gave military commanders wide-ranging powers to declare areas ‘closed’. Palestinian property had been demolished on a large scale in the old city of Jaffa in the 1930s, an action subsequently justified with a retrospective town planning scheme (Gavish, 1989). The designation of closed areas was a more efficient device to evacuate areas (even whole villages) and facilitate subsequent transfer of ownership to the Israeli state (Nasser Abufarha, 2002).

Acquisition of land for highways was a means of isolating Palestinian settlements and severing them from their farmland. The Mandate Width and Alignment of Roads Ordinance 1926–1927 prohibited dwellings a certain distance from the road centre-line, and was used to justify demolition of Palestinian dwellings near the road. The ambitious Israel road-building
programme was used to bypass Palestinian areas, while facilitating access to Jewish settlements (ArabHRA, 2002).

The plan-making process was employed to restrict the expansion of Palestinian villages, while encouraging Jewish settlements. Government-prepared plans for Palestinian settlements drew tight boundaries around them (often defining areas smaller than the built-up area of the village), followed by the demolition of houses beyond the boundary, but with little opportunity for community participation or objection, while liberal land allocations were accorded Jewish settlements. The predominantly Palestinian town of Nazareth, for example, was allocated 1420 ha of urban land for a population of 60,000, while its twin (Jewish) town of Nazerat Illit has 3400 ha for 45,000 people (SHAML, 2002). Official approval of community plans prepared by and for Palestinians was often delayed, and their natural population increase ignored in housing projections, restricting new development to infill, and forcing Palestinians to stay in their overcrowded villages for fear of property expropriation if they moved away for work (Coon, 1990).

Land use zoning followed British planning practice, with a policy presumption against new construction on agricultural land. Not only were Palestinians discouraged from living on their agricultural land, but that land could be transferred to Jewish-controlled local authorities or to the state for forestry or green space. Once transferred, such land could be fenced off, with army patrols to prevent trespass, and local Palestinians wanting to cultivate the land that was once theirs under miri rights were often forcibly excluded. Olive plantations (99 percent of which were owned by Palestinian Arabs, and which took decades to grow to full yield) were not allowed to be tended if belonging to ‘absentees’, and the trees could be dug up for various official reasons (defence, reforestation, Jewish settlement). Often the appearance of a bulldozer and Israeli soldiers was the first indication that land had been confiscated. Thus the Palestinian agricultural base has been eroded, and farmland next to Palestinian communities transferred to the ILA, which can then only be used by Jews (Bowring and Chome, 1990; Kedar, 2001).

A further twist of the planning system has been the exclusion of about 100 small Palestinian settlements (with some 70,000 inhabitants) from official recognition. Although they usually predate the 1948 establishment of the state of Israel, as unrecognized settlements they cannot get permission for new dwellings, and public utilities are legally prohibited from connecting them to water, electricity or telephone services. A committee in 1986 recommended immediate demolition of 1000 homes in such areas, and classification of another 4400 ‘grey’ houses for later demolition: some 1440 such houses were demolished between 1993 and 1996. A different approach was adopted for Israeli and Israeli Arab unauthorized development: the latter accounted for 57 percent of recorded unlicensed building, but 94 percent of demolitions (ArabHRA, 2002).

The Ottoman land code had prohibited building construction without permission, under pain of demolition, but the provisions were rarely enforced (Goadby and Doukhan, 1935: 30-1). The British Mandate planning
regulations were potentially tougher, specifying large minimum plot sizes and limiting site coverage by buildings, which made it difficult to gain approval for extensions or new building. These regulations were rigorously applied by Israeli officials against Palestinians (Lein, 2002). No building permits were issued without an approved town plan, or without legal proof of ownership, yet property title (especially in the West Bank) registered under the previous Ottoman code was not recognized, which indicated boundaries only by description, not on a cadastral map. In the Occupied Territories Military Order 291 of 1968 ended new registration of land, so that Palestinians could neither get their historic land title accepted, nor register afresh (Coon, 1992; Khamaise, 1997).

