

OSCAR WELLER

›Memory Also Gives a Right‹

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131



Oscar Weller

‘Memory also gives a Right’

Norman Bentwich and the Implementation of the
British Mandate for Palestine

Mohr Siebeck

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For Ezra

‘Memory also gives a right’
Norman Bentwich

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Frankfurt, March 2025

Oscar Weller

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Norman Bentwich, 1931
Drawing: Wladimir Sagalowicz (Sagal); University Library Zurich;
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Chapter 1

Introduction

On January 23, 2002, the Israeli writer Amos Oz appeared on American television to talk about his book *The Same Sea*, which recently had been published in English. The conversation turned to the Israeli-Palestinian conflict and Oz was asked what he thought what ending it might have. The journalist reminded Oz that he, Oz, once had said that he hoped that this tragedy would be resolved in a Chekhovian tradition, where the conflict would still linger with both sides being still frustrated and unhappy, but alive, a clenched teeth compromise, instead of a Shakesperean end, where the stage was covered in dead bodies, but in Oz' words, "justice of sorts" has prevailed. In the conversation, Oz shares his definition of the tragedy, which to Oz was a clash between right and right, where both sides have very powerful, very convincing, and very painful claims and each side believes that they were right.¹

This inquiry goes back to one of the first acts of the tragedy, the British Mandate for Palestine, which was created after World War I. It was the time, when Europe was in shambles, empires have fallen, and political structures and systems were changing rapidly. The modern era promised more equal societies in which women will be allowed to vote and where non-European nations shall no longer be governed by imperialist nations, but international relations shall rather be characterized by mutual respect and regard. This revolutionary concept formed the intellectual backdrop to the new Mandate System, which was agreed upon in the context of the Paris Peace Conference of 1919. Old colonial structures were to be replaced by a "humane" and "caring" support system for those peoples who were not yet "able to stand alone" until they could be released by the Western powers into self-determination. Among all those mandates, the British Mandate, which allotted the former Ottoman province of Palestine to Great Britain, stood out, because it featured one crucial detail: a declaration issued by the British Foreign Secretary Arthur Balfour, in which the British government declared its support to the Zionist movement in the establishment of a Jewish national home in Palestine. The inclusion of the famous Balfour Declaration into the Mandate text made the commitment legally binding, and the British were thereby obliged to fulfill two conflicting demands. One was to respect the rights and interests of all the inhabitants of Palestine, as stipulated in the Covenant of the League of Nations, that would govern the Mandate System. The other was to

¹ See the online transcript "Coping with Conflict: Israeli Author Amos Oz."

promote Jewish settlements in the territory of what was known as Palestine, an endeavor which quickly faced resistance from the local Arab population, who were themselves striving for independence, like their neighbors in Egypt, Jordan, and Syria. The British had walked into a spiderweb and were left with only a sticky way out.

The central subject of this assessment is Norman Bentwich, the first attorney general, who presided over the legal administration in Mandate Palestine for more than ten years. As the highest-ranking legal official, Bentwich was in charge for the implementation of the British Mandate, which, according to his understanding, was the implementation of the Balfour Declaration. Bentwich was not just a British government official, he also supported the Zionist plan of the creation of a Jewish national home in Palestine. Born in 1883 in Victorian England, at a time when Antisemitism was on the rise in Europe and Zionism had transformed from a spiritual idea into a political movement with access to the chambers of political power, Bentwich was immersed in Zionist English life since childhood days. The activist and founder of modern political Zionism, Theodor Herzl, was a frequent visitor at the Bentwich family home. Instilled with a strong Zionist spirit, Bentwich led the transformation of the legal landscape in Palestine to facilitate the Zionist vision of a national home, which eventually became the State of Israel. With his personal background, Bentwich personified the above-mentioned conflict the British administration had created, between the duties of a neutral administrator and the commitment to the Zionist movement. In between these irreconcilable positions, Bentwich had taken on an impossible task. This study aims to retrace the story of this remarkable man, whose legacy often has a negative connotation. I believe there is more behind this, and the intention of this work is to uncover it.

I. Research Puzzle

I came across Bentwich while studying the (legal) history of the British Mandate during my LL.M. studies at the Hebrew University in Jerusalem. There is no comprehensive study of his life or work, at least not in English. However, his name appears in various scholarly legal history publications, and in Assaf Likhovski's seminal work, *Law and Identity in Mandate Palestine*, the words "Norman Bentwich" are literally the first words (see Preface). The prominent position in the book caught my attention. I then came across Mitra Sharafi's review of *Law and Identity* where she noted that the complex mix of Bentwich's personality, the historical circumstances of his lifetime and the law could fill a whole chapter.² After further research, that confirmed my initial curiosity, I thought that Bentwich's story needed to be told.

