The Legal Philosophies of Religious Zionism 1937-1967

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ABSTRACT

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This dissertation is an attempt to recover abandoned pathways in religious Zionist thought. It identifies a fundamental shift in the legal philosophy of religious Zionists, demonstrating that around the time of the establishment of the State of Israel, religious Zionists developed a new way of thinking about the relationship between law and the state.

Before this shift took place, religious Zionist thinkers affiliated with a variety of legal and constitutional philosophies. As shown in chapter 1, the leaders of the religious kibbutz movement advocated a revolutionary, almost anarchic, approach to law. They (in theory, at least,) only accepted rules that emerged spontaneously from the spirit of their religious and national life, even if that meant departing from traditional halakha. Others had a more positive attitude towards law but, as chapter 2 shows, differed widely regarding the role of halakha in the constitution of the Jewish state. They covered a spectrum from, at one extreme, the call for a complete separation between religion and state to, on the other, the call a rabbinic oversight of all legislation. They all, however, were legal pluralists; they agreed that a single polity may have within it a plurality of legitimate sources of legal authority and that, even in a Jewish state, other kinds of legislation may hold authority alongside halakha.

In the late 1940s, this wide variety of legal pluralisms in the religious Zionist camp was replaced by a new legal philosophy: legal centralism. This doctrine maintained that all legal authority in
the state must derive from a single source of authority, in this case halakha. As chapters 3 and 4 demonstrate, this shift was associated strongly with the first Ashkenazic chief rabbi of Israel, Isaac Herzog, whose scholarly life had been dedicated in large part to portraying the sources of Jewish law according to the image of state-centered jurisprudence that was valorized by modern legal scholars in Britain and in Palestine. Chapters 5 and 6 make clear that Herzog was not the only figure to adopt this position. It became so influential among religious Zionist leaders that it molded their constitutional fantasies, determined the way they represented themselves to the state and guided the construction of the new system of rabbinical courts.

As well as identifying the shift from legal pluralism to legal centralism, this dissertation attempts to uncover its origins. Through a close reading of rabbinical court records, constitutional pamphlets, speeches, journal articles and halakhic decisions, it traces trends in religious Zionist legal philosophy to modern European jurisprudence. In particular, it demonstrates the influence of British and German jurisprudence on the thinking of religious Zionists. It also places religious Zionist jurisprudence in the context of the legal philosophy of other twentieth-century nationalisms. In so doing, it sheds new light on the conflicts between religious and secular Zionism and on the way that religious Zionists throughout the history of Israel have understood their relationship to the law and politics of the Jewish state.
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Transliteration and Translation

Transliteration from Hebrew follows the SBL General-Purpose Style except where common convention differs.

All translations are my own unless stated otherwise.
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Introduction

Afraid for his life, Éamon de Valera, former President of the Irish Republic, sought refuge with a Zionist rabbi.

The Anglo-Irish Treaty of 1921 had created an Irish political entity that remained under British sovereignty. Although the treaty was supported by many Irish, it was opposed by de Valera and his fellow “anti-treatyites”, who would settle for nothing less than complete independence. This conflict eventually erupted into a full-scale civil war during which de Valera sought shelter under the roof of Isaac Herzog, the Chief Rabbi of Ireland. The two men, who shared an antipathy for British imperialism, enjoyed each other’s company. Evidently, de Valera trusted Herzog to hide him from violence. In 1937, after years of struggle, de Valera finally oversaw the enactment of the new Constitution of Ireland and the establishment of a completely independent Irish state. In that same year, Herzog took up the post of Ashkenazic Chief Rabbi of Palestine and began his own work on a constitution for the Jewish state that he hoped would soon be established.

Ostensibly, Herzog’s constitutional writings have little in common with those of de Valera, or with the legal and political discourse of any modern European state. Herzog’s writing is in the language of the rabbis, thick with Talmudic references, halakhic arguments and quotations from medieval jurists. In this sense, he was representative of all religious Zionists, who were not only committed to the vision of an independent Jewish nation state, but also to the authority of the
Jewish religious tradition. This dual commitment gave rise to tensions in many spheres, including that of legal and political theory. A foundational principle of the modern democratic state is that sovereignty derives from the people whose will is the source of all law. According to traditional Jewish belief, however, law derives from the will of God as revealed at Sinai and interpreted in the canonical texts. Religious Zionist leaders had to synthesize these two fundamentally different worldviews, each with its own legal and political language. In the words of Herzog, the state had to be “theocratic-democratic.”

How can a state be both theocratic and democratic? This dissertation tells the story of a significant shift that took place in the way that religious Zionists answered that question. Pre-modern Jewish communities had a pluralistic attitude to law, recognizing that no one institution, not even halakha, has a monopoly on legal authority. Just as halakhic law was binding, so was the law that originated with the lay leadership of the community and the Gentile ruler. For decades, this pluralistic attitude was the foundation of religious Zionist articulations of a vision of a Jewish state in which the Jewish tradition had a place, but only alongside a democratic legislature and a secular judiciary. In the months before the state was established, however, a different approach to law began to take hold in religious Zionist circles. Legal pluralism was replaced by another legal philosophy, conventionally called legal centralism, which insisted that all law and all legal authority had to be vested in one source: the state. Closely associated with Isaac Herzog, this new philosophy slowly rose to dominance in the first few years of Israel’s

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1 The term “religious Zionism” has become the conventional term for Orthodox Jewish Zionists, most of whom were affiliated with Mizrahi or Ha-Poel Mizrahi.
existence and had a tremendous impact on the shaping of religious Zionist policies and institutions.

This shift had profound consequences for the future of the Jewish state. A pluralistic outlook allowed religious Zionists to give the state its due while leaving room, at least in theory, for the independent status of religious law and rabbinical courts. However, for the centralist outlook, according to which the state was the origin of all law, to be combined with religious sensibility, the association between religious and state law had to be far more comprehensive. This shift in legal philosophy, then, had to be accompanied by a corresponding shift of the general attitude of religious Zionists towards the state, an increased interest in the centralization and bureaucratization of the rabbinate, and an enduring desire to bring the state under the umbrella of halakha.

The following chapters lay out the evidence for this transition. They also try to explain why it occurred. To be properly understood, religious Zionist discussions of law and constitutional theory must be placed in the context of wider jurisprudential trends. The rabbinical idiom in which religious Zionists wrote often belied their debt to modern European legal theory. The unstated assumptions behind their approach to law and their vision of the shape of the constitution was drawn, sometimes consciously and sometimes not, as much from Weimar German and post-Victorian England as from the Talmud and Maimonides. The shift from legal pluralism to legal centralism among religious Zionists mirrored a similar shift in the legal philosophy of modern Europe and of nationalist movements the world over, not least among the secular Zionist élite during the same period.
My work engages with four overlapping scholarly conversations. The first regards the place of law in the formation of modern identity and nationalist culture, and of Zionism and the State of Israel in particular. Law is an expression of culture, embedded in an environment that it creates and by which it is created. This makes it into a valuable object of historical study, capable of shedding light on socio-political, economic and intellectual structures. This is particularly true of constitutional law, which provides particularly important insight into political culture and civic identity. Law has always played a significant role in the forging of Zionist identity. Many Zionists considered the cultivation of a unique legal culture to be important to their nationalist project in the same way as the creation of a modern Hebrew language. Law itself has both addressed and reflected tensions and trends in Israeli society regarding the role of religion and the place of minorities in the state, amongst a host of other existential questions about what it means to be a “Jewish and democratic” state. The Supreme Court, since its early days, has been a lightning rod for existential debates about the meaning of the state. It has been vilified in the

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eyes of some, while others have considered it to be a saving grace of Israel’s political culture. Indeed, many, from the founding of the state until today, have invested considerable hope in the use of a constitution as a tool to heal the rifts in Israeli society by articulating a consensus between its various populations and interest groups. My analysis of the religious Zionist approach to legal and constitutional theory will contribute to this conversation by exploring the approach of one subset of Israeli society to these important issues.

