In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine

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Abstract

This article examines debates among the judges of the Supreme Court of Mandatory Palestine about the proper scope of Anglicization of the law of Palestine. These debates were conducted while interpreting article 46 of the Palestine Order in Council – 1922. Article 46 required the courts of Palestine to use English law “so far only as the circumstances of Palestine and its inhabitants.” By asking the courts to compare the inhabitants and “circumstances” of England and Palestine, the article forced the British judges in Mandatory Palestine to define themselves. The decisions of the Supreme Court of Palestine which interpreted this article can thus be read as a debate on British and native identity conducted between two distinct groups of British judges: One group was mainly composed of upper and middle class, public school educated English judges, still imbued with the notions of pre-First World War English colonialism. The second group came from a more marginal background. Because of this background, these judges felt more empathy towards the ”natives” of Palestine and had less of a need to maintain a clear distinction between themselves and the natives. Consequently they were also more willing to provide the natives with the benefits of English law. The debate about Anglicization carried by British judges therefore reflected the identity of the participants. The ultimate result of the debate is that there was no single British judicial policy on questions of Anglicization. Different British judges had different views about what being British and being Jewish or Arab meant, and occupied different positions along the progress/tradition and English law/local law spectrum.
IN OUR IMAGE: COLONIAL DISCOURSE AND THE ANGLICIZATION OF THE LAW OF MANDATORY PALESTINE

Assaf Likhovski*

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*Palestine Parodies*, 2 (1938)

I. Introduction

A. Down the Hole: An Arab, A Jew, A Little English Girl

and the Law of Torts of Mandatory Palestine

My story is full of holes. The first hole, or rather, ditch, was dug in 1930 by the municipality of Haifa. An Arab, Dr. Caesar Khoury, fell into the ditch and fractured his shoulder-blade.

Could Dr. Khoury recover? The law of torts of mandatory Palestine was found in the Mejelle — an Ottoman code of Moslem civil law. Did the Mejelle provide a remedy in the case of personal injury? “Unfortunately,” said Judge Francis Baker, who delivered the opinion of the Supreme Court of Palestine, “the Mejelle dealt with liability for damages caused by animals to property, but it was ‘silent’ with regards to injuries caused to persons”. Therefore, Dr. Khoury could not recover.

The second hole in my story belongs to a Jew, Feivel Danovitz. In 1939, Danovitz was run down by a truck in Tel Aviv. He sued the driver and the owner of the truck. The lower courts of Tel Aviv decided that


3 *Municipality of Haifa v. Khoury*, (1932) 4 Rotenberg 1343. The only way a plaintiff could recover for personal injury, said Judge Baker, was by virtue of a civil action ancillary to a criminal one. (*Id.*, at 1345-46). See also *Rosenberg v. Zeidan* (1927) 4 Rotenberg 1337 (a previous case in which the Court recognized that there was a general civil liability for damages caused by any negligent act).
if the Mejelle did not deal with liability for personal injury, that meant
that there was a hole in the tort law of Palestine. Such a hole could be
filled by recourse to the English common law in accordance with the
provisions of Article 46 of the Palestine Order-in-Council, 1922. Since
the English common law recognized liability for personal injury, Danovitz
could recover.

The Supreme Court of Palestine, on appeal, rejected this argument.
Judge Randolf Copland, who wrote the majority opinion, acknowledged
that there was indeed a hole in the tort law of Palestine. However, said
Copland, the proviso of Article 46 prevented the importation of the
English common law of torts. The proviso stated that English law could
be used by the Courts only so far as “the circumstances of Palestine and
its inhabitants . . . permit”. The Common law, said Copland, is a law
based on the customs and habits of the English people, and

the customs and habits, mode of life, mode of thought and character
of the English people are very different from those of the inhabitants
of Palestine. . . it would be a grave injustice to force on another
country a customary law which is founded on the totally different
customs and habits of a totally different race.

Importing the English common law of torts would also be unjust, said
Copland, because this law was found in textbooks and decisions which
the majority of the people of Palestine could not read, since they were
written in English.5

4 Article 46 declared that in the absence of Ottoman law or local Palestinian legis-
lation, the civil Courts of Palestine should “exercise” their jurisdiction “in conformity
with”

“. . . the substance of the common law, and the doctrines of equity in force in England
. . . Provided always that the said common law and doctrines of equity shall be in
force in Palestine so far only as the circumstances of Palestine and its inhabitants.
. . permit and subject to such qualifications as local circumstances render necessary”.

The notion that there is a gap in the Palestinian law of torts and that this gap might
be filled by recourse to Article 46 was raised as an obiter dicta in Palestine Mercantile
Bank Ltd. v. Fryman, (1938) 5 P.L.R. 159, at 163.

5 Sherman v. Danovitz, (1940) 7 P.L.R. 363, at 367-68. Copland raised several other
objections to the importation of English Law. See also G. Tedeschi & A. Rosenthal,
Phudat Hanetzkin Le'or Toldot Hit'havuta Vetikuneha [Civil Wrongs Ordinance in
Light of the History of its Preparation and Amendments] (1962/3) vi (mentioning a
letter written by Chief Justice Trusted three months before the Sherman decision in
which Trusted adopted a similar position).
Dissatisfaction with the *Sherman* decision led to the promulgation of the Civil Wrongs Ordinance, 1944. The ordinance, however, came into effect only in July 1947, after the Supreme Court of Palestine overruled *Sherman* and decreed that English tort rules were indeed applicable to Palestine. This was caused by a little English girl and by my third hole.

Stephanie Constance Orr, the daughter of the chief registrar of the Supreme Court of Palestine, was born in 1943. She was born in a Jerusalem hospital belonging to the London Society for Promoting Christianity among the Jews. While still in the hospital, a hot water bottle with a hole in it was placed in her cot. The bottle leaked, and Stephanie Orr was permanently crippled. Her parents sued the London Society.

This was one of the rare cases in the history of the law of Palestine where the two parties were British. It was indeed an irony that a British family (closely connected to the judges of the Supreme Court) and a colonialist British society, were now contending over the question whether the English law of torts was inapplicable to their case because they belonged to a “totally different race”.

At first glance it appeared that, in view of the *Sherman* decision, the Orrs were bound to lose. The Jerusalem District Court and the Supreme Court, however, decided otherwise.

“A more distressing case”, said Judge Ross of the District Court of Jerusalem, “can, indeed, hardly be conceived. On the one hand there is a little child — a beautiful little child . . . whose future must inevitably be accompanied by mental and physical suffering such as few of us have fortunately to bear”. On the other hand, he continued, “there is a

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8 The defendants filed a motion to dismiss the case on the ground that no cause of action has been shown. Judge Curry of the District Court of Jerusalem dismissed the motion, but nevertheless said that “it appears to me at present that the respondent [the Orrs] is unlikely to succeed”. *Rendle v. Orr* 1946 S.C.D.C. 94-95 (1946) (Jerusalem District Court).
missionary society of whose magnificent work in the unending war against disease and premature death I am well aware”. The decision of the Supreme Court in Sherman “clearly binds this court”, said Ross, but he then went on to overrule it.9

The onus of proving that the Common law of torts is inapplicable to Palestine is on the defendants, said Ross, and not only have the defendants failed to prove that English law is inapplicable, but, remarked Ross “the present case has disclosed the existence in Palestine of numerous and well equipped hospitals, necessary features in a civilized community. In these circumstances some law . . . regulating the liabilities of hospitals towards their patients is essential”.10

The decision of the District Court was rendered in January 1947. An appeal was lodged and the Supreme Court of Palestine decided to dismiss it in May 1947. Like Judge Ross, Chief Justice FitzGerald, who delivered the opinion of the Court, overruled the Sherman decision. If there ever were circumstances which prevented the application of the English Common law of torts, said FitzGerald, they do not exist anymore. “There is now in Palestine”, he said “a population of 600,000 Jews with western ideas of culture and western ideas of commerce. There is a progressive Arab population of one and a half million, also with strong cultural and commercial ties with Europe”. The circumstances of Palestine and its inhabitants do not bar the importation of English tort law.11

B. Colonial Discourse and Anglicization of Law

The aim of this paper is to contextualize the Orr decision, and the wider process of which it was part — the anglicization of the law of Palestine during the British Mandate. What led the Supreme Court of Palestine to hold in Sherman that the English law of torts was inapplicable and then to reverse its position in Orr?

10  Id., at 18.
It is my intention to show that Orr specifically, and the process of anglicization generally, can be partly\textsuperscript{12} understood as the result of different British perceptions of the nature of the “natives” in Palestine, both Jews and Arabs. Analyzing the cultural prejudices and the colonial images which shaped the mind of British judges is, I will claim, essential to understanding the process of anglicization of the law of mandatory Palestine.

This article deals with the legal history of mandatory Palestine, but it also has some broader implications. In the first place, it has some relevance to the historiography of mandatory Palestine. The dominant paradigm of Palestine historiography (the “dual society” paradigm) depicts Palestine as composed of two monolithic societies, Arab and Jewish, with little interaction between them. Recently, however, it was suggested that this paradigm should be replaced by a “relational” approach to the history of Palestine, an approach which will focus on Jewish-Arab interaction and stress the links between the two populations.\textsuperscript{13}

This article is based on a variation of the “relational” paradigm. The stories of Dr. Khoury and Mr. Danovitz teach us that the legal history of mandatory Palestine, perhaps more than other fields of mandatory history, can be studied by focusing not only on the Arab-Jewish conflict, but also on the less unique, but nonetheless important, relations between colonial rulers and the subject population (both Arab and Jew).

\textsuperscript{12} I do not claim that the colonial perspective is the only legitimate way of viewing the Orr decision (or the process of anglicization). One can see Orr as an example of the important role of empathy and personal connections in judicial decisions. The Orrs were connected to the British judges of the Supreme Court and these judges were obviously more inclined to rule in favor of the young daughter of a close British acquaintance than to assist an adult Arab or an adult Jew. There were also some practical considerations which might have led to the different decisions in Sherman and Orr (the desire to let the public insure itself before imposing tort liability, a fear of overloading the Courts with tort claims etc.). See Tedeschi & Rosenthal, supra n. 5, at vii (discussing these considerations in the context of the Civil Wrongs Ordinance).

This article also has some methodological implications. Colonial discourse analysis is a recently developed method. Its effect on (non-international law) legal scholarship has been negligible. Using colonial discourse analysis is therefore interesting not only in the specific context of the history of the law of mandatory Palestine, but also because it might lead to a better understanding of the possible uses of such a method as a legal history tool.

The article has two parts. The first part contains some background information on the attitude of the British administrators in Palestine toward Arabs and Jews, the legal policies of the British Empire and the way that British lawyers in Palestine viewed native judges and Ottoman law.

The second part deals with the process of anglicization. The subject is wide, and the discussion will be focused on a relatively small group — the British judges of the Supreme Court of Palestine. These were not the only players in the arena of Palestine law. A thorough investigation of the subject must also include the British judges in the lower courts of Palestine, British officials in the Legal Department of the Palestine Government, the officials of the Colonial Office in London, Jewish and Arab judges, lawyers and laymen. My description will therefore be, by definition, incomplete.

II. The Cultural and Legal Background

A. The British Administration and Images of Arabs and Jews

Edward Said has pointed to the special way in which the Orient was represented in western thought. The Orient was seen as exotic and
mysterious, obscure and strange, disorganized and irrational. Oriental societies were described as primitive and static, harsh and despotic. The Orient was a place of ancient greatness, but present decadence. In short, the images used to portray the Orient and orientals were diametrically opposed to the image that Europeans had of themselves. When the British came to Palestine, they brought orientalist imagery and colonial ways of thought with them, and these were manifested in various ways in the thought of British officials and in the structure of the British administration.

The local population of Palestine was not homogenous. The Arab population conformed (or so the British thought) to the traditional image of “the oriental” and “the native”. Parts of the Jewish population did not. It is wrong, however, to think that the British were willing to see the Jews as their equals. “The English”, said John Hayes Holmes, an American reporter, in 1929,

do not like the Jews as a subject population. In fact, they do not know what to make of them . . . the Jews must be classified as natives, but they do not seem like natives. They are acquainted with western culture; many of them speak the English language and are familiar with English ways. What is more, these Jews do not act like natives. They are not submissive and obedient and grateful . . . on the contrary, they are independent and proud . . . [they are thus] regarded

by the English . . . with the active dislike of a superior class for an inferior class which does not know and keep its place.19

The British used a number of categories to maintain the barrier between themselves and the Jews. Often both Jews and Arabs were lumped together as “Semitic”.20 Sometimes the Jews were described as “Slavonic” or as “uneastern and unEuropean”.21 In short, the British saw the Jews as no less “others” than the Arabs.

Although many British officials were unwilling to see both Arabs and Jews as their equals, most of them took sides in the conflict between Arabs and Jews. Many British administrators in Palestine were pro-Arab. There were various reasons for this attitude, such as the fact that the Jews did “not know or keep [their] place” in the traditional colonial hierarchy as opposed to the Arabs, who “behave as the English have found natives behaving in other parts of the earth”,22 anti-Jewish prejudice,23 the identification of Jews with Bolshevism,24 or a romantic notion of the “colorful orient” being destroyed by the European Jews who refuse to integrate into an Arab region.25

Class sentiments were also a factor. Some upper class Englishmen could not find their counterparts in Jewish society in Palestine, which

19 John Haynes Holmes, Palestine To-day and To-morrow: A Gentile's Survey of Zionism (1929) 151-52; See also Ronald Storrs, The Memoirs of Sir Ronald Storrs (1937) 385-86, 388 (noting the “refusal” of the Jews to be treated as natives, and quoting “Dryden’s inspired couplet”: “God’s pampered people whom, debauch’d with ease/ No king could govern and no God could please”); Norman and Helen Bentwich, Mandate Memories 1918-1948 (1965) 90, 91; Gad Frumkin, Derekh Shofet BYerushalayim [The Life of a Jerusalem Judge] (1956) 312-13.

20 See e.g., Royal Institute of International Affairs, Great Britain and Palestine 1915-1939: Information Department Papers No. 20A, 33 (1939) (mentioning “the profound psychological difference between the Anglo-Saxon and the Semitic races” and noting that while this difference may not characterize the “whole of the Jewish branch of the Semitic race”, it does characterize the “eastern Jews [who] form the bulk of the Palestinian immigrants.”)

21 Freisel, supra n. 18, at 425.

22 Holmes, supra n. 19, at 154.

23 Freisel, supra n. 18.

24 Bentwich, supra n. 19, at 133; Holmes, supra n. 19, at 152; Wasserstein, supra n. 18, at 12.

did not have an "upper class" in the traditional sense, and so tended to identify with the Arab upper class.\textsuperscript{26}

In other cases, the pro-Arab attitude was the result of a paternalistic attempt to assist the "less intelligent native population", who were seen as the underdog in the struggle for Palestine, against the danger posed by "the clever purposive Jew".\textsuperscript{27}

Finally, the negative attitude toward the Jews was also based on imperial policy considerations. The Jews were a nuisance. They wanted massive development, for only such a development would enable large Jewish immigration which was essential to the realization of the Zionist program. But British colonial policy favored the preservation of the status quo and only slow development.\textsuperscript{28}

All the notions described above are, of course, generalizations. Not all English officials opposed rapid development, and not all British officials were pro-Arab.\textsuperscript{29} One can also distinguish between different periods in the history of Palestine. A (very crude) generalization is that the 1920s were a period when the "development" conception was more common. The first High commissioner, Herbert Samuel, was an English Jew who favored the Zionist cause, and he attempted to pursue a policy of creating the political, legal and economic conditions necessary for facilitating the Zionist project. Several other high ranking administrators at the time also favored Zionist aspirations.\textsuperscript{30}

The Arab riots of 1929 led to a retreat from this policy. The country did develop rapidly in the 1930s, but this development was a result of massive immigration of people and capital, fleeing Nazi Germany,

\textsuperscript{26} Ashbee, \textit{id.}, at 95 ("the Arab is not so clever [as the Jew] but in many respects is much nicer than the Jew: not such a modernist, but so much more of a gentleman."). See also Holmes, \textit{supra} n. 19, at 151 (quoting an English official who stated that "these Arabs, you know, well they are gentlemen, and one can invite them to his table, but the Jews! . . .")

\textsuperscript{27} See Bentwich, \textit{supra} n. 19, at 142; Wasserstein, \textit{supra} n. 18, at 10-11; Friesel, \textit{supra} n. 19, at 429. The effort to protect the Arabs (by discriminating against Jews) led Holmes to compare the situation of the Jews in Palestine with that of the blacks in the American South. See Holmes, \textit{supra} n. 19, at 155-56.


\textsuperscript{29} See \textit{e. g.} Bentwich, \textit{supra} a. 19, at 155, 160.

