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HISTORIES OF LEGAL TRANSPLANTATIONS

Questioning Harmonization: Legal Transplantation in the Colonial Context

A Comment on: "Some Reflections on the Transplantation of British Company Law in Post-Ottoman Palestine" by Ron Harris and Michael Crystal.

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Questioning Harmonization: Legal Transplantation in the Colonial Context

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Harris and Crystal's fascinating article[1] demonstrates that legal transplantation is not a simple affair, even in a colonial context, where the colonial power would seem to have both the motivation — and the power — to transplant its law unchanged, so achieving maximum harmonization among subordinate legal systems.

To Harris and Crystal, the fact that the Palestine Companies Ordinance of 1929 was not such a simple transplant is puzzling, an historical anomaly requiring explanation. It seems to me, on the other hand, that the discrepancies between the English and Palestinian statutes were wholly typical of British colonial legislation of the period, not a departure from any well-worn path of harmonization. There is, in my view, no *a priori* theoretical reason to expect colonial legislation to consist of direct transplantations from the metropolis to the colonial periphery, nor does the course of colonial legislation in this period bear out the view that this was typically the case as a historical matter. While it is true that as a formal matter, given the menu of legislative tools at their disposal (imperial legislation, Orders in Council, colonial legislation copying or importing British law), officials at the imperial center apparently had the legal power necessary to fully harmonize colonial law with British law, it does not follow: (1) that they typically would have had the political and institutional power necessary to do so in practice; or (2) that this typically would have been their goal.

Harris and Crystal demonstrate that one of the obstacles to the transplantation of English company law into Palestine was the pressure

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1 Ron Harris & Michael Crystal, *Some Reflections on the Transplantation of British Company Law in Post-Ottoman Palestine*, 10 THEORETICAL INQUIRIES L. 561 (2009).

brought to bear on British officials by entrepreneurs and lawyers in both Britain and the colony to adapt the law to their needs.[2] The authors argue that the situation with regard to Palestine was unique in this respect, but my view is that the dynamic described in their article was probably typical. I think it safe to assume that regarding each legal issue, at least some local elites in every colony, as well as some Britons with an interest — commercial, missionary or what have you — in colonial legislation, were likely opposed to harmonization (alongside others who supported it), and that at least some of them would have succeeded in making their opposition felt in policymaking circles at home or abroad. Legislators for a colony, while insulated to some extent from democratic pressures inside the colony, are nonetheless not immune to them, as effective control requires some sensitivity to public opinion in the governed territory. Moreover, if domestic legislation can be understood as the product of competing interest-group pressures, the same is true for colonial legislation, though the number, directions, and magnitudes of the vectors of force will presumably be different in each case.

Taking the argument a step further, one wonders whether the authors' observation that "distinctions between colonizer and colonial subject were blurred"[3] is in fact uniquely valid for the case of Palestine, or rather an apt description of the colonial situation in general. David Cannadine, for one, has documented the ways in which the ruling classes of the British Empire of this period were structured less on distinctions between the imperial center and periphery than on status distinctions that cut across societies.[4] Given this picture, it is likely that, as in the case of Palestine company law, legislation throughout the British Empire in this period was less the result of commands emanating from rulers at the center than the product of a matrix of power centers in the metropolis as well as in the colonies, sometimes working in concert and at other times in opposition to each other.

Even had Westminster officials possessed the effective power to unilaterally impose their legal will on a colony, the question remains whether this was in fact typically their goal. British officials were indeed hostile to Ottoman and civilian-influenced laws that they found in place in the colonies, and often worked to replace them with improved legislation. New laws, however, were not necessarily modeled on English ones. All other things being equal, harmonization was no doubt a policy goal; but competing goals often outweighed it.

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2 *Id.* at 586-87.

3 *Id.* at 587.

4 DAVID CANNADINE, ORNAMENTALISM: HOW THE BRITISH SAW THEIR EMPIRE (2001).

There were a variety of reasons why colonial legislation often did not track the law of the metropolis. One set of considerations had to do with matching the law to local circumstances. As the authors point out, care was often taken not to impinge on local religious and other sensibilities;[5] other factors, too, such as local geography, economic conditions, communal divisions, international commitments, and so forth, would clearly have been strong reasons for divergence. Even when English law was supposed to be transplanted wholesale to the Mandate by the Palestine Order in Council of 1922, it was to be in force "so far only as the circumstances of Palestine and its inhabitants . . . permit and subject to such qualification as local circumstances render necessary."[6] Whereas in many such cases, English law was considered to be too modern for the colony, in others it was English law that was recognized as less than modern, and lawmaking for the colonies recognized as an opportunity for implementing a reformist agenda. The most famous example is probably the Benthamite Indian criminal code,[7] but there were many such cases. For instance, when the Palestine government worked on drafting a Forest Ordinance in the 1920s, it was directed by Colonial Office officials to look not to Britain, which had no forest protection law, but to the laws of other colonies, as forest protection had been a major concern of colonial legislators for many decades.[8]