The planning system has been called ‘one of the most influential mechanisms affecting the map of the West Bank’ (Lein, 2002: 70). The British Mandate planners had approved plans for the Jerusalem and Samaria districts, and under Jordanian rule (1948–67) the West Bank followed British-derived planning, with a City, Village and Building Planning Law passed in 1966. Planning powers after the Israeli occupation in 1967 were transferred (by Military Order 418 of 1971) to the military commander. The Mandate period plans were kept in force, but with no updating of population estimates or revision of settlement boundaries, while district and village planning bodies were abolished. Palestinian settlements, neglected in any case under Jordanian rule, were denied basic infrastructure (sewage, electricity, roads), which the new Jewish settlements routinely received (Lein, 2002). The lists of Arab settlements in the Mandate plans were used by the Israeli government to limit recognition of new Palestinian villages (which grew from 264 in 1947 to 400 by 1967, resulting from natural increase, expansion of hamlets and sedentarization of the nomadic Bedouin). Thus the planning system operates along two separate tracks worthy of the British dual mandate ideology, expanding Jewish settlements but restraining Palestinian. The effect of the Oslo agreements was to break up the West Bank further into some 120 disconnected Palestinian cantons, outside which development was restricted through planning and other regulations (FMEP, 2002). Even areas ostensibly transferred to the Palestinian Authority were kept under Israeli military control, and there was no physical boundary demarcation between the Palestinian Authority and Israel (Coon, 1992).

After 1967 the Israeli state in the Occupied Territories confiscated land, with little negotiation or compensation, for new Jewish settlements, extending the earlier Zionist strategy. After the Oslo agreements, which were supposed to end new Jewish settlements, they were redefined as ‘new neighbourhoods’ of existing settlements, providing for natural growth and falling under the jurisdiction of the parent settlement, even when there was no territorial contiguity. A master plan for new settlements was produced by the World Zionist Organisation and the Ministry of Agriculture in 1983, and a Joint Settlement Committee determined the location and form, sometimes retrospectively, usually on land administered by the ILA, and with the approval of the Ministry of Defence. Jewish settlements operate special
planning committees appointed by the regional military commander, and by 2000 there were over 200,000 Jews living in such settlements in the West Bank and Gaza (FMEP, 2002; Lein, 2002).

**CONCLUSION: ‘LIVES OF POSSESSIONS AND PROPERTY AND ESTABLISHED BOUNDARIES’**

When Mordechai Ben-Hillel Hacohen wrote that the Arab Palestinians should learn to live ‘lives of possessions and property and established boundaries’ (see above), he was anticipating the currently popular thesis of Hernando de Soto, that formal property systems are the foundation for capitalist economic development: ‘building a legal and political structure, a bridge, if you will, so well anchored in people’s own extralegal arrangements that they will gladly walk across it to enter this new, all-encompassing social contract’ (De Soto, 2000: 62). The Arab Palestinians were holding what De Soto calls ‘dead capital’, without formal property rights, locked in the ‘grubby basement of the pre-capitalist world’ (De Soto, 2000: 55). In practice, however, such a transformation through property rights has been largely denied to the Palestinians by the confiscatory processes of the postcolonial Israeli state, prepared by the British Mandate.

The importation into Palestine of ready-made British-style law, drawing upon British colonial experience, contributed the building blocks for the Israeli state. Thus ‘Jewish nationalism develops in the womb of British colonialism’ (Strawson, 2002). The Zionist project achieved the paradox of a near-monopoly of land ownership by the state coexisting with a strong private property ethos, and the integration of individual land title with communal tenure based upon religious precepts. Land in Palestinian communal use was confiscated and physically fenced off by the Israeli state, an action justified on behalf of a religious community that included Jews of all kinds (Ethiopian and Russian, African and American, Sephardim and Ashkenazim), but excluded non-Jews, most especially those Palestinians who had occupied the territory before the Zionists. The process of creating a new Jewish pseudo-communal land tenure involved discarding much Ottoman land law, while that of the British Mandate was selectively applied and reformed. Registration of title accorded Jewish buyers of property (usually holding the land in trust for Jewry) state protection, and after 1948 the Israeli state created a new landholding authority (the ILA). For the Palestinians the former Ottoman registered land title was no longer sufficient protection of their property rights, and even Mandate land title acquired through the land settlement process was forfeited by the refugees of 1948 and subsequent wars. Land given in trust for one religion (Islam) as wakf has been confiscated by the state, to be held in trust for another (Judeaism). Those Palestinians who fled in 1948 have found their absentee status to have become permanent rather than temporary, while the land title that had seemed permanent proved temporary. For the Zionist settlements, on the other hand, what began as
temporary ‘facts on the ground’ was to become permanent occupation guaranteed and protected by the state.