\textsuperscript{30} Norman Bentwich, \textit{Palestine} (1934) 144-46; Biger, \textit{supra} n. 28, at 2; Wasserstein, \textit{supra} n. 18, at 87.
rather than the result of an active government policy. The Arab Rebellion of 1936-1939 and the approach of the Second World War led the British administration to adopt an overtly anti-Jewish (and anti-development) policy in an attempt to appease Arab and Moslem public opinion.\textsuperscript{31}

After the Second World War the imperial vision of the world collapsed.\textsuperscript{32} The rise of national movements in the colonies, the victory of the Labour party in Britain, the beginning of decolonization, and the dichotomous division of the world into a communist and capitalist spheres (instead of a division into several imperial zones belonging to different European nations), all led to changes in the attitude towards the colonies and specifically toward the question of Palestine.\textsuperscript{33}

There was a corresponding shift in the image of the Jews and, to a lesser extent, of the Arabs. Although the association of Jews and Communism persisted in some quarters,\textsuperscript{34} the horror of Nazi racism and the massive Immigration in the 1930s of more westernized Jews from Germany led to a change in the Jewish image. The social changes in the Arab community led to a corresponding shift in the Arab image. The boundary between the British “self” and the Arab and Jewish “other” still existed, but it was now less rigid than before.\textsuperscript{35}

B. The Colonial Legal System, Native Judges and Local Law

1. The Legal System of Palestine and Native Judges: The British legal system in Palestine was part of the British administration. Many British judges shared the attitudes of their colleagues in the administration,

\begin{itemize}
\item \textsuperscript{31} Biger, \textit{supra} n. 28, at 59; Wasserstein, \textit{supra} n. 18, at 342-43.
\item \textsuperscript{32} The cracks appeared earlier. The Mandate system itself was an early symptom of the decay of imperialism. See Reuveni, \textit{supra} n. 18, at 20; Said, \textit{Orientalism}, \textit{supra} n. 7, at 248.
\item \textsuperscript{33} See e.g. John Marlowe, \textit{Rebellion in Palestine} (1946) 102.
\item \textsuperscript{34} See Wm. Roger Louis, “British Imperialism and the End of the Palestine Mandate”, in Wm. Roger Louis and Robert W. Stookey, eds., \textit{The End of the Palestine Mandate} (1986) 1, 23-24.
\item \textsuperscript{35} A nice example of the changes in colonial perceptions as a result of the Second World War can be found in the information paper on Palestine mentioned in note 20 above. The passage about the difference between the “Anglo-Saxon” and “Semitic” races was removed from the 1945 edition. See \textit{Royal Institute of International Affairs, Great Britain and Palestine 1915-1945: Information Papers No. 20, 38} (1945). See also \textit{infra}, n. 203.
\end{itemize}
and saw the natives in general, and native judges in particular, as inferior. The structure of the legal system tended to enforce that image.

Because of the ethnic division of the country, the jury system was not used in Palestine. Native judges, both Arabs and Jews, were viewed at first as similar to English jurymen — local “collaborators” whose only role was to help British judges understand local customs and local mentality. As time went by, this notion disappeared, but various marks of inequality remained. There was a difference between native and British judges in civil service ranks and salaries. Native Supreme Court judges were denied some of the privileges that British judges had (such as the right to preside over panels of the court). Some cases could only be decided by British judges, and parties could request that British and not native judges try their case.\(^{36}\)

Some of these distinctions had practical reasons,\(^{37}\) but sometimes the discrimination between British and native judges can only be explained as an attempt to preserve the colonial hierarchy. For example, the *Palestine Law Reports*, the official report of the Supreme Court of Palestine, included a list of the judges of the Supreme Court. In the first volumes, only the British judges of the Supreme Court were listed.\(^{38}\) Another, seemingly trivial fact, which illustrates the wider discrimination, was the difference in dress. British judges wore wigs, but native judges were denied the right to wear them. There was a long struggle between native and British judges of the Supreme Court before native judges too were allowed to wear a wig.\(^{39}\)

Only in the 1940s, partly as a result of objective conditions and partly as a result of the efforts by the last Chief Justice, William FitzGerald, did native judges achieve equality. The jurisdictional powers of native magistrates were widened. The discrimination in salary between native and British judges was abolished and native judges were allowed to preside in court. The final mark of discrimination, the use of the official title “British judge” (to distinguish between native and British judges)

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\(^{37}\) The difference in the cost of living in Britain and Palestine, the ethnic division of the country, or the fact that some native judges were considered corrupt.

\(^{38}\) See (1936) 3 P.L.R. III and (1937) 4 P.L.R. III.

\(^{39}\) Frumkin, *supra* n. 19, at 275-76.
was abolished in February 1948, three months before the end of the Mandate.\footnote{Frumkin, supra n. 19, at 275-76, 465-69. See also “Harkhavat Samkhutam Shel Shofte Hashalom Ha’aretz-Yisraelim, [Wider Jurisdiction of Palestinian Judges]”, (Apr. 1944) HaPraklit at 5; “Leminuy Shofim Elyonim Khadashim [Appointing New Supreme Court Judges]”, (Nov. 1944) HaPraklit; “Shofte Shalom “Britim” Veyehudim [“British” and Jewish Magistrates]”, (1945) 2 HaPraklit 98; “Shofim Britim Ve’eretz Yisraelim [British and Palestinian Judges]”, (1946) 3 HaPraklit, 164; “Din Vekheshbon Mehave’ida Ha’artzi’it Ha-XII Shel Histadrut Orkhe Hadin Hayehudim Be’eretz Yisrael [Report from the XII National Convention of the Jewish Bar Association in Palestine]”, (1947) 4 HaPraklit 13; “Bitul Hazkhut Leberur Shoftim [The Abolition of the Right to Choose Judges]”, (1947) 4 HaPraklit 197.}

2. The British Empire and Local Legal Systems: A major contradiction in colonial policy was the contradiction between development and status quo, modernization and tradition. This contradiction also existed in the legal sphere.\footnote{See generally, Roger Owen, “Defining Tradition: Some Implications of the Use of Ottoman Law in Mandatory Palestine”, (1994) 1 Harvard Middle Eastern and Islamic R. 115, 117.}

Nineteenth and early twentieth century Europeans believed in an evolutionary theory of law, which saw European law as being in a more advanced stage of development than non-European law. The notion of a “civilizatory mission” of the colonial power thus pointed to the need to replace existing indigenous norms with European ones. On the other hand, the European colonial authorities saw the native population as different, and therefore as unfit to be governed by modern laws. There were also practical considerations. The replacement of local law was bound to cause native resentment and the administrators in the colonies were therefore often reluctant to upset the legal status quo.\footnote{Moore, supra n. 15, at 41; W. J. Mommsen, Introduction, to European Expansion and Law, supra n. 2, at 4-5.}

Every colonial power dealt differently with the contradicting desires for change and conservatism. English rulers tended to prefer the practical and politically wiser option of preserving the status quo, and favored replacing only those norms that seemed to conflict with what the British thought were the universal principles of “natural law”.\footnote{See Anton Bertram, The Colonial Service (1930) 154; Olawale Elias, British Colonial Law: A Comparative Study of the Interaction Between English and Local Laws in British Dependencies (1962) 80-81. See also Konrad Zweigert & Hein Kotz, Introduction to Comparative Law, Vol. 1 (2nd ed., 1987) 233-45.}
Over time, however, English law did penetrate into the legal systems of the British colonies. This process was partly planned and centralized, and partly haphazard. Some indigenous legal systems were more resilient than others. The result was that the amount of imported English law varied from colony to colony.\(^{44}\)

The variation in the scope of importation also changed from one area of law to another. Two legal concepts influenced the process of replacing native laws. The distinction between substance and procedure, and the distinction between the public and private spheres.

While the English were less willing to replace substantive law, they were more willing to replace procedural law. The replacement of the indigenous laws of procedure and evidence was a practical need, since English judges were used to working with the evidentiary and procedural notions of the Common law. These notions, which supposedly had an impact only on the conduct of judges, were also seen as belonging to the public sphere, and so their replacement was seen as having less adverse political effect.

The replacement of rules of procedure and evidence rules was also seen as enhancing the efficiency of the legal system. It was thus connected with the notion of the “civilizatory mission” of the British Empire. The notion of the “civilizatory mission” of the Empire was reconciled with the notion of “respect for the legal status quo”, emphasizing the legal “contribution” of English to the native legal systems in the field of procedure rather than in the field of substantive law. The English contribution to the colonies, the argument went, was to provide the natives with a system of justice which enforced local norms, but unlike the native legal system, did it in an efficient and incorrupt way. “The feature of British administration which is most renowned in the East is justice”, said Norman Bentwich, the Anglo-Jewish Attorney General of Palestine. Thus in colonial works one often finds the idea that the British “civilized” the local legal systems by importing the ideal of the “rule of law” or the procedural mechanisms of “the rules of natural justice”.\(^{45}\)

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\(^{44}\) Elias, \textit{id.}, at 11-13.

\(^{45}\) Zweigert & Kotz, \textit{supra} n. 43, at 235, 239, 241; Bentwich, \textit{supra} n. 36, at 273, 279; Said, \textit{supra} n. 7, at 37 (quoting Lord Cromer on “the British official who denies (the African savage) gin but gives him justice”); Moore, \textit{supra} n. 15, at 18, 21; Martin Chanock, “The Law Market: The Legal Encounter in British East and Central Africa”, in \textit{European Expansion and Law}, \textit{supra} n. 2, at 279, 280; Collier, \textit{supra} n. 15, at 395, 396. The results of the introduction of these European concepts were
The British also changed substantive law. Here one can differentiate among three areas. Those areas of law conceived as most “private” (or “religious”) — family law, laws of inheritance and the rules governing land tenure — were usually left unchanged. An intermediate area of law, the rules of contracts and torts, were usually replaced by English rules, but the process sometimes took a long time. Finally, the more “public” areas of law — criminal law and commercial law — were almost invariably anglicized. Sometimes, the public-private distinction was reflected in institutional structure, by creating a system of European law courts for dealing with certain areas of law and certain populations, while preserving at the same time local courts which enforced local “customs.”

One must also note that the process of the importation of English law was sometimes unintentional. When new legal questions appeared, English trained lawyers and English judges naturally turned to English law to solve them, and so imported English law into the legal system of the colonies in an inadvertent way. This kind of importation was also the result of the ignorance of English judges. Sir Anton Bertam, who was the Attorney General of the Bahamas, a judge in Cyprus and the Chief Justice of Ceylon, writing no doubt from personal experience, said in 1930:

sometimes opposite to the expectations. Bentwich recounts that a Haifa Arab complained about the incorruptibility of British legal machinery which caused an increase in the number of crimes in the Haifa area. In Ottoman times, it seems, crime was unprofitable, because the criminal would have spent all his ill-gotten gains on bribing the judges and law officers. Once the element of bribe was gone, crime became profitable, and thus proliferated. See Norman Bentwich, My 77 Years: An Account of My Life and Times 1883-1960 (1962) at 58.

See Elias, supra n. 43, at 5, 137, 141, 147; Zweigert & Kotz, supra n. 43, at 235, 241-42; Yoram Shachar, “Mekorotcha shel Pekudat Hakhok Haplili, 1936 [The Sources of the Criminal Code Ordinance, 1936]”, (1979) 7 Iyun Mishpat 75. What the British saw as belonging to “religious law” was not necessarily what the natives saw as belonging to religious law. The English tended to see family law as belonging to the religious sphere. Contract law was seen as “secular”. But of course, this division would not necessarily be that of a Moslem or a Jewish lawyer. The prohibition on usury is just one example of a norm which has “religious” significance in some legal systems. See also Richard W. Lariviere, “Justices and Panditas: Some Ironies in Contemporary Readings of the Hindu Legal Past” (1989) 48 J. of Asian Studies 757, 758 (discussing the problem of defining “religion” in a colonial context).

Mommers, supra n. 42, at 10.

The most extraordinary feature of our judicial system is . . . the
diversity of law which our Courts apply. The judges of our various
Supreme Courts pass on promotion from one system of law to another
and are required immediately on their arrival in a new territory to
administer a system of law . . . to which they are completely strange. 49

3. British Images of Ottoman Law: The legal history of mandatory
Palestine was not different than that of other legal systems of the
Empire. When the British came to Palestine in 1917, they found a legal
system based on Ottoman law. When they left in 1948, a large part of
that law was replaced by English norms. The process of replacement is
the subject of Chapter III. Here I will attempt to outline the attitude of
the British judges and lawyers in Palestine toward Ottoman law.

The law of Palestine before the British conquest was in one sense a
native law and in another sense a foreign one. The law of the Ottoman
Empire was initially based on Moslem law, while non-Moslem commu-
nities enjoyed a legal autonomy enabling them in certain matters to
apply their own religious norms. 50 However, during the nineteenth
century, the Ottoman Empire underwent a process of reforms in an
attempt to stem its decline in the face of growing European pressure.
A major aspect of this process was legal reform. The Ottoman rulers
enacted a number of codes (criminal, commercial and procedural) mainly
based on French law. They also enacted a code of Moslem civil law —
the Mejelle, and a code of Ottoman land law. 51 The Ottoman law which
the British found when they conquered Palestine in 1917 was thus a
hybrid system which was based on three sources: Moslem law, nine-
teenth century French law, and the personal law of each community.

In the end of the 1920s, the secular government of Turkey abolished
the Ottoman legal system, and replaced it with a series of codes copied
mainly from Switzerland. However, these Turkish reforms which were
done after the British conquest of Palestine, had no effect on the law of
Palestine. As was their legal policy in other places, the British preserved

49 Bertram, supra n. 43, at 152. See also Eisenman, supra n. 1, at 107.
50 See C. A. Hooper, The Civil Law of Palestine and Transjordan (1936) 31; Malchi,
supra n. 1, at 16-42.
51 See generally Hooper, id., at 30-34; Malchi, supra n. 1, at 27-31, 43-74; Daniel
Friedmann, “The Effects of Foreign Law on the Law of Israel: Remnants of the
Ottoman Period”, (1975) 10 Is. L.R. 192; Orucu, supra n. 2, at 44-51; Said, supra n.
7, at 78.
the legal status quo.52 Here is how Sir Anton Bertram described British legal policy in Cyprus and Palestine in a 1930 book:

One curious result of our scrupulous respect for the status quo is that in our various colonial possessions we preserve systems of law which have elsewhere become extinct... The modern Turks, with sacrilegious hand... have ruthlessly extinguished their old sacred law, which is still piously preserved as the common law of Cyprus and Palestine, and in its place they have enacted a new code, based upon the Swiss model.53

This passage is remarkable both for its reverence for the status quo and for its orientalist depiction of the Turks (even when modernizing their law!). The devotion to the old legal systems of the colonies, was also described by Bertram in terms taken straight from adventure literature. “In Cyprus”, said Bertram

we boldly took over the Turkish law, which consisted of the old Mohammedan Sacred Law, supplemented by a large quantity of Turkish codes and other legislation. The Turkish text in the case of all legislative enactments was of course authoritative, and our courageous judges had to ascertain the meaning of this text by the help of interpreters or by learning the language.54

The two contradictory images: British judges piously protecting Moslem law from the sacrilegious onslaught of the “cruel Turk”, and British judges courageously storming the stronghold of obscure Ottoman law (armed with an inkwell and a quill?) are both incredible. They may be attributed to the peculiarity of the British sense of humor, but perhaps they should also be attributed to the fact that many British officials, both in Cyprus and in Palestine, saw themselves as later day Crusaders.55

Of course, the “reverence” of the status quo did not mean that the British valued the legal system that they found. Orientalist images of

52 Hooper, id., at 29.
53 Bertram, supra n. 43, at 154 (emphasis added).
54 Id., at 153 (emphasis added).
55 Crusader rhetoric and visual images were common in British public iconography both in Cyprus and in Palestine.
Turkish law played an important part in the process of anglicization, and often appeared in the case law and in other sources. One finds them, for example, in a 1938 book called *Palestine Parodies*, which was written by British administrators associated with the legal system of Palestine.\(^{56}\)

Ottoman law was described in this book as old and antiquated, intricate and obscure, illogical and unreasonable, harsh and monstrous. The Mejelle was called "a law that knows no reason".\(^{57}\) One of the fables in the book talked about "the Mejelle and other antiquities in the Law".\(^{58}\) Another fable mentioned "complicated and obscure" legal problems such as "book XIII of the Mejelle or the provisions of the Ottoman land code".\(^{59}\) The Mejelle was also portrayed as harsh and unfair to women.\(^{60}\)

The French based Ottoman Penal Code and Code of Civil Procedure fared no better. The Ottoman Penal Code was called "this antiquated legal enactment", and its provisions were labeled "this delightful piece of juridical nonsense".\(^{61}\) A footnote in a parody dealing with the Ottoman Code of Civil Procedure said "contrary to general belief, some provisions of this superannuated monstrosity are still in existence". Another part of the book mentioned "the Code of Civil Procedure and other Ottoman antiquities".\(^{62}\) The Ottoman Press Law was described as "intricate" and as "almost incomprehensible, except to those who had studied it from their cradle".\(^{63}\)

These attitudes toward Ottoman law seem to have had wide currency among the British in Palestine. References to the "medieval provisions

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\(^{56}\) *Palestine Parodies Being the Holy Land in Verse and Worse, Written by Mustard with the Assistance of Cress and Illustrated by Blass* (private edition, 1938) [a copy of the book is found in the Widener library, Harvard University]. "Cress" was Judge P.E.F. Cressall.

\(^{57}\) *Id.*, at 171.

\(^{58}\) *Id.*, at 130. See also *id.*, at 91, 93, 96, 100 (mentioning ancient commentaries on the Mejelle — "the common law of the 6th century").

\(^{59}\) *Id.*, at 147.

\(^{60}\) One of the "cases" in the book describes a Christian who converted to Islam when he discovered that according to "article 2632974" of the Mejelle, "he could get rid of a tiresome wife by word of mouth". *Id.*, at 90. This may be a hint to the familiar colonial theme — the colonizers as protectors of native women from native men.

\(^{61}\) *Id.*, at 98.

\(^{62}\) *Id.*, at 102, 149.

of the Mejelle” were found in official reports to the League of Nations, and there were British judges who expressed regret that “Hitler did not burn the Mejelle”.

English lawyers in Palestine therefore faced a conflict between their desire to preserve the Ottoman legal heritage and their contempt for this heritage. The actual process of anglicization was the result of these two contradictory policies.

III. Anglicizing the Law of Palestine

A. Avenues of Anglicization

1. Historiographical Note: There have been two attempts to describe and explain the process of anglicization of the law of mandatory Palestine, one by Eliezer Malchi and the other by Robert Eisenman. Both described the process as sinus — conservatism in the 1920s, growing

64 Report by His Britannic Majesty’s Government on the Administration under Mandate of Palestine and Transjordan for the year 1924, at 19.
65 Moshe Silberg, “Kinus Ha’yuridicaya Ha’aretz Yisraelit [Compiling Palestinian Case Law]”, Ha’aretz 1934, reprinted in Moshe Silberg, Ba’in Ke’ekhad, (1982) 111, 112. Silberg added sarcastically “his honor forgot only one thing: the Nazis burn only good books”. See also Lahav, supra n. 63, at 245 (discussing British contempt toward Ottoman laws).