The second conversation regards the relationship between religion and state in Israel, and the study of religious Zionism itself. The religious response to Zionism and the relationship between religion and the State of Israel has been analyzed from theological, political, legal and sociological perspectives. Little attention, however, has been paid to the religious Zionist attitude to law in a historical perspective. There has been a huge output of legal scholarship on the subject under the category of Mishpat Ivri, Hebrew law. This term has had various meanings. As discussed below, it was the name given to the movement that tried to reinvent Jewish civil law for application in a modern Jewish polity in first half of the 20th century. Today, however, Mishpat Ivri refers primarily to the academic study of Jewish law using the terminology and

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methodology of modern legal studies. In this vein, there have been many treatments of the ways in which Jewish law was thought to understand the modern state and its institutions.

Methodologically, however, this research is juristic rather than historical; it generally attempts to produce a static and internally coherent picture of the law in theory rather than to investigate the dynamics of change or questions of causation. Similarly, there have been countless articles and books from within religious Zionist circles that deal with the relationship between the state and the Jewish tradition. These, too, however, are predominantly legal explorations rather than historical investigations. In recent years, scholars have become more interested in a historical analysis of this topic. A number of articles have been produced using extensive new archival research. My work engages with this new work from the perspective of intellectual history.

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11 See, for example, the journals ha-Torah veha-medina and Tehumin. On the former, see: Mark Washofsky, “Halakhah and Political Theory: A Study in Jewish Legal Response to Modernity,” Modern Judaism 9, no. 3 (1989).


The third conversation is the scholarly engagement with Jewish political thought. The beginnings of Jewish historical study in the nineteenth century tended to downplay the importance of a distinctively Jewish approach to political thought. In the twentieth century, however, a number of leading Jewish historians produced important works about the legal and constitutional history of Jewish communities. More recently, this historical work has been complemented by an impressive array of scholarship from the disciplines of law, political science and intellectual history. This dissertation is a further contribution to the understanding of the ways in which Jews have thought about politics and the interaction between religious law and political life.

Finally, my work is situated in the field of the history of political thought. In particular, it engages with the study of the relationship between religion, politics and law in the modern world. Since the early part of the twentieth century, the dominant theoretical approach to this

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field has been that of “secularization theory,” associated most closely with Max Weber. According to this approach, the inevitable consequence of modernity was the demystification of the world and the gradual disappearance of religion in the face of a worldview based on reason. In recent years, this theory has been undermined on two fronts. First, religion, far from melting away, has become demonstrably more prominent and has become an increasingly important factor in political culture all over the world. Second, many scholars have demonstrated that the structures of modern society have not abandoned religion and that archetypally modern phenomena such as the nation state have religious ideas at their core. It is not just religious ideas that have shaped modernity, however. The converse is also true: religious ideas are shaped by their interaction with modernity. This dissertation is a case study in the ways in which religious groups and their ideas are conditioned by their collision with modern conditions. It demonstrates that even, and perhaps especially, when religious culture resists modernity, it assimilates some of its most fundamental features.


My methodological allegiance is primarily to this fourth conversation, of the history of political thought. I have received some inspiration from the “Law and Culture” movement within the legal academy which has showcased a compelling way of speaking about culture with a special sensitivity to the internal logic of law as a discipline.¹⁹ Fundamentally, however, my work is not a cultural history, (“history in the ethnographic vein,”) but an intellectual history, a history of political thought with a particular emphasis on the history of jurisprudence.²⁰ I have tried to model myself on the theoretical approach of the so-called “Cambridge School,” epitomized in the work of Quentin Skinner, J.G.A. Pocock and others.²¹ According to this methodology, to put it plainly and to risk oversimplification, language has different meanings in different contexts. To understand the statements of historical figures, it is therefore necessary to reconstruct the meaning of the specific vocabulary and idioms that they were using. A person may directly quote Maimonides, for example, but use his words to mean something quite different from what he originally meant or what someone else quoting the same words may have taken them to mean. The first stage in intellectual history, then, is “to find language as context, not text.”²² This is achieved by piecing together the discourse in which historical statements are embedded because the meaning of a text can only be uncovered when it is placed in a matrix of other texts to which

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it is implicitly or explicitly responding. My work, then, attempts to ask questions that lie behind the ways in which the writings of religious Zionists are typically approached. Before asking how they understood the relationship between law and the state, I ask what they meant when they said "law" and "state." Before describing their approaches to constitutional questions, I ask how they understood the very idea of a constitution. To do this, I try to reconstruct the matrix of the discourse against which their writings can best be understood by paying careful attention to references, terms, ideas and rhetorical moves that point to other texts. As already indicated, this has led me to situate certain key writings of religious Zionists firmly in the context of modern European jurisprudence.

The first two chapters of the dissertation argue that the rise of Herzog’s centralist vision was not inevitable by exploring two alternative religious Zionist approaches to the state. Chapter 1 analyzes the "holy rebellion" of the religious kibbutz movement, which, though deeply dedicated to religious ideals, was willing to implement, at least in theory, radical modifications to the halakha to make it commensurate with a modern state. It shows how the approach of this movement to law can only be understood by reference to particular schools of German jurisprudence. Chapter 2 explores the long history of legal pluralism in Jewish political thought and the ways in which many religious Zionists of very different persuasions advocated a pluralistic approach to the state. The remaining chapters set out the rise to dominance of Herzog's brand of legal centralism. Chapter 3 investigates the early context of Herzog's intellectual formation against the backdrop of the modernization of English law. Chapter 4 demonstrates the ways in which he brought his early thought to bear on the formulation of a halakhic constitution for the State of Israel and how he implemented modern legal theory in the
same way as secular Zionists and the leaders of nationalist independence movements all over the world. Chapters 5 and 6 show how Herzog's particular way of thinking about law seeped into the structures of religious Zionist institutions and the ways in which this shaped the workings of Israel's Chief Rabbinate and its rabbinical courts.
1. Law and Revolution on the Religious Kibbutz

Our religious beliefs demand that we delve continually into the sources of religious law and thought in order to find solutions to questions of our existence, even if the habitual structure of traditional Jewish living be thereby endangered.