British colonialism’s role in building the Israeli state has been reasserted by Shamir:

Too little attention has also been given to the basic fact that the British, aided by all their colonial experience elsewhere, created and installed a functioning state in Palestine: a rather advanced web of administrative apparatuses and governmental departments, a sound infrastructure and, of course, a fully-developed, ready-to-use legal system. (Shamir, 2000: 11)

The Mandate drew upon Ottoman precedents and British colonial experience, and legislated for an array of modern land management tools, such as ‘scientific’ cadastral survey and land use planning. It created a bridge, allowing the mutation of the despised but useful Ottoman/Islamic land law for Israeli purposes, and retaining a religious communal basis which could be preempted. A modern, positivist ideology of law and the state supported the colonists/colonialists in dispossessing the colonized, and trapped the indigenous Palestinians in a world of manipulated bureaucracy worthy of the pages of Kafka and Orwell. Land once held in undivided ownership by Palestinian village communities, and managed by them through local registers of ownership and periodic land readjustment, was transferred to the Israeli state. Fifty years after its creation, the state of Israel can claim a kind of success for the Zionist project of ‘redeeming the land from desolation’: it controls virtually all of the biblical territory of Palestine as ‘public land’. Yet this control, quite apart from the hostility of the Palestinians, is now under attack from the new rhetoric of globalization, which pursues privatization, transparency and liberalization in land markets, potentially weakening Jewish exclusivity and challenging the role of the ILA, which a recent article discussed under the revealing title ‘Relic or Necessity?’ (Werczberger and Borukhov, 1999).

The Israeli state under conditions of postcolonialism cannot achieve security or freedom from violence, as the suicide bombings continue to demonstrate. The Palestinians will not go away, nor will their demands for justice. Notwithstanding massive Jewish immigration, the Palestinian population more than keeps pace through natural increase. A population of 1.3 million Arab Palestinians when the Mandate ended became 5.8 million 50 years later, the result of one of the highest population growth rates in the world (over 3 per cent per annum). This is Arafat’s ‘biological bomb’, a limitless source of suicide bombers. As the Israelis say, ‘our strength is our weakness; their weakness is their strength.’ Abuses of Palestinian human rights, especially in the Occupied Territories, breach numerous international conventions, and the application of planning and land regulations in particular invites comparison with the discredited South African state-legislated apartheid: Palestine as Bantustane. The state of Israel is locked in a seemingly endless and unsolvable struggle, between Jewish colonists and Palestinian colonized.

In the meantime the postcolonialist discourse provides a platform for ‘filling
the gaps and silences in dominant historical narratives' (Otto, 1999), and for understanding the processes at work. Through historical research those Palestinian communities seemingly erased from history can resurrect themselves, and assert their continuity and claims upon collective memory and territorial justice (Walid Khalidi, 1992; Sekaly, 1995; Salim Tamari and Elia Zureik, 2001). The only solutions to the present violence, other than genocide or forced expulsion of one or other group, are the territorial partition of Palestine or coexistence within one national territory. Either solution will require a settlement of intercommunal land rights, through a process of land readjustment, probable physical partition, and transfer of population and state territory.

NOTES

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1. Land areas in Israel/Palestine are usually expressed in donums (one metric donum is 1000 m², equivalent to one decare or a tenth of a hectare). This article uses square kilometres (= 1 million square metres, 100 hectares or 1000 donums).

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