The British attitude toward Ottoman law naturally raises the question — wasn’t this description true? Wasn’t Ottoman law really archaic, incomprehensible, harsh? The answer is, of course, that there is no “objective” or “true” description of “reality”. The same images and metaphors used to describe Ottoman law, could just as easily have been used to describe English Law. Certainly many provisions of the Mejelle were “archaic” or incomprehensible (see e.g. Friedmann, supra n. 51, at 197 n. 29; Mejelle, article 1705 (prohibiting “dancers and buffoons” from testifying)). But this is also true of parts of English law. The Common law is certainly disorganized as much, and in some senses, even more than the Mejelle. Parts of the Common law were more archaic than Ottoman law. It is true that Ottoman law was incomprehensible, but incomprehensibility is a relative, not an absolute concept. Ottoman law was incomprehensible to English lawyers. It was comprehensible to Moslem or French ones. Finally, some Ottoman legislation was certainly less harsh and more liberal than the mandatory legislation that replaced it. See Lahav, supra n. 63, at 244 (comparing the Ottoman press law with the mandatory Press Ordinance, 1933). The criticism of Ottoman law was thus only partly the result of “defects” in that law. It was also caused by orientalist notions.
anglicization in the 1930s, and a “reaction” to anglicization in the 1940s.\(^{66}\) Both descriptions did not distinguish between different means of anglicization (legislation and case law, overt and covert anglicization), and therefore lumped together different processes, and saw them as part of one single coherent process. Both descriptions were also based on a positivistic understanding of the law, and did not distinguish between the influence of different players (the Privy Council, the various judges in the Supreme Courts of Palestine, etc.). Below, I will differentiate between various avenues of anglicization, and describe the changing pace of anglicization in each avenue. I will then focus on a single process — the use that the Supreme Court of Palestine made of Article 46 of the Palestine Order-in-Council, 1922 to import English law. I will attempt to connect the way different British judges of the Supreme Court approached Article 46 with their cultural background and colonial outlook.

2. The Framework: The British conquered Palestine in 1917. At first, they held the country by virtue of conquest, but in 1922, the League of Nations granted the British a mandate over Palestine. The change in status of the country meant a change in the duties of the British from the point of view of international law. Instead of preserving the status quo, the terms of the Mandate now required the British to “plac[e] the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home”.\(^{67}\)

The change in the international status of Palestine led to a reorganization of the legal system. The British enacted the Palestine Order-in-Council, 1922 — a “constitution” which delineated the roles of the different branches of the administration. The Order-in-Council envisioned setting up a legislative body which was supposed to be partially representative, but political difficulties soon led to the consolidation of both legislative and administrative authority in the hands of the High Commissioner.

\(^{66}\) See Malchi, supra n. 1, at 12. There are, however, some minor differences in their approach. While Malchi saw 1935 as the starting point of the process of anglicization, Eisenman seems to suggest 1932 as the starting point. Eisenman also placed less emphasis than Malchi on the “reaction” in the 1940s. See Malchi, id., at 15, 123-24; Eisenman, supra n. 1, at 108-9, 110, 135.

\(^{67}\) Article 2 of the Mandate.
Civil Courts were set up, and Article 46 of the Order-in-Council defined the laws which they were to use. The Article was modeled on similar enactments in the British empire, all of which formally attempted to reconcile conservatism and change, by declaring that the Courts shall apply local law, and turn to English law only in case of gaps in local law. Accordingly, Article 46 declared that the Civil Courts shall use Ottoman laws and mandatory legislation. Only “so far as the same shall not extend or apply” shall they turn to “the substance of the common law and the doctrines of equity”.

In theory, the possible scope of importation of English law was narrow. In practice, however, English law was massively imported through various channels, and by the end of the Mandate in 1948, a large portion of Ottoman law was replaced by English norms.

3. Legislation: The most important channel of importation was legislation. Throughout the Mandate, the British administration replaced a large number of Ottoman norms by Ordinances and Regulations based on British or British colonial codes. The process of replacement was done in a logical manner. One can depict the law as consisting of concentric circles, the outer ones “public” and the inner ones “private”. The British legislation process began with replacing Ottoman law in the outer circle, and gradually moved into what the British saw as the more “intimate” or “private” areas of law.

The 1920s were a period of conscious development efforts and these efforts were evident in the amount of legislation passed, to the extent that the Arabs, hostile to changes, talked about the existence of a “legislation factory”. In the 1920s the British repealed most of the Ottoman commercial laws, the Ottoman code of criminal procedure and some Ottoman rules of evidence.

68 As opposed to religious courts.
69 See Tedeschi, supra n. 1, at 221-222; Zweigert & Kotz, supra n. 43, at 234, 237-238. In some of the colonies, the relevant articles also mentioned English statutory law. See Tedeschi, id.; Yadin, supra n. 1, at 59, 61.
The British also engaged in organizing the colonial space, by reorganizing the land registration system, by beginning a cadastral survey of the land, by attempting to settle and register titles to land, and by enacting town planning legislation. "Environmental" legislation, such as the Game Protection Ordinance, 1924, which was aimed at regulating or preventing the use of the natural resources of the land by the natives, was also enacted.\textsuperscript{72}

All these changes were a part of a centralized policy directed from London. A policy aiming at exploiting the natural resources and the labor of the colonies, and turning the colonies into markets for imperial goods. Ordering the land, preserving its resources and changing its commercial laws to ease the penetration of British trade were all meant to achieve these imperial goals.

However, these changes were also partly due to local factors. The process of legislation was orchestrated by Norman Bentwich, the first Attorney General of the Government of Palestine. Bentwich, an Anglo-Jewish Zionist, was keen to facilitate the Zionist program, and so concentrated his attempt on providing Palestine with modern laws that would enable the development of the country.\textsuperscript{73}


\textsuperscript{73} See Bentwich, \textit{supra} n. 36, at 273, 277 (describing the legislation effort as an attempt by an "active administration" or a "progressive administration" to facilitate development and modernization). See also Wasserstein, \textit{supra} n. 18, at 91, 148-151. This pro-Zionist use of legislation was criticized by some in the British administration. See Ashbee, \textit{supra} n. 25, at 234, 269-70 (asking rhetorically is Bentwich the right man "to make laws for this, a Moslem country", and lamenting the commitment of the British administration to the policies of Zionist propaganda, instead of protecting the local inhabitants from industrialization).

A different picture of Bentwich, as opposed to anglicization (of the criminal law) is found in Colonial Office correspondence studied by Prof. Yoram Shachar. In that correspondence, Colonial Office officials constantly complained that Bentwich was opposed to the complete anglicization of certain provisions of the Ottoman Penal Code. See Shachar, \textit{supra} n. 46, at 75, 105-6; Yoram Shachar, "Annea Alpi Din? [Lawfully Raped?]", (1982) 8 \textit{Iyunot Mishpat} 649, at 675; Yoram Shachar, "Kavanat Hamekahokek be Kavanah Tekhila" [Legislative Intent in "Malice Afore Thought"] (1982) 2 \textit{Mekkarei Mishpat} 204, at 207-8. It seems, however, that Bentwich's position was more nuanced. In 1928, for example, he decried "the unsuitability" of the Ottoman Penal Code "to the needs of the modern state", and said that "it cannot be long before what remains of that truncated body will receive decent burial and be entirely replaced". Preface in \textit{The Criminal Law of Palestine — 1928} (Norman Bentwich comp., 1928).
The focus on commercial law was also an attempt to deal with the different populations of Palestine. The Palestine legislator, said Bentwich, is “a circus rider with his feet on two horses, one that will not go fast, and the other that cannot go slow”.\(^74\) The solution adopted was to restrict legislation to specific areas of law. The “main motive of law-making is the demand for modern institutions by the progressive population which came to Palestine from . . . Europe [i.e. the Jews]” said Bentwich in 1932. The Arabs on the other hand, would be “allowed” to keep the law “governing their contracts and simple [sic] dealings”.\(^75\)

It is interesting to note that the early legislation efforts were mainly aimed at those parts of Ottoman law, whose change was seen as politically least dangerous. “The Civil code and the Land code”, said Bentwich, both “regarded as an Eastern and Moslem heritage, were left broadly in force to govern day to day transactions”. But, he continued, “it was otherwise with the Commercial law. No sacredness of religion or custom attached to the Ottoman version of the French code, and the provisions, imported in 1860, were clearly unsuitable for a country developing, under British administration, the enterprise of the most alert commercial people in the world”.\(^76\)

The conscious use of legislation as a tool of development seems to have disappeared in the 1930s, partly, no doubt, as the result of the enforced resignation of Bentwich, after a failed assassination attempt.\(^77\) The major change in the 1930s was the replacement of the French based Ottoman Penal Code and the Code of Civil Procedure. Other changes

\(^{74}\) Bentwich, supra n. 36, at 273.

\(^{75}\) Id., at 273-74. See also Owen, supra n. 41, at 127.

\(^{76}\) Bentwich, supra n. 36, at 274-75. Most of the Mejelle remained in force throughout the Mandate. The only parts of it which were repealed were those parts dealing with arbitration (1926), Partnership (1930), Torts (1947), and (to a certain extent) Bankruptcy (1936). See Eisenman, supra n. 1, at 126-31. A large part of French based Ottoman law was replaced in the 1920s. Another part (criminal law, civil procedure) was replaced in the 1930s.

Perhaps another motive for the replacement of French law was the imperial competition between Britain and France in the Orient. See generally Said, Orientalism, supra n. 7, at 211 (Lord Cromer complaining about the attraction that the “semi educated” “Asiatics and Levantines” have to French civilization, not recognizing the “merit of sincerity” of the “undemonstrative, shy Englishman”).

It is interesting to note that not all British lawyers in Palestine viewed French law as “unsuitable”. See Horace B. Samuel, “From the Palestinian Bench”, (1920) 88 The Nineteenth Century 498, at 500.

\(^{77}\) See Norman Bentwich, supra n. 45.
included an enactment of a Cooperative Societies and Bankruptcy Ordinances. The conservative notions of this period may be illustrated by the fact that while the British repealed the (French-based) Ottoman Code of Civil Procedure, they specifically kept its effect in the Moslem Shari'a courts. As was to be expected, despite their dislike of Ottoman law, and their constant criticism of it, the British administration refused to tamper with the inner core of civil law — the Moslem law based provisions of the Mejelle.  

Only in the 1940s were inroads made into “inner” parts of Moslem law such as tort law. The 1940s were also a period where the idea of legislation designed primarily for one community reappeared. An example of such legislation was the Income Tax Ordinance, 1941 which was mainly aimed at the Jewish community, and labor legislation enacted with the support of the pro-Jewish director of the Department of Labor.

4. Case Law: Article 46 was not the only channel through which judges could import English case law. Many Ordinances included provisions in which the courts were instructed to refer to English law for interpretation. In a few cases, the Ordinance included a provision in which the courts were instructed to fill in gaps in the relevant area of law by reference to English law. Even where there were no such provisions, British judges naturally turned to English law to interpret and supplement the English based Ordinances.

English law was also imported in an unacknowledged or even unconscious fashion, when judges used English norms with which they were familiar, without referring to the terms of Article 46. This process was assisted by native lawyers. Often, both lawyers and judges were unsure if Ottoman or English provisions were applicable, and so they relied on both systems of law.

The final channel of importation was overt anglicization through the use of Article 46. This is the channel on which I will focus.

78 Shachar, supra n. 46 (the history of the Criminal Code Ordinance); Eisenman, supra n. 1, at 120-129 (changes in the Ottoman law of evidence and civil procedure, and the replacement of the Ottoman Code of Civil Procedure).
79 See Reuveni, supra n. 18, at 84-86; Y. Bar Shira, “Hatkhika Hakhadasha Bedine Avoda [The New Labor Legislation]”, (1945) 2 HaPraktit 227; Bentwich, supra n. 19, at 88; Malchi, supra n. 1, at 164.
80 Friedmann, supra n. 70, at 324, 326, 357; Malchi, supra n. 1, at 102-3.
81 Malchi, supra n. 1, at 141.
B. The Supreme Court of Palestine and the Process of Anglicization

1. The Haycraft and McDonnell Courts

(a) English Law and the Early Court: Between 1922 and 1927 the Supreme Court of Palestine was headed by Chief Justice Thomas Haycraft. In 1927, Chief Justice Haycraft was replaced by Michael McDonnell, who served as the Chief Justice of the Supreme Court of Palestine until 1936. The attitude of the Haycraft and McDonnell Courts to anglicization was very similar. I will therefore discuss them together.

During this period, some English law was introduced by the Supreme Court. For example, the Court imported, inadvertently it seems, the English doctrine of consideration.\(^2\) English law was also referred to when British judges interpreted mandatory enactments which were based on English legislation or common law.\(^3\) However, the Court was often quick to recognize differences between the law of Palestine and the law of England as preventing application of English norms,\(^4\) and overall, there was quantitatively little importation of English law.\(^5\)

New legal problems where sometimes solved by the use of Ottoman sources.\(^6\) When the judges were unable to find a solution to the legal problem before them in Ottoman law, this often decided the case, since

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82 Shibel v. Taha, (1931) 2 Rotenberg 425. It took the Court just two sentences to introduce the doctrine. See also Habayeb v. Saba, (1934) 2 P.L.R. 228; Homsi v. Commission on the Finance of the Orthodox Patriarchate, (1934) 2 P.L.R. 114; Malchi, supra n. 1, at 115, 132; Tedeschi, supra n. 1, at 207.

83 See e.g. Alpert v. Chief Execution Officer, (1929) 1 Rotenberg 126; Mottes v. Matzkin, (1931) 4 Rotenberg 1437; Baron v. Bedolach, (1927) 1 Rotenberg 180; Hammameh v. Shifrin, 1 Rotenberg 196; Aboutboul v. Abyad, (1935) 4 Rotenberg 1572; Hinkis v. Attorney General, (1930) 2 Rotenberg 467. See also Malchi, supra n. 1, at 138.

84 Trachtengot v. Wilson, 1 Rotenberg 175; Miara v. Zimmerman, (1933) 2 Rotenberg 708; Durzi v. Najia, (1933) 1 P.L.R. 789.

85 See P. Dickstein, “Hakhraza al Hamishpat Ha’ivri [Proclamation on Jewish Law]”, (1948) 5 HaPraklit 3, 4 (“In the [first] 10-15 years, the inhabitants of Palestine, its judges and lawyers were little aware of the existence of Article [46]. Then came a movement of anglicization . . . legal scholars, judges, lawyers and legislators in a race against one another turned the law of Palestine into English law”). See also “The Legal System”, supra n. 72, at 82-83.

86 See Rosenberg v. Zeidan, (1927) 4 Rotenberg 1337 (discussing Ottoman law and liability for personal injury); Bathum v. Chief Execution Officer, (1934) 2 P.L.R. 40 (deciding that an execution officer cannot force a wife to return to her husband, a decision based on a commentary on the Ottoman Law of Execution).
they did not turn to English law. Sometimes, as in *Khoury*, it seems that the judges genuinely believed that Ottoman law explicitly intended to deny a remedy in certain cases. At other times, however, the possible use of English law was just not considered. When the Court was explicitly requested to declare that an English right, remedy or institution were part of the law of Palestine, it often refused to do so.

There were few cases in which Article 46 was, overtly or covertly, mentioned. In the earliest of these cases, the Supreme Court interpreted the Article in a very restricted manner. Chief Justice Haycraft held that Article 46 gave the judges a privilege to use "rules of equity to be found in English law" when they saw fit. Haycraft's decision seems to indicate that he understood Article 46 not as importing specific English doctrines into the legal system of Palestine, but rather as authorizing the judges to use "equitable" (in the colloquial sense) rules to modify Ottoman law when they thought it appropriate. Article 46 was thus

87 *Municipality of Haifa v. Khoury*, supra n. 3, at 1349 (Frumkin, J., "it can hardly be assumed that the omission of reference to injuries to person is only the result of an oversight or unthoughtfulness").

88 *Pinhasovitch v. Litvinsky*, (1926) 5 Rotenberg 1777 (holding that since "there is no [local] law whereby specific performance can be enforced in Palestine" therefore "the remedy is in damages"). See also *Kamal v. Rokach*, (1926) 1 Rotenberg 30; *Hamanchil Company v. Municipality of Jaffa*, (1926) 4 Rotenberg 1452. Even when English law was used, the Court was often uncertain as to its power to apply it. See *Hazine v. Algemeene Yer Staalmaatschappij Ferrostaal* *Haag*, 4 Rotenberg 1493.

89 See e.g. *Elias v. Director of Lands*, 1 P.L.R. 735 (non-charitable trusts do not exist in Palestine). But see *El Jorf v. Ed Din*, (1934) 2 P.L.R. 138 (English rules of prescription with relations to trustees can be used in the case of a contract for planting of trees). See also *Tedeschi, supra n. 1, at 211-12.

90 *Yared v. Khoury*, (1925) 4 Rotenberg 1209 ("we are by Clause 46 . . . authorized to apply rules of equity to be found in English law when not inconsistent with the Ottoman law"). See also *Zarrub v. Ahyad*, 3 P.L.R. 14 (Baker, J., expressing the same idea); *Malchi, supra n. 1, at 113-14.

91 Such an idea was certainly implied in Judge Frumkin’s opinion in this case. The question before the court was whether prescription was a bar to an action in the case of fraud. Judge Frumkin said that "there should be no excuse under existing Ottoman law why prescription should not run in this case, and I do not think that the application of the rules of prescription would under the circumstances of this case be contrary to principles of equity and natural justice". *Yared v. Khoury, supra n. 90, at 1212* (emphasis added).
seen not as a “pipeline” used to import English law, but as a “filter” of native law, which the judges can use to screen Ottoman law, and weed out those parts which are “uncivilized”. The decision thus reflected the orthodox colonial policy — preserving the existing native laws, and changing only those laws and customs which seemed to conflict with “natural law”.

There were a number of other cases in which Article 46 was used, but overall the early judges of British Palestine seemed to have been “blind” to its effects. “It cannot be contested” said one of the post-1936 Supreme Court judges, that “for some reason” the early Supreme Court “failed” in many instances “to consider certain parts of Article 46”.