² Sharafi, "A New History," 1069.

The historical setting of this study are the early years of the British Mandate for Palestine, and the Mandate System of the League of Nations in general. The study will be structured as a legal biography, which is a popular research form in the Anglo-Saxon academic world, where biographies have always enjoyed great appreciation, both in academic and popular literature.³ The American historian James Clifford even called the biography “the most Anglo-Saxon of literary forms.”⁴ A plethora of scientific material on legal biography writing, reaching back to the 1920s, is the result.⁵ For this study, the biographical approach seems most suitable, even though this “genre of mixed quality,” as Richard Posner calls it, is still viewed with skepticism.⁶ Having to weave together multiple disciplines such as history, sociology, and law, deprives the legal biography of a clear-cut academic classification. In addition, the legal biographer faces the challenge of balancing the legal and the non-legal, personal aspects of the subject. Because of the difficulty of overstating the facts, the “sterile & fertile,” and getting to the “soul” of the subject, Virginia Woolf calls the genre “a bastard, an impure art.”⁷ Even though this description is drastic, the methodological issue becomes apparent. The non-legal aspects bring the story to life, but to what extent do they matter and in what detail? There is always the danger of extensively describing an incident or a period in a person’s life which is interesting but not relevant to the overall legal topic. What about the childhood? Does the family matter? There is no universal answer to these questions, every biographer needs to look at each individual case. I believe that, usually, certain elements of the non-legal life of a person should be incorporated, as they provide context and possible explanations for certain behavior.

Another question that comes up in this context is the structure. Gwynedd Parry differentiates between the empirical and the intellectual legal biography. Following the empirical approach, the biographer puts the subject in the center of his or her work.⁸ The focus is solely on this individual, taking into consideration his or her character and using mostly primary sources. The entire work revolves around the subject and his or her actions. This approach was often used in the past to portray the image of heroic lawyers who have fought for justice in court or on the floor of parliament, without putting the individual in a larger legal context.⁹ The intellectual biography on the other hand contextualizes the subject

³ Klein, *Grundlagen der Biographik*, 16.

⁴ Clifford, “Hanging Up Looking Glasses,” 187–188.

⁵ See Hugh Evander Willis’ work, *Introduction to Anglo-American Law. Covering Briefly Legal Philosophy, Legal History, Legal Biography, Legal Bibliography*, published in 1926. In his review of the work, Burke Shartel, is not convinced however, writing: “Philosophy, History, and Biography, stated in such condensed form, will neither arouse the interest of the student nor leave him with any appreciable knowledge of theories, periods, or persons.”

⁶ Posner, “What Books on Law should be,” 860.

⁷ Quoted in Lee, *Virginia Woolf*, 10.

⁸ Parry, “Is legal biography really legal scholarship,” 214.

⁹ Parry, “Is legal biography really legal scholarship,” 212.

within an abstract legal question, where the subject is only an instrument for this approach.¹⁰ Parry uses the term “medium” to describe the individual’s role in the attempt to approach a larger legal topic through the works and life of this person.¹¹ Judicial biographies of prominent judges often qualify for such an approach, especially if they have served during historically turbulent times or decided on pivotal legal questions. This could be an historic event, such the establishment of the State of Israel and the constitutional conflicts arising alongside, which Pnina Lahav describes in her biography of former Israeli chief justice Simon Agranat.¹² Or the work of Marike Hansen, who assesses the path to a more gender-equal society through the works and life of the first female judge appointed to the Federal Constitutional Court in Germany, Erna Scheffler.¹³ In his review of the biography of Thurman Arnold, the co-founder of the prestigious U.S. law firm Arnold & Porter, Mark Fenster applies a more general suitability test for a legal biography. According to Fenster, a legal biography requires “a legal professional whose practice or career path has resulted in a life that even non-family members would find interesting and important.”¹⁴ Bentwich certainly falls into this category. Even though, there is not one law, or one reform connected to Bentwich’s name, his life and career path are certainly interesting to a broader audience and offer a glimpse into a bygone era. Especially, because his field of expertise and interest in legal and philosophical topics spanned different fields and was not limited to matters concerning Palestine. This study however primarily focuses on his time as attorney general in Mandatory Palestine, but also describes his personal life leading up to this position, and the years after. The primary sources are the many books and articles Bentwich had written over the course of his life.