- Moshe Una

There is no single legal philosophy of religious Zionism but rather a variety of legal philosophies. Each one of them stems from a different idea of law and its relationship to religion and politics. This dissertation tells the story of the rise to dominance of one kind of legal philosophy among religious Zionists which invested great importance in the state and pushed for centralization, allegiance to tradition and the bureaucratization of legal and religious authority. This was not an inevitable development, however. In the years leading up to and immediately following the establishment of the State of Israel in 1948, very different approaches to law competed with the approach that ultimately rose to domination. This chapter tells the story of the legal philosophy of the Religious Kibbutz Movement. It was characterized by a radical commitment to spontaneity, a revolutionary attitude to the past and a deep suspicion of the state and of established religious authority. Although its ideas were not always fully implemented in practice, in the early years of the state it constituted a vital foil to the approach that eventually came to dominate the religious Zionist establishment.
The Religious Kibbutz Movement was a strange hybrid.\textsuperscript{1} In the words of one of its founders and most prolific spokesmen, Moshe Una, “the unique character of the Religious Kibbutz Movement was determined by three principles: religion, Jewish nationalism and Socialism.”\textsuperscript{2} These principles were not easy to reconcile with each other, especially in the early years of the movement, a time when many socialist Zionists repudiated religion and most religious Jews opposed both Zionism and socialism. Nonetheless, in the aftermath of World War I, several groups of religious youth immigrated to Palestine with a view to establishing socialist religious communes.

The immigrants originated in two centers.\textsuperscript{3} A significant group came from Eastern Europe. They, or their parents, had mostly grown up in Hasidic communities and been attracted to Zionist youth movements like ha-Shomer ha-Dati, the youth wing of the religious Zionist Mizrahi organization. Although they became mostly estranged from the religious conservatism of their parents, they subscribed to the ideas of charismatic community and constant regeneration that they perhaps retained from their Hassidic backgrounds. They formed a training camp called


Shahal, the acronym of one of their early leaders, Rabbi Shmuel Hayim Landau, in order to prepare themselves for their agricultural life in Palestine. Landau was a descendent of Menahem Mendel of Kotzk, the mid-nineteenth century Hasidic leader, and his thinking was infused with his ancestor’s radical spiritualism. Landau died young in 1928 and became not just a founding ideologue but also a symbol of the religious kibbutz movement as a whole. Most of the Eastern European group immigrated to Palestine in 1930.

A larger and more established group immigrated from Germany. It emerged from the movement known as Bahad, (an acronym of berit halutsim dati‘im, the Association of Religious Pioneers,) and became known as the Rodges group, named after their training farm in Germany. Acculturated to German society, they were more likely than their East European colleagues to express themselves in the language of Western philosophy and were able to follow the example of Christian socialists like Paul Tillich in synthesizing a religious outlook with socialist ideals. They first immigrated to Palestine in 1929.

Upon arriving in Palestine, each of these groups affiliated with ha-Po‘el ha-Mizrahi, an umbrella organization established in 1921 to unite religious workers in towns and the countryside. Ha-Po‘el ha-Mizrahi established a number of settlements in the 1920s but none were kibbutzim. After the influx of the ideologically motivated religious socialist youth, the Religious Kibbutz Federation [RKF] was formed. Initially part of ha-Po‘el ha-Mizrahi, it later became an independent organization. Its focal point was the newly arrived Rodges group which formed the first religious kibbutz in 1937. Named Tirat Tsvi [Zvi’s Fortress] after the early religious Zionist

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4 For more on the religious labor Zionist movement in Germany from which the Rodges group emerged, see: Joseph Walk, “The Torah va’Avodah Movement in Germany,” Leo Baeck Institute Yearbook 6, no. 1 (1961).
leader Rabbi Zvi Hirsch Kalischer, it was established in the Bet She’an valley. This location was chosen because it had enough space nearby in which to establish other religious kibbutzim. It was also on the frontier of the settlement efforts of the World Zionist Organization, thereby earning them the support of the Jewish National Fund, without which the new kibbutz would have been untenable. Eleven further religious kibbutzim were established by 1949.

The kibbutz movement as a whole was a powerful element in the Yishuv. Tens of thousands of people lived on kibbutzim around the time of the establishment of the state. Religious kibbutzim had only a fraction of that number but the ideological motivation and philosophical articulation of the members of the RKF meant that they had a disproportionate effect on the development of Religious Zionism in Palestine and in Israel’s first decades.

At the heart of the RKF was the mission to synthesize the goals, values and modes of living of traditional Judaism with those of socialism and Zionism. According to Ernst Simon, whom the Rodges group, while it was still in Germany, took to be a spiritual and intellectual leader, the ideal immigrant to Palestine was to be a “talmid hakham and halutz,” an individual who is both a scholar of Torah and a nationalist pioneer with the revolutionary commitment to revive the nation by returning to the land and its soil. Implicit in this ideology was a criticism of the mainstream German Jewish Orthodox, which, in the view of the Rodges group, failed to connect the Torah as a religious pursuit, with the rest of life.

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This critique of the Orthodox establishment was reinforced by reference to the concept of Gemeinschaft, which pervaded Weimar culture and society. The term originated in the work of the sociologist Ferdinand Tönnies in the late nineteenth century and was expanded upon by his younger colleague, Max Weber. It was particularly popular among philosophers, youth groups, religious leaders and politicians in the unstable years in the aftermath of World War I. Gemeinschaft referred to a total society in which individuals found self-realization in the organic life of the community which took precedence over their own self-interest. It was a key idea in the widespread romanticist critique of modernity which was attractive to Jews in many different walks of life. This included the religious Zionist youth who rejected conventional Orthodoxy which, in their understanding, forced the Torah into a private realm associated only with ritual and divorced from actual living. A combination of labor, Torah and Zionism provided the opportunity to bring about “a restoration of the completeness of life to Judaism” which could take place only in an authentic, autonomous Jewish community in the Land of Israel “since only there can Torah encompass the entire present and, at the same time, constitute the base for our people’s Gemeinschaft.” There, it was possible to bring the spirit of the Torah, not only to the study hall, but to the entirety of the life of the community. In the words of Yeshayahu Leibowitz, a leading thinker of ha-Po’el ha-Mizrahi:

We perceive Torah as a method, a legal structure, and a form of life intended to encompass and define the occupational sphere, a

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life of labor as well as all the problems encountered in a social system.\(^9\)

This all-encompassing mode of living, they believed, necessarily took the form of an autonomous socialist society in the Land of Israel. There, the autonomy of the Jewish community would enable its members to incorporate the values of the Torah into all aspects of life while the socialism of the communes would in turn enable the perfection of each member of society.

Ultimately, the religious kibbutz was designed, according to one of its leading spokesmen, “to order society by way of overcoming oppositions between its members and cultivating love and brotherhood between them.”\(^10\)

In short, then, the RKF combined Marxian determinism, romantic ethno-nationalism and the charismatic spiritualism of Hasidism. It could be compared, in the words of a leading RKF thinker, “to a Hassidic community, but in place of the Rebbe comes the idea.”\(^11\) This combination of ideals produced an inherent tension. The movement was caught between, on the one hand, the idealization of a utopian past and a deep faith in the power of their religious tradition to respond to the crisis of the modern Jew and, on the other, a revolutionary urge to repudiate the constrictive and petrified social structures of exilic Judaism in favor of a renewed ideal Judaism on the socialist commune in the Jewish state.