(b) Objective Reasons for the Neglect of English Law: Why did the Palestine Supreme Court neglect English law during the first fifteen years of the Mandate? Why did the judges of the Palestine Supreme Court “fail” in many cases “to consider” Article 46?

There were some objective barriers to the introduction of English law. English legal literature was not readily available in Palestine at the time. Many local lawyers, as well as some British judges, were unfamiliar with English law. There was also less pressure to import English law because the massive development of the economy of Palestine occurred mainly in the 1930s and 1940s. Another problem may be our sources. There is also a problem with the style of the decisions. The early decisions tended to be very brief, and it is often difficult to tell the reasons that led the judges to decide one way or the other.

92 The “pipeline” metaphor is often found in mandatory and Israeli legal literature. See e.g. Polonski, supra n. 1, at 184. Prof. Pnina Lahav suggested in an interview the possibility that its source might be found in Jewish law. Prof. Yoram Shachar in interview has pointed to possible literary sources of this metaphor.

93 See e.g. Penhas v. Felam, (1925) 3 Rotenberg 995; Friedman v. Miller, (1931) 2 Rotenberg 788; Raym v. Hadar Hacarmel Cooperative Society, (1933) 3 Rotenberg 1001; Ottoman Bank, Haifa v. Mulki, (1935) 9 Rotenberg 766. See also Chedid v. Tenenbaum, (1933) 2 Rotenberg 406, at 418.


95 Malchi, supra n. 1, at 14, 144.

96 The sources for the period of the 1920s and early 1930s are rather poor. There are collections of judgments from the 1920s and early 1930s, but these collections were compiled in the middle of the 1930s. Only then did regular reports appear, and so the collections of early judgments include only those cases that reached the compilers.
All these factors can explain why there was quantitatively little importation of English law by the judges during this period, yet they cannot explain why the judges did not turn to English law on the few occasions when they noted that Ottoman law did not grant a specific right or remedy. These cases seem to suggest not objective reasons, but “blindness”, which is connected with a culturally conditioned understanding of the world.\(^7\) We must therefore enquire who were the judges of the Supreme Court of Palestine and how did they view the world around them.

(c) The Judges of the Early Supreme Court:

“I would have you know, young lady, that I was brought up at Eton . . . would you like to see the old school tie?” *Palestine Parodies*, 45

One can imagine a scale of attitudes toward the relationship between local and English law. On one end of this scale, one would find the orthodox British colonial notion according to which English law is superior and local law is inferior, but English law should not be introduced into the local legal system, since the natives are inferior too, and therefore should be governed by their own local laws, which are adapted to their condition.

An intermediate position on this scale would be that English law is superior to local law, and should therefore be introduced into the legal system as part of the “civilizatory mission” of the British Empire, which is aimed at bringing the natives up to the level of English civilization.

Finally, on the other end of this scale one would find a position according to which the natives and the English are equal, and English law and local law are comparable. Therefore, those parts of English law that are better than the comparable parts of local law should be introduced, and *those parts that are inferior to local law should not.*

At least some of the judges of the early Supreme Court of Palestine came from a cultural background and held ideas which would place them in the orthodox end of this imaginary scale. One of these judges was Judge Owen Corrie. Corrie was described by Judge Frumkin, the only Jewish Judge on the Supreme Court, as “a graduate of Eton and Cambridge and a member of the English bar”, who “saw himself as

superior to his British colleagues... and it goes without saying that he snubbed his non-British ones, and attempted to erect a barrier between himself and them”. In 1936, Corrie was appointed the Chief Justice of Fiji Islands. “He liked ceremonies”, recounts Frumkin “and when he was transferred to Fiji as a chief justice, he enjoyed the pomp and ceremony which accompany such an office in a far-away colony. He told his friends about the number of boats and servants he had, and sent them a photo of himself in his official dress with a black boy holding the fringes of his gown”.

Similar things can be said about Michael McDonnell, the second Chief Justice. McDonnell was educated at a public school — St. Paul, and then at Cambridge University. In 1909, when he was 27 years old, McDonnell wrote the official history of St. Paul. The 500 page book provides some insight into McDonnell’s mind. The book is based on meticulous historical research, but in essence, it is just a list of the achievements of St. Paul’s graduates throughout the ages: the academic and athletic prizes they won, the books they wrote, the various positions in the British government they occupied. It is a work of an extremely conservative 27 year old man, convinced of the superiority of his class, his education and the tradition he represented.

McDonnell was also an ardent Catholic, and English upper class snobbery was combined in his personality with strong anti-semitism. High Commissioner Chancellor, who was not too pro-Jewish himself, remarked that “like all the Latins in Palestine [McDonnell is] strongly anti-semitic”.

99 Kirk-Greene, id., at 231.
103 Wasserstein, supra n. 18, at 11, 214-15 (McDonnell’s anti-semitic and pro-Fascist stance). McDonnell’s anti-semitism was noted by other contemporaries. See e.g. Frumkin, supra n. 19, at 343. See also Rubinstein, supra n. 36, at 20-21.
The familiar image of the Jews, as different and threatening, can be found in a 1930 contempt of court case decided by McDonnell. In that case, a Hebrew newspaper published an article that claimed, rather Weekly, that the legal system discriminated between Arabs and Jews following the 1929 Arab riots.

In his decision, McDonnell noted that “the traditions of centuries” made contempt of court proceedings rare in England. He then cited a West Indies case which held that “in small colonies consisting principally of a colored population”, the use of contempt proceeding “may be absolutely necessary to preserve in such a community the dignity of, and respect for, the Court”. This case, said McDonnell, was applicable to Palestine. The Hebrew newspaper, he said, “describes itself as a Palestine Labour Daily, the clientele to which it appeals is a cosmopolitan proletariat coming, it may be, from countries where the confidence in the impartiality and probity of the tribunals is not what it is in territories under British rule”. The English “traditions of centuries”, so revered by McDonnell, made contempt proceeding unnecessary in England, but the Jews, implied McDonnell, being a “cosmopolitan proletariat” unused to “British rule”, did not seem to deserve a share in this tradition.

105 Id., at 880, 882.
106 In a similar case decided the same day, the Jewish editor of an English language newspaper which published a translated version of the same article was convicted. In his decision McDonnell said that “we must mark our disapproval of the fact of the editor of an English paper falling into the error of giving further currency to matters such as this”. Attorney General v. Schwartz, (1930) 1 P.L.R. 883, 884 (emphasis added).

McDonnell was pro-Arab, and this attitude eventually led to his early retirement. He was forced to resign in the aftermath of a 1936 opinion, El Qasir v. Attorney General, (1936) 3 P.L.R. 121. This case involved an attempt by the British army to blow up parts of old Jaffa in the early phases of the Arab revolt. Several Arab inhabitants of Jaffa received unsigned official notices informing them that their houses would be blown up as part of a scheme “for opening up and improving” the city of Jaffa. The inhabitants petitioned the Supreme Court and McDonnell in his opinion criticized “the singularly disingenuous lack of moral courage displayed by the administration”. The Government, he said, should have declared “frankly and truthfully” that the demolition was to be carried out for “defensive” rather than “aesthetic” purposes. McDonnell’s opinion in this case made him a hero of the Arab community. See “Chief Justice to Retire”, Palestine Post, Sept. 19, 1936 (mentioning Arab proposals to name a street in Jaffa after him). But this does not mean that McDonnell saw the Arabs as his equals. McDonnell’s criticism was not directed at the action of demolition itself. Rather, McDonnell criticized the Government for failure to abide by the (public
The first Chief Justice, Sir Thomas Haycraft was, like McDonnell, a barrister and a veteran of the colonial service. He seems to have been more learned than McDonnell, and to have had a better grasp of English law. Haycraft was also less partisan than McDonnell. This does not mean, however, that Haycraft's colonial perceptions were less conservative than those of McDonnell. "Haycraft", said Frumkin, "brought with him [from Cyprus] an experience in the ways of law and judges of the east. He knew the soul of the Greek and Turkish judge, and used to joke about their corruption". Palestine was the last station in Haycraft's colonial career. When he came to Palestine in 1921, he was 62 years old, and naturally more conservative. Haycraft's colonial career may also have contributed to his conservatism. He was not involved in legislative activity and was therefore less inclined to be creative as a judge.

Corrie, McDonnell and Haycraft, as well as other judges on the Supreme Court on whose background and character there is less information, were all reluctant to use English law. They seemed to have seen Article 46 as giving the British judges discretion to turn to English law if they thought it appropriate. They rejected the idea that in certain cases the natives could claim English rights or remedies by virtue of the Article.

Their attitude, I believe, stemmed in part from a strong self-other view of the population of Palestine which would have prevented them from thinking that English law (or English "traditions") were applicable to the natives. In the minds of some judges, like McDonnell, this notion was combined with a pro-Arab stance, which also tended to favor the preservation of the legal status quo.

107 Haycraft published a treatise called Executive Power in Relation to Crime and Disorder, or Powers of Police in England, A Short Treatise on the Executive Power Which May be Exercised by Private Citizens and Official Persons for the Pursuit of Crime and the Maintenance of Public Order (1897). Haycraft also had more opportunities to keep in touch with English law during his colonial career. Unlike McDonnell, whose early colonial career was in West Africa, where English law was little used, Haycraft's prior colonial career was in small colonies: Cyprus, Gibraltar, Mauritius and Grenada, where English law was very dominant. See Kirk-Greene, supra n. 98, at 163; Zweigert & Kotz, supra n. 43, at 238; Elias, supra n. 43; Frumkin, supra n. 19, at 243-44; Rubinstein, supra n. 36, at 20.

108 See Frumkin, supra n. 19, at 243-44.
2. The Trusted Court

(a) Introduction: In 1936, the correct interpretation of Article 46 became a subject of controversy among the judges of the Supreme Court of Palestine. The Judges attempted to define the scope of the Article and the relationship between the law of Palestine and English law. Malchi and Eisenman both saw the period between 1936 and 1939 as the zenith of the process of anglicization. Malchi saw the growing anglicization in the end of the 1930s as caused by social and economic pressures from below — the growth in the size of the Jewish community and in the number of Jewish lawyers as a result of the massive immigration from Germany, the corresponding growth in the number of law suits, and the resulting demand for a “modernization” of the law.109

Eisenman, on the other hand, saw the process of anglicization as a process directed from “above”. He talked of a simultaneous, centralized process, conducted in both the legislative and the judicial sphere and orchestrated from London by the Privy Council. The reason for the desire for anglicization in the late 1930s, said Eisenman, was “growing familiarity” of the British with the customs of the country, “increasing impatience at the limitations imposed by these customs”, and the advent of the Second World War, which made the British want to “retrench” and which led them to feel that their administration was going to “continue on indefinitely in Palestine”.110

I believe that both accounts are incomplete. There was no overall process of anglicization. The period between 1936 and 1939 was certainly not the zenith of the process of anglicization by legislation, and even in the case law, one does not see massive importation of English norms. It is true that some English doctrines were imported but if one tried to count the rules that were imported, the results seem a bit meager.111

110 Eisenman, supra n. 1, at 109-10, 130.
111 See e.g. Sherman v. Danowitz, supra n. 5 (Copland, J., saying “certain provisions of the Common law and doctrines of equity have been applied in this country, but they have been applied only to a minor degree. We have, rightly or wrongly, the difference between a penalty and liquidated damages. The doctrine of specific performance and equitable title can now be invoked, and the Common law of rules of evidence are largely applied in the trial of cases in the Courts”). Copland certainly did not mention all the rules imported (especially in contract law), but his list does show that there has been an exaggeration as to the scope of anglicization during the late 1930s. Furthermore, in the late 1930s, the Court tried to reverse some “anglicized” decisions of the early Court. See Palestine Mercantile Bank v. Fryman, supra n. 4 (the doctrine of consideration is not part of the law of Palestine).
As for the causes of anglicization, the causes mentioned by Malchi certainly played a part in the process, but they alone cannot explain it. Malchi saw the Jews as the active element in the process, and the British judges were seen by him only as a passive force, a description which is not accurate. Eisenman did take into account the British involvement in the process. However, his explanation is not supported by any concrete evidence either in the cases or in other contemporary sources.

The “Trusted Court” period, between 1936 and 1941, was one of attempts to find a new balance between the law of Palestine and the law of England. The causes of this attempt were not only economic or social, as Malchi claimed, nor were they strategic, as Eisenman implied. Instead, these attempts were caused by a contingent event — what I believe was an inadvertent remark made by the Privy Council in a 1935 case. This remark caused havoc in the law of Palestine. When the Supreme Court of Palestine attempted to regain balance, each judge reached a different conclusion as to the proper relationship between local and English law. The reasons for the difference were to be found in the background of each judge. The process of anglicization during this period was thus caused by a combination of a contingent event (the Privy Council’s decision) and the changing composition of the Supreme Court.

(b) The New Judges: Around the year 1936, the Supreme Court of Palestine changed its composition. All the British judges retired or left the country, and were replaced by new judges.¹¹²

Judge Owen Corrie left the Court in 1936. He was replaced by Judge Richard Manning. The differences between them were striking. Corrie was a Cambridge educated English snob. Manning, on the other hand, was an Irish “outsider” who began his career in the colonial police and was less well educated than his predecessor.¹¹³

While Corrie attempted to erect barriers between himself and the native judges, Manning breached them. “He treated Palestinian [judges] as colleagues”, said Frumkin “and not only did he see them as his equals but he encouraged them to demand complete and absolute equality”.¹¹⁴ Another aspect of Manning’s personality was his relative unfamiliarity

¹¹² Frumkin, supra n. 1, at 354.
¹¹³ Id., at 348. See also Kirk-Greene, supra n. 98, at 242.
¹¹⁴ Id.
with non-English legal systems. Manning came to Palestine after serving on the Supreme Court in Trinidad, a colony whose legal system was based on English law, and was thus unused to administering non-English norms.\textsuperscript{115}

On the other hand, Randolph Copland, who was appointed in September 1936, seems to have been made in the same mold as Corrie. Copland too was a Cambridge graduate. His prior legal career was as a judge in several District courts of Palestine. He was thus familiar with the law of Palestine. Frumkin described him as "cynical" and mainly interested in deciding cases in the fastest possible way (his nickname was "the broom".)\textsuperscript{116} As is sometimes the case with judges who began their career in the lower Courts, he was opposed to judicial creativity.\textsuperscript{117}

Harry Trusted who was appointed in January 1937, replaced Chief Justice McDonnell.\textsuperscript{118} Before his appointment Trusted served as the Attorney General of Palestine,\textsuperscript{119} and in this capacity was responsible for drafting legislation. Frumkin complained that Trusted "found it difficult to adjust to the fact that he no longer represented the Government. He saw in the laws what other judges did not see, for who if not he, the creator of the law, knew the real intentions of the legislator". His personal character ("severe and easily angered") was manifested in attempts to enforce a military-like discipline on his colleagues, both British and native.\textsuperscript{120}

The opinions of both Copland and Trusted indicate a lack of empathy with the local population, especially with the plight of the Jews at the

115 Id.
116 Frumkin, supra n. 19, at 348-49. See also Rutman v. Khalil, (1943) 10 P.L.R. 407, at 414 (Copland, J. complaining about "the excessive number of actions which these courts — the higher Courts at any rate — unfortunately have to try").
118 Or as the contemporary joke went, McDonnell was replaced because he could not be trusted. Frumkin, supra n. 19, at 347.
119 Kirk-Greene, supra n. 98, at 360.
120 Frumkin, supra n. 19, at 350-52.
time. Judge Manning, on the other hand, not only regarded his native colleagues as equals, he also seems to have sympathized with the local population, both Arabs and Jews. Another British judge, Maurice Green, was appointed in April 1937. Green did not leave a mark on the law of Palestine. He came to Palestine from Cyprus at the end of his colonial career, and had a tendency to concur with the decisions of his colleagues, which earned him the nickname “I agree.”

(c) The Privy Council and Article 46:

“The Lord Chancellor: Where is Jerusalem? Sir Albert: I am instructed that it is a village situated not far from the Dead Sea, Milord”.

Palestine Parodies, 82

121 See e. g. Karwassarsky v. Moyal (1939) 6 P.L.R. 279, at 281 (Copland, J., discussing a change of venue request from the District Court of Arab Jaffa to that of Jewish Tel Aviv, by a Jewish advocate, due to the danger faced by Jews when traveling to Jaffa. Copland rejected the request inter alia because “the petitioner will at any rate be fortified by the knowledge that in encountering the dangers and perils, which he anticipates that he will meet, those dangers and perils will be shared in the same degree by his friend Mr David Moyal [the respondent]. That will, I am sure, prove to be a great consolation to him.”); Seligman v. Attorney General, (1939) 6 P.L.R. 405, at 408 (Trusted, C.J., discussing the conviction of a Jewish advocate for conspiring to aid illegal Jewish immigration (on the eve of the Second World War) and saying “that an educated man, knowing the conditions from which illegal immigrants may come, and the conditions under which they travel to this land, and the consequent ever present danger of contagious or infectious disease, should contemplate assisting them to land . . . is appalling”).

122 Manning was the judge who issued the rule nisi against the Government in the Jaffa case discussed supra n. 106. See El Qasir v. Attorney General, (1936) 3 P.L.R. 121, at 126. But unlike McDonnell, he was not overtly pro-Arab. It is true that some Jews criticized him, apparently because in a frustration of contract case connected with the Arab Rebellion — Palwoodma v. Majdalani, (1937) 4 P.L.R. 271 — Manning failed to decide in favor of the Jewish party. See P. Dikstein, “Atzma’ut Medinit Ve’atzma’ut Mishpatit [Political and Legal Independence]”, (1948) 5 HaPraklit 107, at 112; Ya’akov Meron, “The Mejelle Tested by its Application”, (1970) 5 Isr. L.R. 203, at 206-7. It seems however, that that decision (with which Judge Frumkin enthusiastically concurred) was based on British policy considerations, rather than pro-Arab sentiments. See Eisenman, supra n. 1, at 132-33.

123 Frumkin, supra n. 19, at 349.
The controversy over the correct interpretation of Article 46 was triggered by a 1935 Privy Council decision — *Faruqi v. Aiyub*, a case dealing with damages clauses in contracts.