II. The Outline

The study begins with a chapter on Bentwich’s journey from his home country England to Egypt, and finally Palestine. The first subchapter is dedicated to his family background and his education. Bentwich studied law and philosophy at Cambridge and spent some time as a social worker in London, which made him aware of the hardship and suffering of the less fortunate. After he passed the bar exam, Bentwich moved to Cairo, where he worked for an Egyptian ministry and gained his first professional experience as a legal expert in a Middle Eastern country. Egypt at the time was a vassal state within the Ottoman Empire, which

¹⁰ Parry, “Is legal biography really legal scholarship,” 217.

¹¹ Parry, “Is legal biography really legal scholarship,” 217.

¹² Lahav, *Judgement in Jerusalem: Chief Justice Simon Agranat and the Zionist Century*.

¹³ Hansen, *Erna Scheffler (1893–1983): Erste Richterin am Bundesverfassungsgericht und Wegbereiterin einer geschlechtergerechten Gesellschaft*.

¹⁴ Fenster, “The Folklore of Legal Biography,” 1265.

was under the informal control of the British since 1882. The following subchapter elaborates on the political situation and the legal environment Bentwich encountered in Egypt when he became part of a court oversight administration. The subchapter thereafter follows Bentwich's path through World War I, which finally brought him to Palestine in late 1917. The last subchapter of chapter two describes the years of the British military administration in Palestine. Bentwich was at the right place at the right time and became the chief legal officer in the military administration, which put him in charge of law reforms. The military administration in Palestine was still constrained by the Hague Convention and therefore unable to make major legislative changes, until the former Ottoman and German enemy territories were divided between the victorious powers at the 1919 Paris Peace Conference and the civil administration in Palestine was able to begin its work.

Before we look at the legal reforms, in the third chapter we turn to the creation of the Mandate System in general and the Palestine Mandate specifically. The Palestine Mandate was the brainchild of a handful of powerful people who were all driven by a common idea: the creation of a national home for the Jewish people in Palestine. Many of the supporters were not even Jewish themselves but endorsed the Zionist agenda for their own reasons. Most prominent is David Lloyd George, the British prime minister during those fateful years. The principle of self-determination for the people in the former German and Ottoman territories was the overarching theme of the Paris Conference, which however in reality, was only applied if it served the political interests of the main European players, Great Britain, and France. The United States as the rising world power never committed to the League of Nations or to the Mandate System, even though then U.S. President Woodrow Wilson had promoted the foundation of the world organization in Paris.

Chapter four will focus on the implementation of the Palestine Mandate. Bentwich understood the Mandate as the realization of the Balfour Declaration and its promise to the Zionists, to establish a Jewish national home in Palestine. As an official document issued by a state representative, the Balfour Declaration became a document with international legal relevance. The Zionists rationalized the national home in Palestine by means of the historic presence of Jews in the region dating back to biblical times, but how could this rather vague idea be translated into legal terms? Bentwich and more so, his Cambridge colleague Jacob Stoyanovsky provided answers, which are the subject of the introductory subchapter of chapter four. The succeeding subchapters will then each look at an area of law and Bentwich's reform involvement. Before the arrival of the British, Ottoman Palestine was governed by a complex mix of norms with different cultural and religious origins that accommodated the various communities inhabiting the land. According to Bentwich, the legal system in Palestine would not be Mosaic, in reference to the biblical character Moses, but *a* mosaic.¹⁵ He made no

¹⁵ Bentwich, "The Legal System of Palestine under the Mandate," 33.

efforts to disguise his disregard for Ottoman laws, which he thought were antiquated and in need of replacement. This was not just because of the general assumption of inferiority of those laws to Western norms, but also because Ottoman laws were strongly influenced by the laws of France, Britain's competitor in the Middle Eastern power play.

With the Balfour Declaration in mind, it can be assumed that Bentwich used the legal reforms to provide a legal environment that was favorable to the Zionist cause. In the context of property laws, which will be addressed in the following subchapter, the Mandate text gave the British administrators a clear direction. Among other stipulations, Article 11 of the Mandate specified the duties of the mandatory, which was the introduction of a land system appropriate to the "needs of the country," but with the goal of promoting close settlements and intensive cultivation of the land.¹⁶ The Mandate for Palestine was the only mandate that contained such provisions regarding land and settlement.¹⁷ There is already a rich body of literature on the history of Palestine land law,¹⁸ so the subchapter will only touch briefly upon the legal reforms in regard to land law and will primarily focus on a specific land dispute of 1922–1923, in which Bentwich's legal assessment played an important role. In an excursion, the subchapter describes a case involving Russian properties after the 1917 Bolshevik revolution, which Bentwich comments in a publication. Even though Bentwich seems to have been leaning to the left politically, he considered the communist movement a threat, which is expressed in his thinking about Soviet expropriation policies.