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\(^10\) Moshe Una, “Hoq u-mishpat ba-kevutsa,” in Shutafut shel emet: kovets ma'amim be-derakhe ha-kevutsa ha-datit, ed. Moshe Una (Tel Aviv: Moreshet, 1964), 133. This article was first published in the religious kibbutz journal, Alonim, in 1946.

\(^11\) Ibid., 134.
This tension manifested itself in the social and political commitments of the RKF. Despite the close-knit nature of the kibbutz community, from its earliest days its members felt a “sense of responsibility towards society at large”, that is to the entirety of the Yishuv and the Jewish people, whether they were Orthodox or not. As such, they regarded themselves as a bridge between the majority of the Yishuv, who were secular socialists, and the Orthodox. They hoped ultimately to bring secular Zionists closer to tradition, and to bring Religious Zionists into stronger partnership with the wider Yishuv. They lobbied consistently to urge ha-Po’el ha-Mizrahi, with which they were affiliated, to join the Histadrut, the umbrella organization of socialist Zionists. Although they never succeeded in this goal, religious kibbutzim did join local kibbutz organizations, thereby integrating into secular Zionist society in a fairly comprehensive way. They celebrated May Day (until World War II) as well as the Jewish festivals, and they insisted that the principles of socialism and state-building arose from the Jewish tradition itself.

In the words of a kibbutz member who immigrated to Palestine from Romania in 1938:

> As opposed to the generations preceding us, we have broadened the framework of religion to include the various national and social values, such as labor, building the country, language, social equality, non-exploitation, and so forth – matters that, in our opinion, are elements of the Torah’s outlook as a Torah of life.\(^\text{13}\)

This role as self-appointed bridge builder between Orthodox and secular Zionists required a delicate balance that was not easy to sustain, as internal debates over kibbutz policy demonstrated. For example, in 1957 religious kibbutzim participated in a regional Hanukkah

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\(^{12}\) E. Rosenbleuth, "The Path of Religious Youth in the Land" (1938). Quoted in: Fishman, Judaism and Modernization on the Religious Kibbutz, 142.

\(^{13}\) M. Shiloah, “Religion and Tradition in the Kibbutz,” Amudim 134 (5717 (1957)): 16-17.
celebration that took place on a kibbutz that raised pigs. One member complained in the RKF journal that this was a compromise too far:

If we have reached the sad situation whereby all the good relations with our neighbors did not prevent them from turning our valley into a pre-eminent region for raising that impure animal, we must ask ourselves again: What is the limit to the price that we have to pay for good relations?

The editor of the journal responded:

Our fundamental approach is to welcome joyfully the opportunity to meet with our neighbors… Unfortunately, there are Jews who raise pigs and violate the Sabbath, but they are still Jews! Only when we meet them as brothers can our neighbors feel how proper are our ways.\[14\]

This editorial response no doubt represented the official line of the movement. It did not, however, dissolve the tension inherent in the refusal of the RKF to choose between commitments to religious orthodoxy on the one hand and the brotherhood of all Jews on the other.

The Legal Philosophy of the RKF

This delicate ideological hybrid of socialism, Zionism and religious Judaism led to a particular approach to legal philosophy which was based on a general antipathy to law. This antipathy was summarized well by Eliezer Goldman, a Jewish scholar and philosopher who was one of the few Americans to join a religious kibbutz in the 1930s. (Alongside his philosophical studies and university teaching, he worked in the vegetable garden of Kibbutz Sdei Eli’ahu.) In a 1964

\[14\] S Shimshon, “How Shall we Celebrate?,” Amudim 152 (5719 (1959)): 6-8. This episode is quoted and discussed in: Fishman, Judaism and Modernization on the Religious Kibbutz, 190. fn. 9
symposium about the role of law on the religious kibbutz, Goldman opened his presentation as follows:

In the streets of the kibbutz movement there is a disgust of anything that emits the smell of law, especially regarding a legal framework within kibbutz life.

This phenomenon is well established in the general kibbutz movement. It has at least two important sources. The first is the antinomian tradition of utopianism… Even Marx himself, who was a utopian thinker though he would surely have protested this appellation, described the future communist state as a state in which political functions would be reduced to financial management. In all utopias there is the attempt to free oneself from law and to set society exclusively on the foundation of conscience, good will, the voluntary basis of moral society, and so on.

The second source…is the rebellion against the halakha. Most of the founding generation of the kibbutz movement experienced this rebellion and its spiritual scars remain to this day. They surface in a deep resentment… And this negative feeling is extended to all legal formalism.15

Goldman perfectly captured the distaste of the kibbutz community, and the RKF itself, towards law, which was based on a familiar socialist tendency to antinomianism and reinforced by a rebellious attitude to halakha. The RKF did not advocate the abandonment of halakha; on the contrary, the entire movement was devoted to bringing about the permeation of Jewish tradition into every aspect of life. However, their anti-authoritarianism and revolutionary posture resulted in a paradoxical combination of commitment to Jewish law and rebellion against it. To understand this properly, it is necessary to explore first their attitude to law in general and then their attitude to halakha in particular.

The ambivalence to law among the kibbutzim manifested itself in the informality of their own governance structures. An early sociological study of Israeli communities concluded that the kibbutzim “had no distinctly legal institution” and that their system of internal control should be considered as “informal rather than legal.”\textsuperscript{16} The revolutionary spirit of the kibbutz members made them reluctant to impose a system of law that would govern their communities, or to formalize their legal relationship with the state.

This attitude equally characterized the religious kibbutzim. Precisely because of the prevailing antipathy to the law, in 1946, Moshe Una felt the need to devote an entire article in the RKF journal \textit{Alonim} to argue for a positive approach to law and the adoption of a legal system on the kibbutz. Una (1902-1989) was born in Germany and after studying at the University of Berlin and the Hildesheimer Rabbinical Seminary, became a founding member of the Rodges group. He lived on kibbutz from 1931 until his death and was a Member of Knesset for the first twenty years of its existence. Una felt it necessary to argue publicly in favor of the benefits of law. Many disagreed with him and resisted the creation of any kind of formal legal system. The revolutionary, anarchic spirit, of the kibbutz, reinforced by the Germanic romanticization of the Hassidic approach to life, militated against a formal structure of law. Una reported that some feared that law would work against the idea of the kibbutz which was, in essence, a voluntary collection of individuals committed to spiritual awakening and the free expression of the inner spirit of the people. They believed that the kibbutz “is dependent in its essence on the free will of

its members and on the spiritual spark created when the will meets with the idea… [They claim that] law will bind the will and put out the fire."17

These antinomian members of the religious kibbutz maintained that the kibbutz should be governed by “communal will” [da’at ha-tsibur], rather than rigid regulations.18 This phrase is strongly, and presumably intentionally, reminiscent of Rousseau’s volonté générale, in the sense in which it appears in his Social Contract. There, Rousseau described a small and politically primitive society in which many laws are not required because the concord of the people allows common sense to dictate proper behavior and all the members of the society will readily agree to its unwritten rules:

As long as several men assembled together consider themselves as a single body, they have only one will which is directed towards their common preservation and general well-being. Then, all the animating forces of the state are vigorous and simple, and its principles are clear and luminous; it has no incompatible or conflicting interests; the common good makes itself so manifestly evident that only common sense is needed to discern it. …A state thus governed needs very few laws.19

Like their secular counterparts, the religious kibbutzim were specifically designed to be small communes whose members lived in perfect concord. If Rousseau was correct, they would therefore need no formal legal system. This attitude was reinforced by the Marxian approach to law that was, as Goldman pointed out in the quotation above, very pervasive on the kibbutz.