Ottoman law did not recognize the remedy of specific performance. Parties assured compliance with contracts by relying on damages clauses, which stipulated high amounts of liquidated damages in case of a breach of the contract. The courts of Palestine enforced such clauses, in accordance with the provisions of Article 111 of the Ottoman Code of Civil Procedure, which instructed the Courts to enforce the damages stipulated in contracts “neither more nor less”.

Problems with such a practice were to be found mainly in contracts for the sale of land. In Palestine, Arab sellers often sold land to Jewish buyers. The rise of land prices as the result of the economic and demographic boom between 1933 and 1936, combined with growing nationalist pressures, led many Arab sellers to break their contracts, and thus to be exposed to damage actions. Arab politicians put pressure on the High Commissioner to change the law. A draft bill which was supposed to amend the Ottoman law was prepared in 1935. It was hotly contested by the Jews. It was never promulgated because the decision in *Faruqi I* made it redundant.

The *Faruqi* decisions dealt with a 1929 land purchase contract between Arab parties in which the buyer did not fulfill his obligations. The case reached the Privy Council in 1935. The parties argued various points, but since these points involved the question of the correct translation of Turkish clauses, the Lords decided to remit the case to the courts of Palestine. They added, however, that when rehearing the case, the Courts of Palestine should “bear in mind” that the provisions of the Order-in-Council “do enrich the jurisdiction of the Courts” with the substance of the Common law and the principles of equity, including “the well established [equitable] distinction between penalty and liquidated damages”.

Although an equitable relief against penalty clauses was just what Arab political parties demanded at the time, it is not clear that this was what led to the remark. It seems plausible that this remark may have been the unintended result of a profound ignorance of local conditions,

125 *Faruqi I*, at 392.
127 *Faruqi I*, at 394.
together with a colonial perception of the role of English law in the colonies — i.e., to “enrich” local law with the principles of equity.\textsuperscript{128}

The colonialist basis of the Privy Council’s decision was even more clearly manifested in later phases of this unfortunate case. The Supreme Court of Palestine dutifully heeded the Privy Council’s remark and decided that the clause in question was indeed a penalty.\textsuperscript{129}

The original plaintiffs appealed, and the case reached the Privy Council for the second time in 1941. The plaintiffs claimed that the Privy Council’s remark in \textit{Faruqi I} was based on a misunderstanding of the law of Palestine. The Lords assumed that there was a gap in the local law. However, article 111 of the Ottoman Code of Civil Procedure conclusively dealt with the question of liquidated damages and penalties. There was therefore no gap, and so the equitable distinction could not be imported.\textsuperscript{130}

The Privy Council’s response was to do two contradictory things. First, the Lords tried to disclaim responsibility, by chiding the Palestine Court for “misapprehending” their instructions.\textsuperscript{131} Then, surprisingly enough, they attempted to justify the application of English law:

\textsuperscript{128} The fact that the case was not even reported in English reports may be an indication that the remark of the Privy Council was unintentional. See \textit{Khoury v. Khayat}, (1943) 10 P.L.R. 271, at 279 (referring to “an unreported case of Sheik Suliman v. Michel Habib (P. C. Appeal No. I of 1935”): This claim may be wrong as I did not have the occasion to consult the pleadings in the original Privy Council file in London.

\textsuperscript{129} The case was remitted to the District Court in Jaffa, and was then appealed to the Supreme Court of Palestine. \textit{Faruqi v. Ayoub}, (1937) 4 P.L.R. 331, at 533-34 [hereinafter \textit{Faruqi II}].

\textsuperscript{130} \textit{Ayoub v. Faruqi}, (1941) 8 P.L.R. 116 [hereinafter \textit{Faruqi III}]. The majority of Palestine Supreme Court judges thought that equitable doctrines are not applicable since there is no “gap” in local law. See \textit{Akel v. Alayyan, supra} n. 126, at 325 (Trusted, J.); \textit{Paz v. Zeidan}, (1938) 5 P.L.R. 369, at 371 (Copland, J.); \textit{Khoury v. Slavouski}, (1938) 5 P.L.R. 378, at 385 (Frumkin, J.) See also Tedeschi, \textit{supra} n. 1, at 199 (claiming that finding gaps in the legal system of Palestine can only be done by an internal comparison, rather than by comparing the law of Palestine to English law).

\textsuperscript{131} “It is plain that their Lordships studiously refrained from expressing any opinion as to the effect of this clause [Article 46] upon the issues in this action, and in this respect it would appear that one of the judges of the Supreme Court [Manning] was under a misapprehension”. (\textit{Faruqi III}, at 118).
... under the present system of Palestine such harsh and oppressive terms [i.e. penalty clauses] have to be enforced by the Courts. However, the terms of Article 111 can be readily construed so as to afford the Courts means of giving relief against merely a penal stipulation. The code speaks in a legal system that does not know penalties as such... but when the difference between penalty and liquidated damages is introduced into the legal concepts which now, owing to Article 46 of the Order-in-council, form the jurisprudence of Palestine, the terms of... Article 111 can be given a plain and just meaning [i.e. that the “damages” mentioned in Article 111 do not include “penalties”]... It appears more correct to say that the code must be construed in the light of the doctrines of English law rather than that the English principles relieve against the code. If there is a clear and infrangible antinomy the code must of course prevail.¹³²

Ottoman (or, rather, French) law, said the Privy Council in this paragraph, is “harsh and oppressive”. The (primitive) Ottoman legal system does not recognize the enlightened concept of unenforceable penalties, but now “owing to the generosity of Article 46, which “enriched” the legal system of Palestine with the “light” of English distinctions, Article 111 can be given a “plain and just” meaning. This process of enrichment, said the Privy Council, is magically done without replacing local law, since English law does not “relieve against the code”, but only sheds a “light” on it (a use of English law that is not even mentioned in Article 46). “Of course”, if the (harsh) native law explicitly denies a remedy, English law will not intervene.

These words reflect, in a nutshell, the justification for colonialism: the British build their empire out of charitable purposes — to enrich the natives with the light of British civilization. This task is done, miraculously, without interfering with the native way of life. These words also reflect the British colonial legal policy. The natives are different from the British, and their legal system is inferior. The task of the British is to “enlighten” local law with the light of the “just” principles of equity. At the same time, since the natives are different, they do not really

¹³² Faruqi III, at 120 (emphasis added).
deserve to be governed by English law. Therefore if there is a clear “antinomy”, local law will prevail.\footnote{A truer assessment of the effect of the introduction of the equitable distinction was given by Judge Copland in \textit{Khoury v. Slavouski, supra n. 130 (“The effect [of \textit{Faruqi I} \footnote{Hammad v. Barlassina, (1936) 3 P.L.R. 178. See also \textit{Khoury v. Slavouski, ibid.}} is to nullify the provisions of Art. 111, and the whole basis of the present law of contracts for the sale of land has been cut away”). It is interesting to note that both sides to the political conflict were happy with the result. The Arabs, because of their (short term) victory. The Jews because the case opened the door to the importation of specific performance. The Arab reaction is evident in \textit{Akel v. Alavyan, supra n. 126 (majority opinion of Khalidi, J. and Khayat, J.). The Jewish attitude is described in Malchi, supra n. 1, at 126, But cf. \textit{Khoury v. Slavouski, cit.}, (Frumkin, J., complaining that specific performance cannot be enforced by the courts in some cases, and that therefore penalties are better).}} \textit{Faruqi I} unbalanced the law of Palestine. Its immediate result was the introduction of the doctrine of specific performance.\footnote{Just as they were unaffected by the 1932 Privy Council decision \textit{Chedid v. Tenenbaum, supra n. 93, at 418. See Malchi, supra n. 1, at 113-14. Indeed, as far as I can tell, both Chief Justice McDonnell and Judge Baker ignored \textit{Faruqi I}. The case was decided in September 1935. In January 1936, Judge Baker said in \textit{Zarrub v. Abyad, (1936) 3 P.L.R. 14 that since there was no Ottoman law dealing with the point before him, “we may also call to our aid the provisions of Article 46”. (emphasias added). Judge Baker did not mention \textit{Faruqi I}, and he seems to have used instead the old, \textit{Yared v. Khoury, supra n. 90} approach. In a May 1936 contract case, McDonnell used English law but did not refer to Article 46. See \textit{Rock v. Jaffa Union, (1936) 3 P.L.R. 90.}} But the decision also forced the Supreme Court of Palestine to define the relations between English and Ottoman law, by developing an interpretation of Article 46.

Such a doctrine did not develop immediately. Instead, the cases show uncertainty and inconsistency. It is therefore impossible to provide a simple narrative of development. What is possible, however, is to point to differences in the approach of various judges to English law and Ottoman law. That is what I will attempt to do below.

(d) \textit{Judge Manning}: The \textit{Faruqi I} decision seems not to have had any impact on the decisions of Judge Baker and Chief Justice McDonnell.\footnote{Hammad v. Barlassina, (1936) 3 P.L.R. 178. See also \textit{Khoury v. Slavouski, ibid.}} Of all the new judges, Judge Manning made the most of the decision, but his use of it indicated an attitude very different than the traditional colonial attitude toward local law. First, because Manning was willing to modify Ottoman norms which he thought should be replaced (whereas
the Privy Council, at least in *Faruqi III* stated that explicit provisions of local law cannot be modified). Second, because Manning was also willing to treat local law as equal to English law, and even to see it as superior to English law in some cases.

Manning’s first attempt to define the scope of Article 46 came a year after *Faruqi I* was decided. In October 1935, a case in which one of the parties claimed the remedy of specific performance came before the Court. Manning decided that a remedy of specific performance could be imported into the law of Palestine.\(^{136}\)

There were a number of other cases over the next year in which Manning made use of the Article.\(^{137}\) These cases, however, dealt with procedural and evidentiary matters. When Manning faced the Mejelle, he was less willing to rely on English law. Thus, in a case in which he held that no single article of the Mejelle was exactly applicable to the question before him, Manning did not turn to English law. Instead, he used an article of the Mejelle “which most nearly applies”. The Ottoman law, he concluded, decided the case but, he added as an afterthought, “if Ottoman law is considered too vague or general . . . the principles of English law may be resorted to”.\(^{138}\)

In November 1937, the *Faruqi* case returned to the Supreme Court. As was to be expected, Manning followed the Privy Council’s instructions and used the distinction between liquidated damages and penalties. He also attempted to formulate a coherent interpretation of Article 46, asserting that just as equity modified the Common law of England, so Article 46 modifies the Ottoman law of Palestine. There are two interesting things in this statement — the idea that Article 46 can be used to modify existing Ottoman law, and the comparison that Manning made between the Common law and Ottoman law.\(^{139}\)

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138 *Palwoodma v. Majdalani*, supra n. 122, at 281. In this case Manning expressed a somewhat negative attitude toward the Mejelle, quoting a section of the Mejelle dealing with a contract to pull out a tooth, and saying “the case of the toothache has always struck me as one of those flashes of humor which occasionally illuminate the pages of the Mejelle”. *Id.*, at 279. See also P. Dikstein, “Atzma’ut Medinit Ve’atzma’ut Mishpatit [Political and Legal Independence]”, *supra* n. 122, at 112; Ya’akov Meron, “The Mejelle Tested by its Application”, *supra* n. 122; Eisenman, *supra* n. 1, at 132-33 (discussing the *Palwoodma* decision).
139 *Faruqi II*, at 338.
Manning's willingness to compare Ottoman and English law later turned into a recognition that English law might sometimes be inferior to Ottoman law. In a March 1938 case dealing with a guarantee given without consideration, the District Court decided that since Ottoman law was not clear on this point, the English doctrine of consideration should be applied. The decision was reversed by Manning on appeal. "If the Ottoman Law is not clear", said Manning, "it is the duty of the judge to expound it however difficult it may be", for "in most systems of legislation there are obscure provisions". Moreover, the claim that Ottoman law on this specific point was unclear was wrong because "it is also based on a misconception that a law of contract cannot be complete unless it has [a doctrine of consideration]". Roman-Dutch law and Scottish law do not require consideration, said Manning, and in England itself the doctrine of consideration has become discredited. It is therefore wrong to import "such an artificial restriction on the freedom of contract".

In this case, Manning also offered a detailed version of his vision of the relationship between local and English law. Since Ottoman law had no law of equity in the English sense, all the doctrines of equity could be applied. As for the Common law — when Ottoman law covered a subject (such as guarantee or sale), English Common law could not be applied. However, when a whole branch of the law, "which [is] necessary to the ordered life of civilized communities", was missing in Ottoman law, then perhaps the Court could turn to the Common law.

(e) Chief Justice Trusted: Like Manning, Chief Justice Trusted initially favored English law. But his willingness to import English law seems to have been limited to importing rules of evidence (which, as I said before, were seen as easier to import since they were directed at the British judge, not at the native public). The cases in which Trusted offered a wide interpretation of Article 46 all dealt with evidentiary questions.

140 Palestine Mercantile Bank v. Fryman, supra n. 4, at 162. This was a reversal of his position in the Palwoodma case.
141 Id., at 162, 163.
142 Id., at 163.
143 Id., at 163-64.
As far as substantive law was concerned, however, Trusted seemed to have been far more conservative. An example is found in a late 1937 case which dealt with the applicability of the co-ownership provisions of the Mejelle to a dispute where one of the co-owners was a cooperative society. The provisions of the Mejelle dealt only with natural persons, and Trusted could have easily declared that there was a gap in local law, and English law was applicable. Instead, after noting that "the obscure provisions of the Mejelle are unsuitable to modern conditions", Trusted decided that the Court will nevertheless apply these provisions since modifying the law "is a question for the consideration of the legislature".145

Trusted defined his approach to Article 46 in a May 1938 case, in which the distinction between liquidated damages and penalties was once again discussed. "Resort to English Common law", said Trusted, was possible in cases of "a lacuna and ambiguity" in Ottoman law. It was not possible where there was an "express provision" of Ottoman law, such as the provision of Article 111 of the Ottoman Code of Civil Procedure. Article 46, he complained, "imposes a burden upon the Courts" because it "would seem to vest in them some of the functions of the legislature" which are political in nature (referring to the Jewish-Arab political controversy surrounding contracts for sale of land).146

The last decision was seen as proof that Trusted saw English law as applicable even where express provisions of local law existed.147 But in fact Trusted offered a narrower interpretation of Article 46 than Manning. Manning held that Article 46 could be used to modify express Ottoman provisions, while Trusted rejected this idea.148

146 Akel v. Alayyan, supra n. 126, at 324-25. Trusted was in the minority in this case. The two other judges were both Arab and they both affirmed Manning's decision in Faruqi II, holding that the distinction between penalties and liquidated damages existed in the law of Palestine. This was one of the rare (if not the only) case where the two native judges were in a majority. According to Frumkin, Trusted was "personally hurt when others opposed his opinions". Frumkin, supra n. 1, at 352. It therefore may be possible that Trusted purposely manipulated the composition of the panel in order to express his opinion without upsetting the holding of Faruqi II.
147 Tedeschi, supra n. 1, at 195.
148 See Cotran v. Cotran, (1938) 5 P.L.R. 577 at 590; Attorney General v. Blam., (1939) 6 P.L.R. 247, at 251-52. In another sense, however, Trusted's interpretation was wider. Manning's (final) position was that Article 46 was inapplicable in cases of ambiguity in local law. Trusted thought that the Article was applicable in such cases. See Akel v. Zeidan, (1938) 5 P.L.R. 319, at 325; Attorney General v. Blam., ibid. See also Cotran v. Cotran, ibid.

One should note that although Trusted stuck to a narrow interpretation of Article
(f) **Judge Copland:** Of the three (important) British judges on the Supreme Court at the time, Judge Copland had the most conservative interpretation of Article 46.

Soon after Judge Manning decided that the English remedy of specific performance existed in Palestine, the Supreme Court of Palestine heard a case in which a party claimed to be a *bona fide* purchaser in market overt. The Mejelle was silent as to the rights of a *bona fide* purchaser, and the way was therefore open to the introduction of English law. Copland and Frumkin, who heard the case, held, however, that the notion of market overt may exist in “the city of London” but “this is not the rule in Jerusalem”. 149

Copland, like Trusted and unlike Manning, was opposed to the importation of the distinction between penalty and liquidated damages. He was also not very keen to import the remedy of specific performance. When he discussed that remedy he justified its introduction to Palestine not by reference to Article 46, but by pointing to the fact that since the importation of the distinction between penalties and liquidated damages, “the whole basis of the present form of contracts for sale of land has been cut away”. 150

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46, he did implicitly or inadvertently import English law. See e.g. *George Jacobovitz Building Ltd. v. Jawitz*, (1940) 7 P.L.R. 244 (discussing an action for libel without dealing with the question whether the right to such an action exist in the law of Palestine). In one of his cases, Trusted also mentioned the possibility of introducing the English law of torts by way of Article 46. In practice, however, he was opposed to such a use of the Article. As the Attorney General of Cyprus, Trusted was involved in the drafting of the Cypriot Civil Wrongs Ordinance, in which he attempted to “simplify” English rules so “they may be intelligible and of practical utility to a community unversed in the English common law”. In two letters he sent to the High Commissioner in 1940, he advocated the enactment of that Ordinance in Palestine, and expressed reservations about the importation of the English Common law. See *Attorney General v. Blam*, loc. cit.; *Tedeschi & Rosenthal*, *supra* n. 5, at v.

149 *Kahn v. Spinney’s Ltd.* (1937) 4 P.L.R. 1. In some Palestine Supreme Court cases, the judge who wrote the opinion was not identified. But even if Frumkin wrote the opinion, the fact that Copland concurred at a time when the two other British judges on the Court seemed keen to introduce English law, testifies to Copland’s conservatism.