The subsequent subchapter will address the matter of citizenship in Palestine, which was very important for the success of the Zionist project. The legal status of the inhabitants in Palestine was intertwined with international agreements on the former Ottoman territories, so the British could not act independently. The Palestine Mandate however was clear on this issue as well and charged the British with enacting a nationality law "framed so as to facilitate the acquisition of Palestinian citizenship by Jews" (Article 7). The British administration began to initiate this process before a legal basis became available with the Treaty of Lausanne. In the context of nationality, Bentwich wrote about two court cases, the famous Mavrommatis concessions case, which was litigated in multiple proceedings before the newly established Permanent Court of Justice, and the Ketter case. Both cases will be discussed in an excursion in this subchapter.

The next subchapter is dedicated to Bentwich and commercial laws. The British Mandate opened opportunities for European businessmen to participate in the economic development. Arable land became a sought-after commodity and entrepreneurs competed for government contracts for infrastructure projects. New businesses needed a "reliable" legal system according to Western standards,

¹⁶ Stoyanovsky, *The Mandate*, 118.

¹⁷ Stoyanovsky, *The Mandate*, 113.

¹⁸ See among others, Stein, *The Land Question in Palestine, 1917–1939*.

which was on the British administration to provide. The subchapter looks at Bentwich's role in the draft of the company ordinance, which is exemplary for the entanglement of personal, political, and business interests, that one stumbles across so often in the history of the Mandate.

The following subchapter is dedicated to personal status laws and the introduction of a criminal code. Palestine has always been a cultural melting pot and the home of various religious communities with different legal traditions. Even within one religion, opinions on certain aspects varied, depending on the level of belief that ranged from ultra conservative to liberal. Regarding the Jewish immigrants, not all were equally observant, and they had different expectations as to what role religion would play in the upcoming society. One contentious issue was the jurisdiction of the Jewish religious courts over personal status matters. Many Zionists who had a secular background, would have preferred to restrict their jurisdiction, as they would tend to render more conservative jurisprudence. Bentwich, who was progressive on social issues, such as women's rights, was aware of this conflict and seems to have grappled with finding a compromise. The subchapter also briefly traces the history of the Palestine criminal code, which is an example for the fallibility of the British administration and the approach to transplant laws from one overseas territory to another.

The following subchapter looks at Bentwich's contribution to the establishment of a legal education system. Bentwich grew up in a household of learning and education has always been a priority for him. He had already demonstrated this during his time in Egypt, when he taught at the Khedival Law School. In Jerusalem, he founded the Jerusalem Law Classes, which admitted Jews and Arabs alike, to receive "modern" formal legal education. Critics point to the colonial character of the education system, which was not designed to train the locals to think critically but to apply the law in a mechanical way. It was only much later, until law was taught as an academic subject. The last subchapter of chapter four describes Bentwich's removal as attorney general. Bentwich did not leave the position voluntarily. There had been resistance against his appointment right from the start, which grew stronger over the years, not only on the Arab side, but also from within the British administration. When the tensions between the Jews and Arabs escalated in 1929, Bentwich became unbearable for the British administration and had to be removed. Bentwich seems to have felt that he had been treated unfairly.

Soon after his removal, Bentwich found new occupations, which will be described in chapter five. The political situation in Europe had changed, when Hitler became German chancellor, and European Jews were in imminent danger. Bentwich restlessly advocated for action against the aggressor and tried to get the League of Nations to intervene, but with little success. Bentwich seems to have always been an optimistic character who believed in the good of mankind, but the horrors of World War II really put his faith to the test. When after the war, a Jewish state finally came within reach, Bentwich still could not rejoice, as the Arab refugees and the deteriorating relationship between the growing Zionist

population and the Arabs were not the prelude he had envisioned for the new Jewish nation. What we can take away from his turbulent life story will be discussed in the concluding sixth chapter.