18 Ibid., 134.

Marx thought that for the proletariat, law, like morality and religion, was perceived as nothing more than a “bourgeois prejudice.” It was an example of an “ideology,” part of the epiphenomenal superstructure laid over the substructure of real social and economic relations. In the course of a socialist revolution, Marx believed that society would come to base itself on economic relations only. In the utopian communist future, the state would wither away, and the law with it. It was in line with this belief that many members of the kibbutz, which was modeled on the perfect communist society of the future, rejected the imposition of a formal system of internal governance.

Una, however, rejected this antinomian tendency. He insisted that law is required for the sustained functioning of human society. Law does not work against the goals of the kibbutz, he argued, but supports them:

What is, in fact, law in society? It seems possible to compare it to a skeleton in the body of a creature. It shapes the fixed form of the body, strengthens it and gives the powers working within it a handle for intentioned and harmonious action.

For Una, indeed, law was required to support the particular kind of justice towards which the kibbutz was working:

No society, without a law which is the fruit of the spirit of its distinct way of life, can sustain a way of life unique to itself... Law forms society and is inextricably linked to its order of life and its

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22 Una, “Hoq u-mishpat ba-kevutsa,” 133.
outlook. Law is a function of society and activates its vital forces. These forces will degenerate if they are not able to be activated.  

Furthermore, Una pointed out that there are practical reasons why the law is required. Whereas it might have been possible for the kibbutz in its earliest years to survive as an anarchic society governed by the mutual relations and goodwill of its members, this was no longer the case. The original “personal-social foundations” of the kibbutzim had been eroded as they grew from small families to larger communities. Indeed, “classes” had arisen within the kibbutz itself, as distinctions arose between new and old members, or between manual laborers and others. It was no longer feasible to sustain the community without a legal framework, however desirable this might have been in theory. For a society to govern itself according to “communal will” rather than formal law requires a very high level of moral discipline which was no longer fair to expect of the kibbutz as a whole. The kibbutz, Una argued, could no longer sustain itself on its early passions. “Human society cannot remain in the realm of enthusiasm and desire.” Law did not work against the spirit of the kibbutz. On the contrary, it was required to sustain it. “[The kibbutz] can remain true to the ideal only if it knows how to transform the flame into building blocks and to chain the will which desires to ascend to heaven and to conquer it.”

Una’s defence of law against his more anarchic colleagues was not based solely on these pragmatic arguments. It was also based in part on the reading of the Jewish tradition. He associated Marxian antinomian utopianism with the Greek tradition, according to which law only

23 Ibid.
24 Ibid., 135.
25 Ibid.
became necessary with the decline of society. In particular, Una quoted Ovid’s account of the “golden age,” a lawless utopia at the beginning of history when men were inherently good and did not need a coercive legal regime to keep social order. Una contrasted this with his own presentation of the Jewish approach to law and society in which law is not only intended to protect against social decline but constitutes an expression of “values which are positive in themselves.” Indeed, the ideal polity in the Jewish tradition, even before the Sinaitic revelation, involved the establishment of the Seven Noahide Laws. Not for nothing are judges in the Bible referred to as “gods” [elohim]. They are meant to “demonstrate the qualities of God which relate to the world and to human society in that they are tools for the legal nature of creation and its order.” In other words, according to Una, law is more than a defense against human failings; it has intrinsic value, reflecting the natural order of God’s creation.

This recourse to the Jewish tradition, however, raises questions about the real motivation for Una’s support of a legal regime on the kibbutz. The question at stake was not the observance of halakha but the establishment of formal structures of governance on the kibbutz. It is entirely plausible that the religious kibbutzim could have encouraged strict adherence to Jewish religious laws and yet still made its peace with the anarchic strain of left-wing Zionist socialism. Una’s

26 “First to be born was the Golden Age. Of its own free will, / without laws or enforcement, it did what was right and trust prevailed. / Punishment held no terrors; no threatening edicts were published / in tablets of bronze; secure with none to defend them, the crowd / never pleaded or cowered in fear in front of their stern-faced judges.” Ovid, *Metamorphoses: A New Verse Translation*, trans. D. A. Raeburn (London: Penguin, 2004), 9. Una discussed Ovid at: Moshe Una, “Mahut ha-yehasim ha-notzrim a’y ha-mosad shel hoq u-mishpat ba-kevutsah ha-kellalit be-tokh ha-kevutzah u-ben ha-kevutsah la-medinah,” in *Hoq u-mishpat ve-ha-hevrah ha-kibutsit: proti-kol mi-mei ha-iyun sh-ne’erkhu be-be’erot yitshak me-yamim 25-26* (Be’erot Yitshak: 1964), 5.


28 See Exodus 21:6. Traditional Jewish commentaries, (Rashi, Ramban, Ibn Ezra et al.) take elohim in this verse to refer to the judge or the court.

claim that the Jewish tradition requires a formal legal order for all societies is persuasive to a degree. But it would have been possible to produce an equally convincing argument for the opposite position. Religious kibbutz members were used to mining the Jewish tradition to find support for their way of life. It would surely have been possible to find Jewish sources extolling the values of anarchic living. After all, the Garden of Eden, the biblical utopia, was notably free of laws (except for the single law prohibiting eating from the tree of knowledge.) Indeed, kabbalistic literature often portrays the necessity for law as an unfortunate consequence of Adam’s sin. According to this tradition, in the messianic age the cosmos would be restored to its pre-lapsarian state and law would once again become unnecessary.

Given that traditional sources could plausibly yield very different readings of the nature and role of law, we need to look elsewhere to uncover the background against which Una chose to oppose the anarchic streak in the kibbutz membership. Una’s arguments, and those of his opponents, can best be understood in the context of jurisprudential debates that were familiar to many kibbutz members from their time in Europe, particularly in Weimar Germany.

The extent to which Una’s thoughts about law were based on German jurisprudence was made clear in 1964, almost two decades after Una wrote his article in defense of the idea of law. In that year, he delivered a speech which not only drew on the themes and language of German jurisprudence but also referred explicitly to Weimar jurists in support of his position. By 1964,

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30 Particular effort was expended to find precedent for the abolition of private property and the principle of social equality in the Jewish sources. For a collection of essays on this and related topics, see: Refael Auerbach, Shim'on Weiser, and Shemuel 'Emanuel, eds., *Ha-qibuts be-halakha* (Jerusalem: Kevutzat Sha'alvim, 1984), 25-194.

the debate over the role of law on the kibbutz had extended to the question of the relationship between the kibbutz and the state. Despite the prominence of the kibbutzim in the Yishuv and the early state period, until the 1960s there was no specific law that defined the kibbutz in the eyes of the state. The kibbutz was simply considered by law to be one kind of “cooperative society” (other cooperative societies included pension funds, consumer societies, mutual insurance groups and so on) under the British Mandate’s Cooperative Societies Ordinance, 1933, which in turn was based on a similar law in Imperial India, the Indian Cooperative Societies Act, 1912. From the perspective of the state, however, this situation was unacceptable because a kibbutz was not like any other society. The most important difference was that the members of the kibbutz did not own any private property. This caused legal complications, for example, in cases in which a member of the kibbutz would be sued for damages or pursued for the repayment of a debt incurred prior to membership in the kibbutz. The member in a technical legal sense would own no assets and so would be exempted from payment. But this legal situation would be incongruent with the fact that the member would live in a house, be employed in productive labor and have food and clothing. As a result of the incongruity between the legal status and the real situation of kibbutz members, pressure grew for the kibbutzim to enter into a new and specially designed legal relationship with the state.