150 See *Paz v. Zeidan*, *supra* n. 130, at 371 (discussing penalties and saying that “whatever the opinion of individual judges [i.e. Trusted in *Akel*] may be . . . and I am far from saying that I disagree with them — every Court is bound to follow these judgments [which introduced the distinction]). See also *Sherman v. Danowitz*, *supra* n. 5, at 366 (“we now have, rightly or wrongly, the difference between a penalty and liquidated damages”. (emphasis added)); *Khoury v. Slavouski*, *supra* n. 130, at 381 (discussing specific performance).
Copland saw Article 46 as an “equitable” Article. In one case, he refused to turn to Article 46 and to import the English doctrine of assessment of damages in case of breach of contract since, he said, “the manner of calculating damages is not really an equitable rule”.\textsuperscript{151} In his \textit{Sherman} decision, he said,

\textit{For many years the Courts of this country were reluctant to act on Article 46, in my opinion wisely, since the difficulties of introducing the Common Law were too apparent — the doctrines of equity are more easy to bring into force since they are aimed at removing hardship and ensuring fair play.}\textsuperscript{152}

Copland’s attitude toward the introduction of Common law rules was summarized in \textit{Sherman}, where he discussed the introduction of the law of torts. Copland offered various arguments against the importation of the law of torts. Some were based on practical reasons. Copland’s main argument, however, the one which opened his decision, was the argument quoted in the beginning of this paper — the Common law is inapplicable to Palestine because it is the law of “a totally different race”.\textsuperscript{153}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{151} \textit{Paz v. Zeidan}, supra n. 130, at 372.
\item\textsuperscript{152} \textit{Sherman v. Danowitz}, supra n. 5, at 368 (emphasis added). In \textit{Nijm v. Nijm}, (1941) 8 P.L.R. 499, at 505 probably written by Copland, he said, in an (almost) exact repetition of the \textit{Sherman} decision, that “For many years the Courts of this country seemed to show great reluctance in applying the provisions of Article 46 of the Order in Council, which seems unfortunate, but that reluctance has now been overcome”. (emphasis added).

The reason for the Copland’s seeming fickleness may be that the \textit{Sherman} case dealt with Common law rules, while \textit{Nijm} dealt with equitable ones. Another pro English law statement by Copland is found in \textit{Seligman v. Attorney General}, supra n. 121 (“the Ottoman law of evidence was notoriously deficient and antiquated and in practice for many years the Courts of this country . . . have applied the provisions of the English Common law . . . This in my opinion is the correct procedure, and justified by the provisions of Art. 46”). Since English judges saw no obstacle to importing English rules of evidence, this does not seem to me a real exception to Copland’s general attitude.

\item\textsuperscript{153} \textit{See supra} n. 5. Even some of Copland’s “practical” arguments were a reflection of traditional colonial policy. Thus Copland said that “It is not right and possible in my opinion to create a liability which may affect a large proportion of the population when that population has no means of knowing what the extent of that liability is.
\end{enumerate}
\end{footnotesize}
Copland did not refuse to apply the Common law out of respect for the people of Palestine or for local law. He once referred to the law of Palestine as being in “a stage of infancy”,154 and one does not find in his opinions passages in which the local law is seen as superior to the law of England.155

(g) Anglicization and the Trusted Court: The picture that emerges from the discussion above is of a wide variety of approaches to Article 46. The Privy Council’s position was that Article 46 “enriched” Ottoman law, if Ottoman law could be interpreted in “the light” of English distinctions. However, English law was inapplicable where there was an express local provision.

Judge Manning’s final position was that Article 46 imported all of the doctrines of equity, even where these doctrines modified express provisions of Ottoman law. Common law doctrines were to be imported only where whole areas of law were missing from the law of Palestine. When Ottoman provisions existed, it was a “misconception” to see them as incomplete if they did not include English doctrines such as the doctrine of consideration.

It is a fundamental principle that people must have an opportunity of knowing what the law is”. (Id., at 368).

These words echo Warren Hastings, who said in 1774, in response to the suggestion that as a means of civilizing the natives, English law should replace Indian law, that “It would be a grievance to deprive the people of the protection of their own laws, but it would be a wanton tyranny to require their obedience to other of which they have no possible means of acquiring a knowledge”. (quoted in Elias, supra n. 43, at 80). See also Bernard S. Cohn, “Law in the Colonial State in India”, in June Starr & Jane F. Collier, eds., History and Power in the Study of Law: New Directions in Legal Anthropology (1989) 131, 141.

154 See Municipal Corporation of Jerusalem v. Cattan, (1938) 5 P.L.R. 488, at 497. I was referred to this remark by Yoram Shachar (but perhaps one cannot read too much into these words. Copland was repeating Manning’s words in a 1936 case and in any event may have referred only to the case law of the Supreme Court of Palestine).

155 This is true even if we take into account one of the arguments he gave in Sherman against the introduction of the English Law of Torts. “The English Law of Torts” he said, “has been largely amended by statute — if the Courts of this country were therefore to enforce it, we should have to apply only the Common Law, since we cannot apply any statutory amendments — in other words we should apply, in its original customary form, a law which has been found unsatisfactory in certain respects in England”. Sherman, at 368. Note that Copland does not say in this passage that contemporary English law was inferior.
Chief Justice Trusted held that English law could not modify express provisions of the local law, and could be used only in cases of a *lacuna* in local law, or when local law was “ambiguous” or “obscure”. While his attitude towards replacing local law with English law was thus more conservative than Manning’s position, one does not find in his opinions the notion that English law might be inferior to local law in certain cases. On the contrary, Trusted constantly described Ottoman law as “obscure” or “archaic”.

Judge Copland was opposed to the importation of any kind of English law (including doctrines of equity). However, he reluctantly reached the conclusion that Article 46 was to be used, if at all, to import English equity rules. Common law doctrines, at least non-evidentiary ones, were not to be imported.

What accounts for the differences between these positions? There seems to have been a correlation between the cultural background of the judges and their attitude toward Article 46. Copland’s background was very similar to that of McDonnell and Corrie. All three were Cambridge graduates. All came from a social and educational background that tended to encourage the creation of a strong “self” — “other” understanding of colonial relations. It should not be surprising to discover that all three refused to recognize the right of the natives to demand English rights or remedies, while at the same time viewing Ottoman law as inferior.

The Privy Council and Chief Justice Trusted seem to have occupied intermediate positions on the imaginary scale of anglicization which I described above. In the case of Trusted, that position may be attributed to his professional career — the fact that he served as the Attorney General of Palestine before becoming a judge. In the case of the Privy Council, this position can be attributed to the fact that being in London, they did not feel (like some local judges) an urgent need to “police” the boundary between themselves and the natives. On the other hand, this

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156 Of course, this was not the only factor. Certainly part of the difference may be attributed to differing degrees of knowledge of the law of Palestine. The Lords of the Privy Council and Judge Manning were not very familiar with Palestine or its laws. In Manning’s earlier cases one finds expressions testifying to his unfamiliarity and puzzlement with the legal system of the country. See *Palwoodna v. Majdalani*, supra n. 122, at 274, 276-77; *Faruqi II*, at 334. Trusted, and certainly Copland, were more familiar with Ottoman law, and thus more reluctant to turn to English law. Another probable source of difference may be found in differing notions of judicial creativity, Copland being the most conservative, Manning being the least.
also meant that they displayed the traditional colonial notions about the superiority of English law, and about the role of English law in the colonies.

Of all the Judges of the late 1930s, Judge Manning was the closest to the “radical” end of my imaginary scale, both because of his willingness to import English law freely when he thought that “civilized communities” deserved it, and because of his willingness to see English law as inferior in some cases to Ottoman law. Judge Manning’s background as an Irish outsider in the colonial administration may have played a role in forming this attitude towards anglicization.

3. The Gordon-Smith Court

(a) The Judges: The judges of the Trusted Court were gradually replaced in the beginning of the 1940s. Judge Manning left the Court in 1939. He was replaced by Alan Rose, who served before his appointment as the Solicitor General of Palestine. Rose was 40 years old when he was appointed to the Supreme Court. Frumkin describes him as belonging to the “young forces” — British lawyers “free in their beliefs and perceptions”, who came to Palestine in the late 1930s and soon replaced “rigid archaism and formalism” with “logic and common sense”. 157

In the end of 1941 Chief Justice Trusted was replaced by Chief Justice Frederick Gordon-Smith. Frumkin characterized Gordon-Smith in the following manner — “his tenure as Chief Justice was short. He did not get used to the conditions of the place and left the country in 1944”. 158 A note published in the Jewish Bar Association’s journal upon his departure said that “he did not have time to get to know the country and its inhabitants”, and that he “attempted to instill in us love and respect to the foundations of British justice”. 159 Gordon-Smith was less

157 Frumkin, supra n. 19, at 354-55.
158 Frumkin, id., at 463.
159 “Shinuyim Bamangenon Hamishpati [Changes in the Legal Service]”, (Apr. 1944) HaPraklit, 3-4.
of a formalist than other judges, and in some of his cases there were hints of empathic attitude toward local parties.\footnote{160}

Another British judge appointed in 1941 was David Edwards. Before his appointment to the Supreme Court, Edwards served as a District Court judge,\footnote{161} and both the style and the content of his opinions betray his prior position.\footnote{162}

By 1942, all the British judges of the Trusted Court, with the exception of Judge Copland left the Supreme Court. Judge Copland remained on the Supreme Court until his retirement in 1944.

(b) \textit{The Decisions of the Gordon-Smith Court}: The \textit{Sherman} and \textit{Faruqi III} cases ended the debate on the correct interpretation of Article 46. In the early 1940s, some of the more blatantly pro-English decisions of the early Trusted courts were reversed in favor of a return to Ottoman law.\footnote{163}

These developments led Malchi and Eisenman to call the 1940s a period of “reaction” to the process of anglicization. What was the cause of this “reaction”? Malchi mentioned a desire for “stability and clarity”. He also referred to the anti-Jewish policy adopted by the British in the late 1930s and to the effect of the Second World War as factors that led to “the reaction” of the 1940s.\footnote{164}

\footnote{160} “Shinuyim Bamangenon Hamishpati [Changes in the Legal Service]”, \textit{ibid.}, at 4; \textit{Vaad Adat Ashkenazim Be’it Din Hassidim v. District Commissioner Jerusalem}, (1942) 9 P.L.R. 715, at 727; \textit{Ollies v. Superintendent of Detention Camp Maza’a, near Acre}, (1942) 9 P.L.R. 126, at 136; \textit{Schwarz v. Hoiser}, (1943) 10 P.L.R. 170; \textit{Halaby v. Assessing Officer Lydda District}, (1943) 10 P.L.R. 678, at 690. However, his empathic capabilities were sometimes quite restricted. See e.g., \textit{Marx v. Commissioner of Migration}, (1942) 9 P.L.R. 230, at 231 (a case of a refugee from Nazi Germany, in which Gordon-Smith and Copland said that “it may be a hard and harsh case on the petitioner, but with this we are not concerned.”)

\footnote{161} See Kirk-Greene, \textit{supra} n. 98, at 108.


\footnote{164} Malchi, \textit{supra} n. 1, at 15, 153.
But the notion of “reaction” is misleading because the early 1940s were actually a transition period. Not a period of “reaction” and return to the old colonial policy, but rather a period in which a new conception of the law of Palestine began to emerge, a conception which fully bloomed in the late 1940s.

English law was still imported,¹⁶⁵ and not all the judges of the Supreme Court adopted the more conservative, *Sherman* approach to English law. Judge Copland, it is true, adhered to his conservative position,¹⁶⁶ but some of the new judges were more willing to question the *Sherman* decision. Thus in a 1942 action for the breach of a promise of marriage, Judge Rose rejected the appellant’s, *Sherman* based argument, that English Common law was inapplicable to Palestine, and expressed doubts as to the correctness of that decision.¹⁶⁷

Some judges were also willing to import English Constitutional notions into the law of Palestine (and to do that in the middle of the Second World War). In a 1941 case, for example, Judges Rose, Frumkin and Khayat relied on the “fundamental principle of English law that the private rights must prevail over the rights of the community”, to strike down an administrative order appropriating a Haifa apartment.¹⁶⁸

Even in those cases in which the judges stated their opposition to the use of English norms, one often finds that the basis for this opposition was not the existence of Ottoman law, or the difference in local conditions. Rather, the opposition to English norms was now based on the obscurity and complexity of English law, or on the existence of Palestinian case law, which differed from English decisions.

These two kinds of arguments were found in the opinions of Judges Rose and Edwards. One area where their opposition to English law was especially prominent was tax law. In 1941, the British authorities enacted an income tax ordinance, based on an Indian model. Tax law is a subject abhorred by most lawyers and judges. In the early cases which dealt with this ordinance, the judges rejected the use of English prece-

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¹⁶⁸ *Gwurtzman v. Director of Medical Services*, (1941) 8 P.L.R. 533, at 535. See also *Olles v. Superintendent of Detention Camp Mazar'a, near Acre*, supra n. 160.
dents, perhaps in the vain hope that if the parties would not resort to
English case law, the Court would find it easier to decide the cases.

In one of the early tax appeals, Judge Edwards said that he would
not pay attention to all the English cases and literature cited by the
parties since “it would be a pity if in Palestine a huge mass of case law
on this ordinance is allowed to grow up in the manner and to the extent
in which [it did] in England”. In another case, Judge Edwards referred
to an English newspaper article which said that “income tax law in
England was now a ‘tangled morass’”. The obvious conclusion, said
Edwards, was that “one should try to interpret the Palestine Income Tax
Ordinance as far as possible untramelled by authority”.

Judge Rose expressed the same sentiment. It is unlikely, he said, that
the Palestine legislator “desired” to introduce into Palestine “the nice-
ties and complexities of the British Income Tax Law, which in itself is
a highly specialized and fruitful branch of professional activity in En-

gland and the decisions in respect of which are conflicting and in many
instances obscure”.

Willingness to criticize English law was not limited to Income tax. In
a 1942 case dealing with mortgage of chattels which were leased as part
of a hire purchase agreement, English law and the Ottoman Law of
Mortgages led to different results. Judges Edwards and Frumkin de-
decided that the Ottoman law was applicable and added that “we are glad
to come to this conclusion”, because “English judges themselves thought
that the English law on the point was wrong”.

Refusal to follow English law was also based on a feeling of growing
independence (and perhaps professional pride) among the more “local”
of the British Supreme Court judges. Those judges were willing to reject
English rules if they contradicted rules set out in the decisions of the
Supreme Court of Palestine. Thus in a 1940 case, the Court, composed
of Judges Rose, Frumkin and Khayat decided that in case of a conflict

169 Ideal Motion Pictures v. Assessing Officer Tel Aviv, (1942) 9 P.L.R. 481-82. See also
170 Gesundheit v. Assessing Officer, Tel Aviv, (1944) 11 P.L.R. 265, at 269.
171 Halaby v. Assessing Officer Lydda District, (1943) 10 P.L.R. 342, at 346. The judges
were unable to prevent the resort to English case law and in the end they gave in
and routinely turned to English cases. See e.g., Leather Center Ltd. v. Assessing
Officer Jerusalem, (1944) 11 P.L.R. 462, Consolidated Near East Co. v. Assessing
Officer Haifa, (1944) 11 P.L.R. 229.
172 Messrs Kunsler & Co. v. Dr. Raises, (1942) 9 P.L.R. 115.
between English and Palestinian case law, Palestinian case law should be followed.\(^{173}\)

Another example of the preference of Palestine case law to English law is found in a 1944 case, where a conflict arose between Chief Justice Gordon-Smith and the more “local” British judges over the question whether the evidence of an accomplice can serve as a basis for conviction without corroboration. Chief Justice Gordon-Smith, held that there may be some cases in which corroboration would not be required. Judges Rose and Frumkin rejected Gordon-Smith’s opinion. Gordon-Smith, they said, stated “the law in England”, but “as far as Palestine is concerned, certainly for the last seven years, the practice has now crystallized . . . that an accomplice’s evidence needs corroboration”.\(^{174}\)

To sum up, in the early 1940s there was no “reaction” to the process of anglicization, if by “reaction” one means a return to a previous state. It is true that the use of English law was now often rejected, but the causes of that rejection were based on different reasons — on the notion that English law is obscure, or on notions of independence of the case law of Palestine.

(c) Anglicization and the Gordon-Smith Court: As with the Trusted Court so with the Gordon-Smith Court, there was a correlation between the background of the judges and their attitude toward the process of anglicization. Judge Rose belonged to the “young generation” of British lawyers, people who according to Frumkin brought new perceptions to the legal system of Palestine. This can explain both his willingness to question Copland’s Sherman decision, and his willingness to see English law as inferior in some cases to local law. Judge Edwards’ professional pride in the decisions of the Palestinian Courts may account for his refusal to turn to English law. The adherence of Chief Justice Gordon-Smith to English law may be attributed to his unfamiliarity with local law, but it can also be attributed to his traditional belief in the superiority of English law.

\(^{173}\) Khoury v. Khayat, (1940) 7 P.L.R. 191. See also Vadash v. Chief Executive Officer Tel Aviv, (1943) 10 P.L.R. 706. But see Khoury v. Khayat, (1943) 10 P.L.R. 271, at 280 (the decisions of the Supreme Court of Palestine are not “in themselves authorities to establish finally a rule of law contrary to English law”.)

4. The FitzGerald Court

(a) The Judges: In 1944, both Chief Justice Gordon-Smith and Judge Copland left the Court. They were followed in 1945 by Judge Rose. During the final years of the Palestine Mandate, several British judges were appointed as permanent or temporary Supreme Court Judges.175

The Arab presence on the Court declined. In the last years of the Court, only two native judges remained, the eternal Frumkin and Judge Maged Abdelhadi. In numerical terms, the position of Arabs and Jews on the Court was now equalized. In terms of influence on the decisions of British judges, the position of the Jews was now far superior, since Abdelhadi was no match for Frumkin, by far the most senior judge on the Court.176

The most important change during this period was the appointment of Chief Justice William FitzGerald in the middle of 1944. FitzGerald was the former Attorney General of Palestine and like Judge Rose, belonged to what Frumkin called “the new generation” of English lawyers. FitzGerald, “a warm hearted eloquent Irishman”, was similar in many respects to Judge Manning. He was less tied to the British imperial tradition — his relatives were involved in the struggle for Irish home rule. Like Manning, he saw native judges as his equals, and strove to abolish the discrimination between native and British judges. FitzGerald was the most creative of all the judges of the Palestine Supreme Court, disdaining precedents, and basing his judgments on social and historical, rather than doctrinal, considerations.177

175 Among them were Judges Oliver Plunkett, J. H. M. de Comarmond and Judge Bernard Shaw, a nephew of George Bernard Shaw, who unfortunately, did not possess the literary talents of his namesake. See Bentwich, supra n. 19, at 209; Bentwich, supra n. 45, at 240.