Chapter 2

From England to the Middle East

“The doctrine on which we, in our family, were brought up was likewise Palestine for the Jews, to be attained with English help. In the years to come the wagon of Zionism was hitched to the English star.”¹
Norman Bentwich

I. Early Life and Education

Norman Bentwich was born in London on February 28, 1883, to Herbert and Susan Bentwich. His father Herbert Bentwich was a well-respected member of the Anglo-Jewish community in London and held an orthodox view on religious matters.² Bentwich describes his father as being a member of the first generation of emancipated Jews; men who were rooted in the Jewish community but at the same time remained loyal to England, a country which had given them the opportunity to reach for higher offices and positions.³ In his professional life, Herbert was a lawyer and a pioneer in the emerging field of copyright law.⁴ Like Herbert, Bentwich’s mother, Susannah (he called her Susan), was also born into a family of mixed origins. Her father was an English leather manufacturer, while her mother came from a Bohemian artistic family from Prague.⁵ Susan herself played the piano and was awarded gold and silver medals from today’s London Academy of Music and Dramatic Arts. She gave up her career, however, when she married Herbert aged only 18.⁶ Although she had abandoned her own musical aspirations, Susan passed her passion for music on to her children by ensuring that each of them learned to play a musical instrument at an early age. She not only fostered the artistic abilities of all her children but also saw to it that Bentwich’s sisters went on to be professionally trained – a progressive attitude uncommon at the time. Bentwich describes his family as having been closely knit. In his autobiography he describes that at home his father represented “the Hebraic

¹ Bentwich, *Seventy-Seven Years*, 12.

² Bentwich, *Seventy-Seven Years*, 3.

³ Bentwich, *Seventy-Seven Years*, 3, 13.

⁴ See the biography of Herbert Bentwich by Norman and his sister Margery, *Herbert Bentwich, The Pilgrim Father*, 132.

⁵ Bentwich, *Seventy-Seven Years*, 4.

⁶ Glynn, *Tidings from Zion*, 3.

element” with strictness and observance of traditional Judaism, in contrast to his mother who ensured that the children would not limit themselves to “Jewish interests or Jewish friends” but also “cultivate a feeling for art and the good things of humanity.”⁷ As a child, Bentwich attended St. Paul’s School in London for six years.⁸

Alongside music, Zionism played a significant role in Bentwich’s upbringing. Zionism was a collective Jewish movement which advocated for the establishment of a Jewish identity and state in Zion, the biblical appellation of the area around Jerusalem.⁹ Zionism became more popular among European Jews throughout Bentwich’s childhood of the 1880s and 90s, when Antisemitism was on the rise in Europe. For instance, after the assassination of the Russian Tsar Alexander II in 1881, pogroms shattered Jewish communities in Eastern Europe. With the notorious May Laws, the Russian government created a hostile environment for Jews, curtailing their ability to engage in both commercial and social activities. Consequently, an increasing number of Jews migrated from Eastern Europe to England, substantially swelling the size of the Jewish communities in London and Manchester. Others migrated to Palestine, a yet sleepy province of the Ottoman Empire, and established settlements there.

In 1894 and the years thereafter, Antisemitism tainted politics in Western Europe as well, when France was shaken by the Dreyfus affair, in which Captain Alfred Dreyfus, who was Jewish, was falsely accused and convicted of treason, and in Austria, the Christian Social Party candidate Karl Lueger was elected mayor of Vienna, having campaigned on an openly Antisemitic and populist platform.¹⁰ Both events were reported on by a Jewish journalist from Vienna, Theodor Herzl. Herzl was an ardent Zionist who called attention to the rising Antisemitism in Europe in his 1896 utopian pamphlet *Der Judenstaat*, in which he promotes the foundation of a Jewish independent state as a solution to the so-called “Judenfrage.”¹¹ Herzl transformed Zionism from a mere ideology into a political movement, openly voicing Zionist interests and bringing the desire for an independent Jewish state, preferably in Palestine, to the attention of European political leaders for the first time.¹²

Bentwich experienced these developments firsthand. His father was a high-ranking member of the Lovers of Zion Association (“Chovevei Zion”), which

⁷ Bentwich, *Seventy-Seven Years*, 5.

⁸ Bentwich, *Seventy-Seven Years*, 10.

⁹ See Gilbert, *Israel*, 3.

¹⁰ In 1895, Lueger became vice mayor and was appointed mayor in 1897. Lueger is considered a mentor to Adolf Hitler, who attended Lueger’s funeral in Vienna in 1910. For details see Wistrich, “Karl Lueger.”

¹¹ The “Jewish Question” refers to a debate in late 19th and early 20th century Europe, addressing the “question” of how to “integrate” Jews into European societies since Jews enjoyed more liberties after the enlightenment period.

¹² See the biography by Avineri, *Herzl*.

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