The early 1960s was a time of intense debate within the kibbutz community over the desirability of such a development. There remained among many a resistance to the imposition of any kind


of formal law. Some members continued to see law as an undesirable side-effect of an imperfect society:

The legal system is only intended for the pathological condition in the relations between men and in social life in general, exactly as the laws of medicine are intended for the pathological condition of the body. \(^{34}\)

In the kibbutz utopia, it was claimed, law should simply be unnecessary because “when the relations between men are perfect, there is no need for the workings of law.”\(^{35}\)

This question also preoccupied the religious kibbutzim. In 1964 a special symposium of the RKF was convened to address the question of the legal status of the kibbutz.\(^{36}\) Una continued to hold his earlier position that law was essential in any society. He recognized that his position remained unpopular:

I claimed that according to the approach of the Torah, law is a fundamental and necessary thing for every human society… I understand that according to his words Eliezer Goldman sees things the same way, but I have heard no [other] echo from the community of members.\(^{37}\)

Nonetheless, Una insisted that “we have to deal with the issue [of law] out of a desire to build a…sustainable society.”\(^{38}\) A society, he said, cannot be run simply on the “spontaneous outburst of states of soul and spirit.”\(^{39}\) It must be based on law.

\(^{34}\) Yizhak Maor in the kibbutz quarterly *Niv ha-gevutzah* 12, no. 2. Quoted in: Una, “Mahut Ha-Yehasim,” 4. Una’s article was republished with minor changes as: Una, “Ha-zakah ben hoq u-mishpat ba-hevrah uva-kevutsah.”


\(^{36}\) *Hoq* u-mishpat ve-ha-hevrah ha-kibutsit: proti-kol mi-mei ha-iyun sh-ne’erku be-be’erot yitshak me-yamim 25-26, (Beererot Yitshak 1964).


\(^{38}\) Una, “Mahut Ha-Yehasim,” 4.

\(^{39}\) Ibid.
These arguments closely followed Una’s arguments of nearly two decades earlier. At this point, however, Una augmented his position with an explicit reference to the Weimar legal scholar, Gustav Radbruch (1878-1949):

> The accepted position is that “law is the entirety of general regulations for the shared life of men”, according to the definition of Prof. Radbruch.\(^{40}\)

Una took this quotation from the third edition of Radbruch’s *Philosophy of Law*.\(^{41}\) Una’s translation of this term into Hebrew served as the beginning of his enhanced argument in favor of the necessity of law for the kibbutz. Radbruch was a legal scholar and politician, who served as Minister of Justice in the early Weimar period. His *Philosophy of Law* was received with particular acclaim and was considered by many to be one of the most important works on legal philosophy in the early twentieth century.\(^{42}\) Still, whatever the popularity of Radbruch in circles of German legal scholars, it is of particular interest that Una chooses to quote his book more than thirty years after its publication. Even more worthy of attention is the fact that Una apparently expected Radbruch’s name and ideas to be recognized by an audience of religious Zionist kibbutz members, fifteen years after his death. After all, Una refers to him simply as “Prof. Radbruch” with no further elaboration.

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\(^{40}\) Ibid.

\(^{41}\) Radbruch’s formulation in the German was: “Wir...bestimmen in diesem Sinne das Recht als den Inbegriff der generellen Anordnungen für das menschliche Zusammenleben. [Emphasis in the original.]” Gustav Radbruch, *Rechtsphilosophie*, 3 ed. (Leipzig: Quelle & Meyer, 1932), 33.

Radbruch was Minister of Justice in Germany at around the time that Una was studying in the University of Berlin, a time in which jurisprudential battles were not confined to the ivory tower but played a significant role in national debates during a time of extreme political turbulence. The Weimar government was plagued, almost constantly, with existential threats. It was born in the aftermath of a disastrous war and had to constitute itself on the ruins of its predecessor, the constitutional monarchy that had come to an end with the surrender of the Germany and the abdication of the Kaiser. It had to deal with revolutionary threats from the communist left, putsches from the monarchist right, hyperinflation, starvation and occupation. And as this ongoing crisis had political, social and economic dimensions, so it had legal dimensions. Jurists debated at every stage the basis for the validity of the constitution, its relationship to the people and the government, and the power of the president to override it.\(^4\)

These debates over legal theory were not just theoretical; they had enormous practical consequences. The most famous example of this occurred in June 1932 when President Hindenburg authorized a presidential decree under the emergency powers granted to him by Article 48 of the Weimar constitution which put his Chancellor, Franz von Papen, in charge of the State Government of Prussia. The act was eventually judged to be constitutional, but not before fierce debate in the courts: What were the limitations on Article 48? What was the relationship between the states and the German Federal government? Did the President or the Reichstag’s elected officials have a greater say in government policy? Even at the time, this was recognized as a significant moment in legal history. The decision took on more ominous

overtones in hindsight as it was used to pave the way, less than a year later, for the granting of unlimited emergency powers to the next German chancellor, Adolf Hitler.44

Most of the founding members and key ideologues of the religious kibbutz movement, including Una, were educated in German universities during the years in which legal philosophy attained a high degree of significance because of its association with these critical political questions. It stands to reason that just as their intellectual positions coalesced in the crucible of Weimar social philosophy (as with the centrality of the idea of Gemeinschaft on the religious kibbutz,) they were also shaped against the backdrop of these heated and consequential jurisprudential debates. This explains why the traces of these Weimar debates surfaced in the debates over the place of law on the religious kibbutz.

Una’s reference to Weimar jurists continued further in his speech. “What is the place of law in the life of a society?” he asked. “What is the idea that stands behind it?” He answered that there are two approaches to this question arising from two schools of legal theory. He called these schools “formalistic” and “substantive.”

The first it is possible to call a formalistic approach. It says that the law is meant to preserve the order that a particular society has created and determined, according to this approach, to be appropriate for it. The measure of the value of law is its ability to preserve the social order and nothing more. The second approach I would call “substantive,” meaning an approach that evaluates law based on its content. It asks whether the order that it preserves is founded upon justice, or not. “The law must constitute a just order.


45 Una, “Mahut Ha-Yehasim,” 5.
In this way alone is it possible to justify the claim of being a binding authority. From here flows the coercive power of the law.  