176 Abdelhadi was ignored by the British judges. He did not understand English and often, when the translator ceased translating an intricate discussion between judge and lawyer, his colleagues on the bench did not bother to stop in order to enable the translator to translate the argument. See Frumkin, supra n. 19, at 495.

177 Bentwich, supra n. 45, at 210; Frumkin, supra n. 19, at 467; Kirk-Greene, supra n. 98, at 120. See also e.g., Attorney General v. Herskovitch, (1944) 11 P.L.R. 633, 635 (the Court should not follow wrong precedents, justice is preferable to adherence to precedents); Minassian v. His Beatitude Archbishop Mesrob Neshanian, (1944) 11 P.L.R. 191 (sensitivity to social and historical circumstances); Oskarn v. Zenobar, (1946) 13 P.L.R. 49 (applying a rule of civil procedure dealing with villages to a Jewish communal village, taking into account the communal organization); Abu Laban v. Abu Laban, (1944) 11 P.L.R. 550 (interpreting a certificate of partnership
FitzGerald had much more sympathy with the Jewish community than other English judges, and at a time of guerilla war between the British and the Jews in Palestine, when “the British community in Palestine was obsessed with irrational hostility to the Jews”, he was “the most accessible of the English higher officials”.

(b) FitzGerald’s “Law in the Era of Reconstruction” Speech: FitzGerald was appointed Chief Justice in May 1944, a time of great upheaval for the British Empire — a moment before the final victory over Nazism and the subsequent collapse of the Empire. In Palestine itself, great changes were also taking place. The depression of the late 1930s was followed by an economic boom caused by the Second World War, when Palestine became a major industrial and agricultural supplier of the British Middle East. The growth in the power of the Jewish community, the discovery of the horrors of the Holocaust, the need to repatriate the remnants of European Jewry, all would soon after the end of the War lead to a prolonged and violent confrontation between the Jewish community and the British Government, and finally to the partition of Palestine and the establishment of the State of Israel.

These events were bound to effect colonial and legal notions, and they certainly effected FitzGerald, who was less committed to the traditional colonial policies to begin with. An early indication of his ideas is found in a speech which he gave to a convention of the Jewish Bar Association in April 1944, on the eve of his appointment.

with a sensitivity to commercial conditions); Manufacturer’s Association of Palestine v. Chairman and Members of an Arbitration Board, (1944) 11 P.L.R. 187 (rejecting the claim that an award of the arbitration board is ultra vires because it restricts the liberty of an employer to regulate the terms of labor contracts, since the nature of labor relations has changed in the twentieth century).

178 Bentwich, supra n. 19, at 166; Bentwich, supra n. 45, at 210-11. See also William FitzGerald, “The Law in the Era of Reconstruction”, (April, 1944) HaPraktit, 8; “Kabalat Panim Litzkan Hashofetim, [Reception of the Chief Justice]”, (July, 1944) HaPraktit, 27; Weiss v. Assistant Commissioner, Haifa, (1944) 11 P.L.R. 337. The best illustration of his attitude is found in comparing Copland’s cynical opinion in Karwassarsky v. Moyal, discussed supra n. 121, at 281, with FitzGerald’s decision in Litwinsky v. Litwinsky, (1944) 11 P.L.R. 542, at 543, where FitzGerald accepted a very similar request, recognizing the fact that there is a political clash in Palestine.

In the speech one finds mixed together, as often is the case in times of change, old ideas and the germs of new ones. Below, I will attempt both to summarize the speech and point to FitzGerald’s major ideas.180

The title of the speech was “Law in the Era of Reconstruction”. The end of the War, said FitzGerald, will not mean a return to pre-war policies and notions. Rather, a new age — “the Reconstruction Era” will dawn. It will be a period when the “ancient institutions . . . hollowed by tradition”, would be examined, and reformed “with brute frankness”.

Among the institutions that should be reformed is the British legal system. It has sunk into “decay” and “disease”, and it is threatening the health of the British nation. What is the nature of the illness? English law is undemocratic and static. It is based on a medieval tradition that “remained unchanged since the time of Edward the First”. It is unknown and disassociated from the people. English lawyers and judges are a priestly caste, jealously preserving their antiquated medieval traditions and rigid mysterious rituals. They prevent democratization of the law, and thus foster tyranny.

However, said FitzGerald, “although I may think that . . . exaggerated ritualism is out of date in England, I do not condemn it there”, since English law no longer mystifies the English, who are used to it. But there is no justification to “clamp down on the diversified people of the Empire” English principles, which in the “1500 years” of English history have not “commended themselves sufficiently to penetrate the 20 odd miles which separate England from the continent of Europe”.

What should then be the law in the colonies? Although there is a great diversity in the Empire, in practice, the legal systems of the colonies display “a monotonous sameness” — “imported [English] judiciary administering an imported system of jurisprudence”. But “a machine modelled on an instrument invented in England 600 years ago with its apex still in the committee room of the Privy Council” is not “the best instrument for the task of the future”. Therefore, “if we are to avoid terrible upheaval” there should be a devolution of law and its administration. The members of each community should administer the law of the community. The colonial legal systems should reflect the diversity of the people of the Empire.

180 Since the speech is relatively unorganized, I have structured my summary differently than the speech. The speech is relatively short (8 pages), and in order not to encumber the text, I will not refer to specific page numbers.
This, however, does not mean a return to the traditional law of each community. For we should not be “led” by “the light shin[ing] from the graves of the dead”, or allow ourselves “to be dictated to from the graves of men who lived in a different era”. Law should be “flexible and capable of meeting the changing needs of the people”. Both statutory and common law should not be immutable but should change with changing conditions.

Is there no role for English law in the colonies? Here FitzGerald was somewhat ambiguous. “We can, nay we should, gladden those people with the brilliant light of English jurisprudence, but we should adapt that jurisprudence to their own peculiar condition”. The law of England is “as nearly perfect as possible”, but it is not rooted in “the soul” of the people of the colonies, and it cannot therefore “be accorded affectionate respect”. Colonial judges should strive to “follow the light emitted by the British law but with its radiance” to give decisions which “derive their strength . . from their identity with the people”.

In Palestine, specifically, there was “a glorious opportunity”, to do that, “for the old order was swept as clear away as any institution in the course of recorded history”, and replaced “by new and irresistible forces in the emancipation of the Arab and Zionist movements”. But instead of responding to these changes, the British imposed English Common law. “Much of the Common law is derived from Christian Ethics”, and is repugnant to Moslems and Jews. “We can [therefore] scarcely blame Arabs and Jews if they do not share the view [of the Privy Council] that the laws of the colonies are necessarily enriched . . . by importing lock, stock and barrel English common law”.

What did FitzGerald’s speech mean? There were certainly some “old” elements in FitzGerald’s speech. The English/native distinction was still there. Natives were still seen as being in a more primitive stage of development. Thus the dichotomy between reason (modern) — emotion (primitive) was superimposed by FitzGerald on the dichotomy English — native. The English can preserve the mass of fictions of English law because they do not really believe in them, being guided by “reason” which is “the only true force for regulation of human affairs”. The natives however were connected to emotions and primordial forces: “the emotional urges that sway the lives . . . of the diversified people of this Empire”, “the religious significance of Islam, the spiritual urge of Zionism”, the “desire” of Arab unification, the “intensity of Zionist aspirations”, the “irresistible forces” of the Arab and Zionist movements (not to mention “the African philosophy of the forest”).

http://law.bepress.com/taulwps/art81
However, the speech also testifies to the appearance of new ideas, which blurred the old colonial legal notions. For side by side with the English/native dichotomy, new dichotomies appeared: tyranny vs. democracy; immutable tradition vs. dynamic progress; lawyers (and priests) vs. “the People”. These dichotomies undermined the English “us” and the native “them” dichotomy.

The English “us” was broken into two groups (tyrannical, tradition preserving lawyers and democratic, progressive lay people). The native “them” was also broken down. Edward Said has pointed to the traditional colonial conception according to which “although circumstances might differ slightly here and there . . . Orientals were almost everywhere nearly the same”.181 This notion, was replaced in FitzGerald’s speech with a recognition that there is great diversity in the Empire. There were many communities speaking “1000 different languages, [with traditions from] 1000 different sources”, and since each was unique, it was to be treated differently. As far as Palestine was concerned, FitzGerald no longer lumped all the “natives” together, but recognized that there were different communities in Palestine with different needs.

The intrusion of the new dichotomies into the old scheme also led to a breakdown of the old colonial legal notions, both with regard to English and to local law. Thus FitzGerald displayed an ambiguous attitude to English law. The principles of English law were at the same time universal and particular, deserving and unworthy of export. Even his metaphors show this ambiguity. The light of English culture was both positive (“we should gladden those people with the brilliant light of English jurisprudence”), and eerily negative (we failed because we were led by “the light shining from the graves of the dead”).

Similar uncertainty is apparent as to the proper course of colonial law. Colonial judges should use English law, yet refrain from using it. They should turn to the traditions of the people, yet they should refrain from adhering to them (since law should be flexible and progressive).

FitzGerald’s speech was an early indication that new notions of democracy, equality and progress, emphasized time and again in Allied

181 Said, supra n. 7, at 37-38.
propaganda during the War, were undermining the old colonial world view.\textsuperscript{182}

The tension evident in the speech between dynamic notions of law and progress and the respect for static tradition, the willingness to recognize the diversity of the local population, the rejection of the English traditions in the name of universal principles and the rhetoric of democracy were all later found in FitzGerald’s decisions and all shaped his attitude towards anglicization.

\textbf{(c) The Decisions of the FitzGerald Court:} The contradiction between respect and rejection of local customs was found, for example, in some of FitzGerald’s criminal law decisions. In one such case, the use of a dagger by an Arab in self defence was held a permissible act of self defence although this would not have been the case according to English law.\textsuperscript{183} In another case dealing with provocation, FitzGerald proposed to use different tests of “reasonableness” in cases of provocation. In Palestine, he said, there were “different races and even different sub-divisions of those races”. There is no one “reasonable person” but rather each “race” should have it own “reasonable person”.\textsuperscript{184}

However, FitzGerald’s commitment to progress finally led him to reject local customs and traditions completely. This rejection is illustrated by examining the attitude of the Supreme Court to the Arab custom of “preserving family honour” by killing female members of the family who transgressed sexually. In the 1920s, the Palestine Supreme Court, following the provisions of the Ottoman Penal Code, held that the “[bad] conduct and character of the [murdered] woman” was a mitigat-

\textsuperscript{182} Another indication of the same phenomenon is found in a speech given by FitzGerald on the day of his appointment as Chief Justice. In that speech, FitzGerald talked about “Western civilization (i.e., the United States, the British Empire and poor France)” which, he said, was distinguished from other cultures by its adherence to the Law. He also said that “the Law is based on the assumption of equality of all men” which means that “anyone may come and not only request, but demand the rights which are derived from human dignity”. “Kabalat Panim Lizkan Hashoftim, [Reception of the Chief Justice]”, (July, 1944) HaPraktit, 26, 27.

\textsuperscript{183} Bheej v. Attorney General, (1944) 12 P.L.R. 7, at 8 (“deplorable as it may be, we must recognize the fact that some of the people of this territory have not yet reached the state of civilization where the dagger becomes the most abhorrent of all lethal weapons.”)

ing circumstance justifying the reduction in the sentence of the killer. FitzGerald, however, was unwilling to make even that small concession to Arab traditions. In one case, he rejected a defence of preserving family honour without explaining his rejection. In another case he announced that the Court would be unwilling to recognize local customs if they are repugnant to “Natural Justice as Conceived by British Standards”. Finally he reconciled his desire for progress and his commitment to local norms by deciding that the custom of murdering to preserve family honour was not only repugnant to British standards of justice, but also “repugnant to accepted standards of Arab Moslem morality”.

As a proponent of progress, FitzGerald had little respect for Ottoman law, and in some cases he attempted to nullify Ottoman provisions in the name of progress. One example is the preemption provisions of the Mejelle. According to these provisions, when a co-owner sold his property to a stranger, the other co-owners could pay the buyer the purchase price, and gain ownership of the part sold. In one of his early cases, FitzGerald refused to recognize this “archaic” right, designed, he said, for a community where extended families lived in separate houses in the

185 Abu Jasser v. Attorney General, (1927) 2 Rotenberg 543. Article 188 of the Ottoman Penal Code which was still in force at that time, recognized as mitigating circumstances the fact that the murderer saw “his wife or one of his family . . . in the act of adultery” The Criminal Law of Palestine (Norman Bentwich comp., 1928).
187 El Majdoub v. Attorney General, (1945) 13 P.L.R. 69; Kafa v. Attorney General, (1946) 13 P.L.R. 39, 40, 41; Atiyeh v. Attorney General, (1947) S.C.J. 729, 730. See also S. M., “Tzedek Ti’vi Lef Kne Mida Britiyim [Natural Justice as Conceived by British Standards]”, (1946) 3 HaPrakit 209, 210-11 (criticizing the use of the term “Natural Justice as conceived by British Standards” and saying that such customs as murder to preserve family honour could be changed only by “cultural progress”, not by the use of criminal law.)
188 See e.g., Markoff v. Homasi, (1945) 12 P.L.R. 272, at 278.
same compound. "Ancient laws should be interpreted . . . in the light of scientific knowledge and cultural progress", he said.  

The preemption cases also testify to FitzGerald's willingness to recognize the existence of different communities in Palestine, each entitled to its own laws. In the case just mentioned, for example, FitzGerald said that there may be areas in Palestine where preemption provisions "should still be applied", but not when the case involved a "progressive community". Since the case before him was a case of a Jewish merchant, and of urban property, FitzGerald refused to recognize the right of preemption. One can point to a number of other cases, where FitzGerald's decisions were shaped by the existence of specific Jewish institutions or needs.  

FitzGerald commitment to progress often led him to adopt English norms, but his use of English law was not blind. Since he believed that

189 Rafel v. Rachenim, (1944) 11 P.L.R. 367, at 369. See also "Aviv" Aloof Nahagei v. Trauber, (1944) 11 P.L.R. 280, at 282 (Ottoman provisions dealing with "diligences and public coaches must be interpreted in the light of "progress by society" and are therefore applicable to taxi cabs, railways, motor cars, "and even now to commercial aeroplanes"); Levy v. Klein, (1945) 12 P.L.R. 10 (refusing to apply Ottoman provisions of joint ownership to "modern built houses"); A. Hinsheimer, "Shofet Khadaash — Mishpat Khadaash [New Judge — New Law]", (Dec., 1944) HaPraklit, 20 (pointing to the novelty of FitzGerald's approach). See also Shlomo Yifrakh, "Metzranut [Preemption]", 2 HaPraklit, 236 (describing the case law on the subject). Perhaps one should not exaggerate the novelty of FitzGerald's approach to preemption, since even Judge Copland held that the right of preemption was "incompatible with modern living conditions in civilized towns". See Cohen v. Valero, (1938) Apelbaum 1, 338. FitzGerald's notion of progress was not limited to Ottoman law. One can find it in labor cases. See e.g., Manufacturer's Association of Palestine v. Chairman and Members of an Arbitration Board, supra n. 177 (rejecting the claim that an award of an arbitration board is ultra vires because it restricts the liberty of an employer to regulate the terms of labor contracts, since "in the forty fourth year of the twentieth century, it is late in the day to talk about the liberty of the employer to regulate the terms" of employment).  

190 See e.g., Oskarn v. Zenobar, supra n. 177 (applying a rule of civil procedure dealing with villages to a Jewish communal village, taking into account the communal organization); Manufacturer's Association of Palestine v. Chairman and Members of an Arbitration Board, supra n. 177 (recognizing that the existence of Histadruth effects the nature of labor relations in the Jewish community). See also Rokach v. General Officer Commanding British Troops in Palestine and Transjordan, (1947) 14 P.L.R. 154 (recognizing the locus standi of the heads of the Jewish community in certain cases involving Jews); Litwinsky v. Litwinsky, supra n. 178, at 543 (declaring a policy of administrative separation, so that purely Jewish cases will be dealt with by the District Court in Tel Aviv and purely Arab ones in Jaffa).
“the details” of English law were “archaic” and unworthy of export, he tended to extract the more abstract (or “fundamental”) principles from English cases and to apply only those principles to his cases. His approach was unique because he attempted to import to Palestine something which was seen by other judges as particularly English — Common law “fundamental rights” instead of turning to the more universal “equitable rights” mentioned by earlier judges. It was also unique because more than any other British judge on the Supreme Court, FitzGerald was willing to recognize the existence of what he called “the fundamental law of Palestine”.\(^\text{191}\)

Thus, in cases dealing with the interpretation of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, FitzGerald ruled that English cases were applicable since in essence they were just “a restatement of the right of a person to dispose his property as he wishes”. This right, said FitzGerald “is equally part of the fundamental law of Palestine”\(^\text{192}\).

The creation of a Palestinian “fundamental law” was just one aspect of FitzGerald’s commitment to democracy. Another aspect was that the usual term used by the Supreme Court judges to describe the people of

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191 Reference to “fundamental” rights or principles did appear in earlier cases (Gwirtzman v. Director of Medical Services, (supra n. 168, at 535) but FitzGerald used this notion more often than any other judge.

The conventional wisdom is that Constitutional rights appeared in Israeli legal discourse only in the 1950s. Although it is true that the Supreme Court of Palestine often abstractly recognized constitutional rights while rejecting the specific petition before it, still, it is important that in the process of discussing the petition, the Court sometimes did recognize the existence of certain constitutional rights.