It thus seems that harmonization was only one mode of legislating in the imperial context, and not necessarily the dominant one. A perusal of the period's issues of the *Journal of Comparative Legislation and International Law*, mentioned by Harris and Crystal,[9] bears this out. Published by the Society of Comparative Legislation in London, the journal had an empire-wide audience.[10] Yet its purpose was not to inform empire lawyers of legal developments in the metropolis, but rather to allow them to apprise one another of developments throughout the empire, and in the wider world as well. The volume of the journal in which enactment of the Palestine Companies Ordinance of 1929 was reported by Attorney-General Bentwich,[11] for instance, also contains its annual review of legislation covering legal

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5 Harris & Crystal, *supra* note 1, at 568.

6 Palestine Order in Council, Aug. 10, 1922, art. 46.

7 *See* Harris & Crystal, *supra* note 1, at 568.

8 *See* David B. Schorr, *Forest Law in the Palestine Mandate: Colonial Conservation in a Unique Context* (forthcoming in a volume edited by Frank Uekötter & Uwe Luebken, tentatively titled MANAGING THE UNKNOWN).

9 Harris & Crystal, *supra* note 1, at 567 n.25.

10 See the list of subscribers at 13 J. COMP. LEGIS. & INT'L L., nos. 2-3, at x (1931).

11 13 J. COMP. LEGIS. & INT'L L., no. 3, at 162 (1931).

developments across the length and breadth of the empire, but also in France and the United States, with the report on the latter including relatively extensive descriptions of legal reform efforts, including Uniform Acts in private law, modernization of inheritance law in New York, experimentation with unemployment relief in Utah, and reforms of criminal law in many states.[12] Moreover, the *Journal* published scholarly articles and reviews on a wide range of Continental- and other foreign-law issues, of little use to harmonization efforts, but of interest to legal officials and others with a comparativist bent. So the same volume that reported on the English and Palestine companies legislation contained an article on the new Dutch company law, as well as articles on various aspects of Continental, religious, and international law (alongside pieces on British and colonial topics).

The journal's editor at the time was F.P. Walton, a former Scottish barrister and dean of the law faculty at McGill, who had published widely on Roman, French, Egyptian, and Canadian law.[13] Like many of the journal's editors and authors, Walton was at home in a variety of legal systems and traditions, including the mixed or civilian systems of many British overseas possessions. Though in his introduction to the annual review of legislation, under the heading "Uniformity of Legislation within the British Empire and Mandated Territories," he observed that particularly in commercial matters, "we find that British legislation tends to be followed in other parts of the Empire," and noted the Palestine commercial legislation in this respect, he went on to highlight legal innovations from all around the world: alternative dispute resolution (conciliation) in South Australia, increased sentences for recidivists in the United States, a novel industry-wide scheme for workmen's compensation in Saskatchewan, state old-age homes in New Zealand, antiquities law in Palestine, and a caribou preserve in Newfoundland.[14] The *Journal*'s mission was not to spread English law throughout the empire, but to allow legislators and legal advisers across the world to borrow what was best from wherever, within the empire or outside of it, they might find it.

To sum up, I believe that on the theoretical as well as the historical level, there is no reason to assume that a legal system, like a sort of organism,

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12 13 J. COMP. LEGIS. & INT'L L., no. 3, at 175-80 (1931).

13 *See* Armand de Mestral, *Bisystemic Law-Teaching — The McGill Programme and the Concept of Law in the EU*, 40 COMMON MKT. L. REV. 799, 802 n.12 (2003); Rootsweb, Frederick Parker Walton, www.rootsweb.ancestry.com/~qcmtl-w/WaltonFredP.html (last visited Apr. 30, 2009); Open Library entry for Frederick Parker Walton, http://openlibrary.org/a/OL726424A/Frederick-Parker-Walton (last visited Apr. 30, 2009).

14 13 J. COMP. LEGIS. & INT'L L., nos. 2-3, at xxviii (1931).

wishes to replicate itself or propagate its genes, nor that it will typically do so, even in the supposedly hospitable environment of imperial relations. Legal transplantation in the British Empire was indeed rampant, but it was multidirectional, with jurisdictions from around the world borrowing freely from each other, from the legal systems of other imperial territories as well as from outside the empire. More generally, the inherent complexity of legislating, even in the colonial context, makes harmonization an unlikely prospect in any empire.