The two approaches described by Una are those of Radbruch and his contemporary Hans Kelsen. Some contextualization is required to understand the background behind Una’s categorization of approaches to law. These two approaches to law are two sides of a classic jurisprudential debate that characterized German legal philosophy for half a century, and spilled over into legal scholarship elsewhere in Europe and in America. The fundamental question at stake was the relationship between law and morality. According to what became known as the separability thesis, the source of law’s authority is internal to the legal system; it does not derive from an external system of morality. This thesis stands in opposition to the theory of natural law. Natural law theory posits that there exists a perfectly moral law, (many classical natural law theorists presume that this law originates with God), which is accessible to human beings through their rational faculties. It is the task of the human lawmaker to create a legal system as close as possible to natural law. Law must strive for perfect morality and any law that is immoral contravenes natural law and is, by definition, a bad law. Criticisms of natural law theory arose in the very beginnings of the Enlightenment when thinkers began to argue for a distinction between natural law and human law. Thomas Hobbes, for example, insisted that the authority of the laws of the state is not dependent on metaphysics. Rather, it is the result of the association of human beings who create a legal system not in order to approximate divine law but in order to preserve peace and social order. Only in the late nineteenth and early twentieth centuries, however, did there arise a school of jurisprudence which posited a total separation between law and morality.

46 Ibid.
This was known as the theory of legal positivism and culminated in the legal philosophy of its most celebrated proponent, Hans Kelsen.

Kelsen was, according to one contemporary, “the leader of juristic thought in central Europe.”\(^47\) He was tremendously influential and made many practical contributions to the field of law, including the Austrian constitution and the foundations of post-World War II international law. His greatest theoretical contribution, his *Pure Theory of Law*, originated in the Weimar period and was refined over the ensuing years.\(^48\) In his description of legal positivism, Kelsen stipulated that his aim was to produce a theory of law that was purely scientific. He wanted to strip the study of law from all the metaphysical assumptions that were typical of the natural law theorists. He insisted that the realm of law was separate from any other realm. The law, Kelsen argued, cannot be determined on the basis of politics, economics or philosophy. His theory was “purified of all political ideology and every element of natural sciences.”\(^49\) By the same token, law was also distinct from morality. Kelsen’s approach to law distinguished sharply between fact and values, between the “ought” of morality and the “is” of legal fact. For Kelsen, the job of the jurist or the judge is not to determine what the law should be, but what the law actually is. The morality of the substantive content of a law does not determine its validity. Rather, legal validity depends entirely on the internal workings of the legal system itself and the way in which the law was produced. All laws are produced by the authority of a higher law in the legal hierarchy.


law is valid if it is produced by a higher law. The validity of the higher law rests in turn on the validity of a law which is higher still. To avoid the philosophical problem of infinite regression, Kelsen posited that the apex of this hierarchy of legal validation is the Grundnorm, the Basic Norm, which, he said, is presupposed by the entire legal system and is ultimately the source of the validity of every law within it.\textsuperscript{50} Because, according to Kelsen’s positivism, the only legally valid acts in the state were those that were legitimized by the system of law itself, his doctrine worked to bolster the stability of the new and highly precarious European constitutions by challenging the validity of unchecked political interventions on the part of the chancellor or the landed classes.

With this context in place, Una’s analysis can be better understood. There is little doubt that the “formalist” approach to law that Una described, whereby “the law is meant to preserve order that a particular society has created and determined, according to this approach, to be as appropriate for it” was the positivism of Kelsen. This was a mode of law that Una roundly rejected. He shunned the distinction between fact and value and rejected the separation between law and justice. The Gemeinschaft of the kibbutz was not the place for a bureaucratic and formalistic structure of law. If there was to be law on the kibbutz, as Una insisted there must be, that law had to be firmly tied to the moral order and to the values that underlay kibbutz society. This was precisely the approach of the second theory of law that Una described, the one he called the “substantive approach.” According to this theory, the authority of law is not determined only by the formal process of its creation but by the morality of its content. This was the approach of Gustav Radbruch. Una had already quoted Radbruch once before in his speech, apparently

\textsuperscript{50} Kelsen, \textit{Pure Theory of Law}, 55-89.
assuming that his audience would know him well. Here he quoted Radbruch again, without even mentioning his name: “The law must constitute a just order. In this way alone is it possible to justify the claim of being a binding authority. From here flows the coercive power of the law.”

Departing from Kelsen’s positivism, Radbruch maintained that the validity of the law should not be determined only by the inner workings of the legal hierarchy. He did agree that legal stability and predictability is one element of the concept law, but he added two other elements to it: purposiveness (the decision to determine the values that law is intended to serve) and justice, which is the “idea of law” to which law must always be striving. For Radbruch, law must always be oriented towards the value that it is designed to uphold: justice. In other words, against Kelsen’s separability thesis, Radbruch held that there is no complete separation between law and morality, between legal fact and the values of equality and justice that the law is expected to uphold. The relevance of the value of justice to the validity of law became even more important after World War II. During the 1950s, some legal theorists both in Europe and America blamed legal positivism for the rise of Hitler. Kelsen and his fellow positivists, some argued, facilitated Hitler’s rise by divorcing law from morality. This allowed terrible acts to be carried out under the cover of law because legal positivism had made it impossible to challenge the validity of law on the basis of moral objections. Positivists disagreed. They maintained that their divorce of fact from value was simply an exercise in defining the validity of law from the point of view of the legal system, not in deciding right and wrong action. Even valid laws could be immoral, and there were some immoral laws, including many Nazi laws, that are wrong to follow.

51 Una, “Mahut Ha-Yehasim,” 5. When the speech was published, the quotation was put in quotation marks, but no reference was given.

52 For a fuller discussion of this point, see: Edwin W. Patterson, ed. The Legal Philosophies of Lask, Radbruch and Dabin (Cambridge: Mass., Harvard University press, 1950), 91-3.
Nonetheless, the critics of positivism argued that they had created an atmosphere in which, because the law was the law, whether it was moral or not, judges were discouraged from assessing laws on the basis of justice. As a result, the immoral laws of the Nazi regime were never challenged. In this post-war context, Radbruch emphasized even more strongly his differences with the positivists and the centrality of justice to the definition of law. Although he continued to recognize the importance of a formalistic application of law under normal circumstances, he attributed great significance to justice in the determination of law’s validity:

Preference is given to the positive law, duly enacted and secured by state power as it is, even when it is unjust and fails to benefit the people, unless its conflict with justice reaches so intolerable a level that the statue becomes, in effect, “false law” and must therefore yield to justice…Where there is not even an attempt at justice…then the statute is not merely “false law”, it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice.


54 There is some debate if Radbruch’s theory of law fundamentally changed after the war or if it just altered its emphasis. The latter seems the most plausible. For a discussion of this question, see: Stanley L. Paulson, “Radbruch on Unjust Laws: Competing Earlier and Later Views?,” *Oxford Journal of Legal Studies* 15, no. 3 (1995). For a fuller analysis of the relationship between law and justice in Radbruch’s thought, see: Torben Spaak, “Meta-Ethics and Legal Theory: The Case of Gustav Radbruch,” *Law and Philosophy* 28, no. 3 (2009).