192 Greiber v. Baumhall, (1945) 12 P.L.R. 212, at 216 (emphasis added). See also Albina v. El-Ama, (1945) 12 P.L.R. 217. In other cases FitzGerald stated that freedom of contract is “a fundamental keystone of British law” (and by implication, of the law of Palestine), or that the Court “as the long arm of the law” has a duty to protect “the liberty of the subject”. See National Bus Company v. Attorney General, (1945) 12 P.L.R. 321; Zabrowsky v. General Commanding Officer Palestine, (1945) 12 P.L.R. 556, at 557 (discussing a habeas corpus petition but affirming the duty of the Court to protect “the liberty of the subject”); Zabrowsky v. General Commanding Officer, Palestine, (1946) 13 P.L.R. 616 (deciding on appeal that the Common law rules on habeas corpus were applicable to Palestine by virtue of Article 46 (while dismissing the appeal); Funt v. Chief Secretary, (1946) 13 P.L.R. 594, at 596 (the Court as the “long arm of the law, with the power to “protect the liberty of the subject”). The term “liberty of the subject”, taken from English case law, appeared earlier. See Nathan v. Inspector General of the Police and Prisons, (1941) 8 P.L.R. 363.
Palestine — “inhabitants”, was sometimes replaced in FitzGerald’s decisions with the term “citizens”.\(^{193}\)

FitzGerald’s “fundamental law” discourse effected both lawyers and his fellow judges. In the arguments of Jewish lawyers in this period, one sometimes finds references to fundamental rights and to constitutional English documents. FitzGerald usually rejected those constitutional arguments, but he did not do so by an outright rejection of their applicability to the law of Palestine. Instead, he assumed that some fundamental rights existed in the law of Palestine, but that they were not infringed in the case before him.\(^{194}\)

Other judges on the Supreme Court followed FitzGerald’s lead. There were some cases in which the other judges struck down administrative orders requisitioning property,\(^{195}\) and the rhetoric of equality, “citizenship” and “liberty of the subject”, sometimes appeared in their decisions. For example, in a 1946 case, Judge Curry, while upholding a requisition order of a private apartment to house a district commissioner, also severely criticized the Government. The Second World War, he said, was fought in the name of “the freedom of the subject”, and such requisitions cannot be reconciled with this freedom. The fact that “the ordinary

\(^{193}\) Kazak v. District Commissioner Haifa, (1947) 14 P.L.R. 87, 88 (rejecting a petition by an Anglo-Jewish resident of Haifa whose house was requisitioned but referring to the petitioner as a “citizen”). Frumkin used the term “citizen” earlier, but of course, Frumkin was not British. See Sherman v. Danovitz, supra n. 5, at 371, 372 (mentioning “member of the public” and “the citizen”).

\(^{194}\) See Tourgenov v. Chief Secretary, Government of Palestine, (1947) 14 P.L.R. 81, 84 (reference to the English Bill of Rights, Magna Carta etc.); Rosenblatt v. Registrar of Lands, Haifa (1947) P.L.R. 286 (a claim by the petitioner that restrictions on sale of land to non-Arabs, imposed by an Order-in-Council, offends against the fundamental right of every citizen to freely transfer his land and property. This argument was rejected by FitzGerald, but the rejection was based on the assumption that the people of Palestine enjoy the same fundamental rights as English citizens.) One could argue that the turn to fundamental rights was a sign of desperation on part of the Jewish lawyers. That may be so, but one should remember that it would only be possible in a discursive climate in which fundamental rights were sometimes recognized.

\(^{195}\) Lewitt v. District Commissioner, Haifa, (1944) 11 P.L.R. 424 (Frumkin, J.)
citizen” is not “a Government official” does not mean “that he belongs to a lower class of humanity”.196

Generally speaking, however, the other judges on the Court were more conservative than FitzGerald. They often expressed anti-activist or formalist notions, and they were less committed to the notion of progress. For example, while FitzGerald did not see any problem with judicially abrogating the right of preemption, his colleagues refused to follow suit.197

The other Supreme Court judges were also more reluctant to turn to English law. FitzGerald willingly embraced English case law in interpreting the Palestinian criminal clause dealing with provocation, but Judge Edwards, in a late 1946 case, refused to apply English provocation doctrine.198 When the other judges of the Court did use English law,

196 *Sakai v. District Commissioner, Galilee District*, (1946) 13 P.L.R. 216, 218-19 (“The ordinary citizen’s rights have been very seriously curtailed as a result of the Defence Regulations . . . he must often wonder what freedoms remain to him after this war which one understood was fought to establish the freedom of the subject. Because he is not a Government official, it does not follow that he belongs to a lower class of humanity . . . I cannot help feeling that requisitions of this nature increase the bitterness of feeling which undoubtedly exists amongst ordinary citizens against the Government and I do not think that feeling is entirely unjustified. I would express the hope that perhaps the Legal Department would carefully consider the advisability of defending such a use of the power in the future”). *Levy v. Klein, supra* n. 189 (Frumkin, J., stating that the Court will use strict construction in “order to protect the liberty of the subject in disposing of his property”). See also *Salah v. Acting District Commissioner, Samaria District*, (1946) 13 P.L.R. 317 (Shaw and de Comarmond, JJ., affirming a requisition order but “directing” the respondent to enquire whether a part of the requisitioned land could be released).

197 See *Bamieh v. Ali*, (1944) 11 P.L.R. 570, 572 (Rose J., arguing that FitzGerald’s approach to preemption would bar recourse to a remedy provided by the Law, which is “clearly not the duty of the Court”).

198 *Dabit v. Attorney General*, (1946) 13 P.L.R. 437, 440, 442. See also *El Wazir v. Attorney General, supra* n. 184 (FitzGerald, CJ., attempting, unconvincingly, to reconcile Edwards’ approach with his); *Szczupak v. Rapaport*, (1944) 11 P.L.R. 252, 253 (Edwards and Frumkin JJ., refusing to refer to English Common law since the Mejelle applies); *Lande v. Cohen*, (1944) 1944 S.C.J. 364 (Edwards, J., claiming that the right provided by section 1818 of the Mejelle (oath) was not abrogated by the Civil Procedure Ordinance, 1938); *Avinoar v. Chief Execution Officer, Jerusalem*, (1944) 11 P.L.R. 249 (Plunkett, J., refusing to turn to English law in a case dealing with the Ottoman law of execution); *Poishek v. Davidovitz*, (1945) 12 P.L.R. 326 (Edwards, J., refusing to “analyze or even discuss” English case law in interpreting rent restriction legislation, because “it would only make confusion worse”); *Ben Ya’acov v. Forer*, (1945) 1945 S.C.J. 628 (Shaw J., upholding a previous case which held that private trusts do not exist in Palestine).
they often justified it either by finding similar provisions in Ottoman law, or by saying that since a specific English cause of action has been tacitly recognized for a long time, the Court will not interfere. 199

Only in one area were the other judges willing to go further than FitzGerald — the relationship with the Privy Council. In 1944, following a Privy Council decision which criticized a procedural practice of Palestine Courts, Judges Rose and Edwards declared that “it would not be for their Lordships of the Privy Council to prescribe for the Criminal Courts of Palestine what practice should be followed” and implied that they understood the law of England better than the Lords of the Privy Council. FitzGerald, although he himself criticized the Privy Council’s intervention in the law of the Colonies, was nonetheless forced to preserve the authority of the Council, by declaring that his fellow judges did not mean what they said. 200

(d) Orr v. Sherman: We have reached the end of our journey, and the end of the Mandate, and at this end awaits the Orr decision.

Orr should not be seen as an isolated decision. Instead, it should be seen as a testimony to the changes in colonial perceptions that have taken place in the 1940s, as a result of the Second World War, and the beginning of the process of decolonization. Specifically, the case should be read as another expression of the ideas found in FitzGerald’s speeches and decisions: commitment to the notions of progress and democracy, recognition that different communities existed side by side in Palestine, renunciation of British identity in favour of a “Western” one, together with a belief that English law was still superior to all other legal systems, if not in its details then in its principles.

199 See Ayoubi v. Arab Bank Ltd., (1945) 12 P.L.R. 42, 45 (Edwards J., recognizing that the doctrine of quantum meruit may be applied in Palestine “by the combined effect of Articles 568 and 564 Mejelle and Article 46”). But see Agrest v. Fish, (1944) 1944 S. C. J. 139 (Plunkett, J. implicitly importing quantum meruit actions into the law of Palestine without even referring to Ottoman law). See also Nerco Near East Road Construction Co. Ltd. v. Lejwani, (1946) 13 P.L.R. 482 (Edwards and Currry, J.J., refusing to contemplate the appropriateness of importing an action of account, since such an action has been tacitly recognized by the Courts for 23 years).

In *Sherman*, Judge Copland rejected the importation of the Common law because it

is founded on the customs and habits of the English people, developed and extended over many generations, but all the time based on *their* customs and *their* habits. And the customs and habits, mode of life, mode of thought and character of the English people are very different from those of the inhabitants of Palestine. . . . it would be a grave injustice to force on another country a customary law which is founded on the totally different customs and habits of a totally different race.

A second argument used by Copland against the introduction of English Common law was that it is contained in textbooks and cases “which the large majority of the people”, judges and magistrates in Palestine “cannot even read”.\(^{201}\)

In *Orr*, FitzGerald rejected Copland’s first argument, noting that

There is now in Palestine a population of 600,000 Jews with western ideas of culture and western ideas of commerce. There is a progressive Arab population of one and a half million, also with strong cultural and commercial ties with Europe. It may be that some specific form of tortious liability which has its origin in conditions peculiar to the English way of life might be considered out of place in Palestine, but the conception of a person being liable for negligence is far too universal to justify us holding that there is anything in the circumstances of Palestine and its inhabitants which would preclude us from importing . . . English law as to tortious liability.\(^{202}\)

It is obvious that the two decisions reflect two different conceptions of local society.

Copland saw Palestinian society (and the world) as static. He was unwilling to recognize the change in the composition of that society, and he emphasized slowly changing aspects of life (“customs and habits, mode of life, mode of thought and character”).

\(^{201}\) *Sherman v. Danovitz*, supra n. 5, at 367-68.

\(^{202}\) *London Society for Promoting Christianity among the Jews v. Orr*, supra n. 11, at 223.
FitzGerald saw Palestinian society as dynamic, both in the sense that he recognized changes in it ("there is now in Palestine", "a progressive Arab population"),\(^{203}\) and in the sense that he focused on these aspects of personality which could be changed easily ("ideas of culture and commerce" or "cultural and commercial ties").

Copland based his decision on the traditional colonial dichotomy. His world was divided into two — the English people (or English "race") and the people of Palestine (without distinguishing between the different communities). In his world the barrier between ruler and native was impassable, for the natives were required to change their "race" or their "character" (presumably to become an upper class, public school educated Englishmen). This was, of course, impossible since the inhabitants of Palestine were "totally different".

FitzGerald lived in a different world. The English now belonged to a broader category — "the West" (or "Europe"). The inhabitants of Palestine were no longer an undifferentiated mass. Instead, they were divided into two categories — Jews and Arabs. The barriers between all categories were not rigid. What was required of the locals was now not the impossible feat of changing their "character" or "race". All they had to do was to adopt western ways of commerce and culture — the two aspects of bourgeois society with which the West conquered the entire world.

Copland saw the locals as illiterate. English tort law could not be imported, said Copland, for both the native population and "a considerable number of [native] judges and magistrates" cannot read the texts in which the Common law is to be found. This argument seems plausible enough until one thinks of the constant complaints of English judges in Palestine about the Ottoman law being in Turkish. The privilege of administering an inaccessible law seems to have been reserved to British judges. One should also remember that the decisions of the Supreme

\(^{203}\) The reference to a "progressive Arab population" was not merely rhetorical, for the Arab community in Palestine was undergoing a process of change. Although the majority of the Arab population was still rural and uneducated, the social structure of the Arab community had changed. The land-owning class had disappeared, an Arab middle class was being formed, and a process of urbanization was underway. Compare Royal Institute of International Affairs, Great Britain and Palestine 1915-1939: Information Department Papers No. 20A, (1939) 26 with Royal Institute of International Affairs, Great Britain and Palestine 1915-1946: Information Department Papers No. 20, (1945) 30, 33. See also Reuveni, supra n. 18, at 136, n. 43.
Court were published only in English, and so not only English common law, but also Palestine common law was inaccessible to non-English speaking natives. Copland's argument was therefore not so much a practical one, but rather an indication of the condescending attitude of some British judges toward the local population.

FitzGerald did not deal with this argument in his opinion, but in the District Court decision, Judge Ross sensibly used the professional—laymen distinction to assert that the Common law was not known even in England, because case law is, by definition, inaccessible to any layman, be he English or foreign.\(^{204}\)

The parties in Sherman were Jews, but it seems that Copland saw the inhabitants of Palestine first and foremost as Arabs. His decision was based on a paternalistic attitude, in which unwillingness to import the rules of English law was justified by a “concern” for the (Arab) population, and for (Arab) magistrates and judges.\(^{205}\) Copland’s conservatism was perhaps also the result of an unwillingness to upset the “Moslem” provisions of the Mejelle.

If Copland’s decision was “pro-Arab”, FitzGerald’s opinion was “pro-Jewish”. The Jews were mentioned before the Arabs, and the paternalistic urge to protect the natives was gone. The decision was also “pro-Jewish” because it was “pro-progress”.\(^{206}\)

Perceptions of English law also underwent a transformation. Copland saw the Common law as an undivided customary mass of rules which was uniquely English. FitzGerald saw the Common law as composed of “specific forms” and “universal concepts”. English law did not share its “specific forms” with other legal systems, but its “universal concepts” were shared and applicable to all countries.

\(^{204}\) *Orr v. London Society for Promoting Christianity among the Jews*, *supra* n. 9, at 16 (Jerusalem District Court).

\(^{205}\) See also Tedeschi & Rosenthal, *supra* n. 5, at vi (stating that the British administration in 1940s Palestine preferred local legislation to using Article 46 because the use of the Article was seen as giving an advantage to the Jewish community, which, it was assumed, had better access to the English Common law.)

\(^{206}\) Jewish lawyers were insulted by Copland’s decision, because they saw it as lumping together “progressive Hebrew Palestine” and the “backward” Arabs. The result of the Orr decision, though not its reasoning, was (more or less) praised. See L. Bendix, “Al Hagerimim Ha’iratzyonim Bemakhshuvat Hashofet [On the Irrational Factors in Judicial Thought]”, (Oct. 1944) *HaPraklit* 3; A. Polonsky, “Nezikin Bli Khok Nezikin [Torts without a Tort Ordinance]”, (1947) 4 *HaPraklit* 182.
IV. Conclusion

1. Summary

During the Mandate, English norms, English institutions, English rights and remedies were imported by the Supreme Court of Palestine. Different British judges of the Supreme Court had different views about the process and about the relationship between English and local law.

The early Court, headed by Haycraft and McDonnell, had a conservative notion of that relationship. Little English law was imported during the early period, and some of the judges of the early Court understood Article 46 as giving English judges the privilege of using English law, rather than as imposing a duty on them to use English law in certain cases.

In 1936, the attitude of the Supreme Court toward Article 46 changed. A decision of the Privy Council upset the balance of the law of Palestine and forced the Supreme Court to formulate a coherent doctrine of Article 46. After an initial period of uncertainty, each of the British judges on the Supreme Court developed a different interpretation of Article 46.

Although some of the Judges of the Supreme Court, such as Judge Copland, adopted a conservative interpretation of the Article, their interpretation did not completely prevail. In the early 1940s, English law was still being imported. Even in those cases in the 1940s in which judges refused to import English law, the reasoning changed, for judges in the Supreme Court of Palestine now refused to import English law because of its perceived defects.

After the Second World War, English law regained ground, at least in the decisions of Chief Justice FitzGerald, who attempted to reshape the law of Palestine using a creative approach both to Ottoman and English law.

There was a correlation between the way British judges viewed the native "others" and their position with regard to the question of anglicization. The more conservative judges, those which refused to import English law, and at the same time saw English law as superior to local law, were those judges who viewed the locals, both Arabs and Jews, as inferior. The less conservative judges, those who were both more willing to use English law, and also willing to recognize its defects, were those judges whose colonial views were less rigid. These judges shared a common background. The two least conservative British judges, Manning and FitzGerald, were appropriately enough, not even English but Irish.
The transformation in the attitude towards anglicization was not due only to personal changes in the composition of the Supreme Court of Palestine. Broader ideological changes, especially changes caused by the Second World War, also played a part in the changing attitudes of the judges toward anglicization of the law of Palestine.

The 1947 Orr decision was not an isolated decision but rather a reflection of the personal, ideological and cultural changes that occurred in 1940s Palestine.

2. Epilogue

"Let us make a man" says God in the first chapter of Genesis “in our image, in the manner of our likeness”. These are puzzling words. How can man be like God? God is plurality, man is made single. God does not have an image, but man must have one. Man is thus created in the beginning as a hybrid, being like God, yet also being different, partaking in God’s attributes yet in an imperfect way, existing in an intermediate world, between God and the animal kingdom. As such he must sin, and be banished to wander in the world, ever seeking lost perfection.

"Let us make a law" decided the British “in our image, in the manner of our likeness”. A law that will partake in our attributes, but in an imperfect way. A hybrid between the animal and Godly world, between “Civilization” and “the Barbarians”. Thus the law of Palestine was created, an intermediate being, between Ottoman and English law, between East and West, partaking in both yet belonging to none. Condemned to wander in the world seeking a state of lost perfection.

"Let us make a law" demanded Israelis “in our image in the manner of our likeness”. A new law that will reflect our attributes, a nation both ancient and young, traditional and modern, Jewish and secular. Almost fifty years have passed since the creation of the State of Israel and yet little change has occurred. The law of Palestine is still in many respects the law of Israel. There were, of course, practical obstacles on the way to forming an “Israeli” law, yet the real cause is found elsewhere. The law of Palestine has stayed with us, because it is a true reflection of the Israeli condition, a hybrid culture similar yet different, belonging to all and yet to none, forever condemned to wander in the world between East and West seeking a state of lost perfection.

In this sense, the British have succeeded, for they have indeed created a law in our image.