Radbruch’s contention that the very meaning of law is “to serve justice” is exactly the aspect of his legal philosophy that made it so appealing to Una in his speech of 1964. In talking further about the second, “substantive” theory of law, Una explained that “the law has to serve the transcendent principle of justice, even if it does not seem to fit society in all respects.”

Therefore, law cannot be formalistically applied to society; it must arise from the ethical basis of society itself. Una quoted Radbruch again:

> The upholding of the legal order requires a unity of opinion regarding the fundamental problems of shared life, a unity that will be based on shared ethical principles.  

For our analysis of the attitude to law on the kibbutz, this is extremely significant. We have seen that the religious kibbutz movement as a whole had an anarchic streak that made it suspicious of law and legal authority. Una was one of the only voices who argued consistently for the need for law to sustain a society. However, even Una did not argue for a positivist theory of law in which there was no place for a discussion of morality and societal values. Rather, he advocated for a law that was an embodiment, and a concretization, of the values of justice and equality to which the kibbutz was dedicated. This approach to law is extremely pertinent to the way in which the members of the kibbutz related to one particular kind of law: halakha.

**The Theory of Halakha in the RKF**

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56 Una, “Mahut Ha-Yehasim,” 5.

57 Ibid.
So far we have established that the RKF had an ambivalent attitude to law. The prevailing sentiment among its members was that the spontaneous spirit of the kibbutz, and the values for which it was established, should be sufficient to govern kibbutz society. Formal law was stifling, and unfitting for the revolutionary spirit of the kibbutz. Even those few, albeit influential, kibbutz members who argued in favor of the need for a legal system, repudiated the legal positivism of Kelsen and his school in favor of a jurisprudence wherein law arose from, and was consistent with, the underlying values of society. Did this jurisprudence of value-based law affect the way the members of the RKF thought about halakha?

Surprisingly, perhaps, the answer is yes. The religious kibbutz members were all Orthodox Jews and committed themselves to following the halakha. Religious kibbutzim had only kosher food. Their members did not work on the Sabbath and their children received a religious education. In fact, they hoped that the religious kibbutzim would be able to realize the halakha even more rigorously than other Orthodox communities, particularly with regard to those laws pertaining to agricultural life. They recognized that “‘practical’ problems of religion are still, for most of the Orthodox public, questions of arranging the ritual bath, kosher slaughtering, and teaching Torah.” However, they were interested in expanding the significance of halakha by working out “how to arrange the entire technical, economic, organizational, and theoretical complex of our society according to the Torah.”58 Yet behind this orthodoxy, their commitment to halakha was mediated through the same revolutionary and non-positivist jurisprudence that they brought to bear on questions of law and governance more generally.

The RKF’s attitude to halakha was motivated by the call of their early leader, the Hassidic pioneer Shmuel Hayim Landau, for a “holy rebellion,” a way of life that was both a rejection of the Diaspora Judaism of their parents and at the same time a fulfillment of the underlying values of the Torah.⁵⁹ The vision was not of a life that was rebellious despite being holy, but of one that rebellious precisely because it was holy. The motto of the RKF, torah va’avodah, [Torah and Labor], represented a way of life that was true to the Torah and which embraced every aspect of life. This ideology portrayed the Diaspora as a place where Judaism was concerned only with ritual and with private life. In the new Jewish state, and particularly on the religious kibbutz, however, the Torah would govern all aspects of society, including public life, the national economy and modern large-scale technology. This shift was conceived as a fulfillment of the underlying values of the Torah, its real essence. It might require a departure from the letter of the law as it had come to be, petrified in the rabbinic study halls of the Diaspora, but it would be a realization of the true spirit of God’s law. At the root of the project was a deep confidence in the power of the Torah and the halakha to deal with any new situation. This confidence meant that the RKF was willing to face the potential dangers inherent in a project that required an assault on the traditional structures of rabbinical authority. Una put this well when writing in later years about the attitude of the early religious kibbutz:

We saw that the conduct of observant Jewry was determined neither by basic religious principles nor by the values of Jewish tradition. We noticed that contemporary Jewish life was molded neither by the rules of the Halakha nor by the moral demands of Judaism. We were not satisfied by a religion which puts a premium on the mere preservation of that which already exists. It was our intention to revive within our own pattern of living those eternal

values which exist in the panorama of the Jewish past and present. This was the inspiration of our religious approach.

…What did we hope to achieve when we declared that we demand more than the religious heritage and tradition handed down to us from the past? The answer we gave was that religion and all that it implies must serve as a basis for life in all its spheres, and if the Jewish religion is truly the vital force of the Jewish community, it must perforce be capable of solving and interpreting all problems confronting every generation and community. We challenged the so-called religious approach which tries to ignore questions created by everyday life, and never attempts to offer guidance and clarification to contemporary problems. Our religious beliefs demand that we delve continually into the sources of religious law and thought in order to find solutions to questions of our existence, even if the habitual structure of traditional Jewish living be thereby endangered.60

Even at the time, Una realized that this outlook might require a departure from some of the specific norms of the halakha as it was conventionally practiced by Orthodox Jews. But this was a casualty worth sustaining for the sake of deeper values of the tradition:

We assumed the authority to determine…practices even though they were not always in accord with what is written in the Shulhan Arukh… We did this… because of our religious feeling… that a community is able to withstand the violation of an accepted religious practice… Only this can we explain to ourselves how we have dared to touch areas which, from the formal point of view, we were unqualified to touch.61

There was a general feeling on the religious kibbutz that the way of applying the halakha to the entirety of modern life required a willingness to adopt a particular mode of legal interpretation. Rather than hesitant and conservative extrapolation from precedents in recent generations, a more aggressive and self-confident kind of interpretation was needed that recognized the legitimacy of the goal of the kibbutz community in its new circumstances. According to one


61 From the protocol of the Fifth RKF Council in 1951. Quoted in: Fishman, Judaism and Modernization on the Religious Kibbutz, 152.
formulation of a kibbutz member in the 1930s, “every generation finds in Torah possibilities of application that were not, and could not have been, apparent in former generations, although the potential for those possibilities was contained therein.”  

In effect, kibbutz society was a halakhic experiment designed to create the conditions by which the halakha could be modified and updated for the modern age:

We of the RKF have taken it upon ourselves to create a consolidated community that will conduct a directed experiment or a series of directed experiments so as to realize a Torah society under condition of the present… Our goal is to create a halakhic society in the actual conditions of our times. Our method is to create special conditions – kibbutz conditions – which will make this directed experiment possible.

Crucially, the changes in law were to follow the life of the community, not theoretical legal deliberation. “We must redeem the Torah by our own efforts.”

Evidently, the anti-positivism so prominent in the approach of the RKF to law in general was equally important in their approach to the jurisprudence of halakha. A major element of the RKF’s attitude was the recognition that halakha had gaps and needed to evolve in order to be able to deal with the new circumstances of Jewish nation-building. This in itself was an inherently anti-positivist claim. An important feature of Kelsen’s positivism was the assertion that it is meaningless to speak of gaps in the law. This is because the existence of gaps can only be evaluated on the basis of values which are external to the legal system, whereas Kelsen, as we

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62 The quotation is from Pinhas (Eric) Rosenblueth from 1938. Quoted in: ibid., 95.


have seen, insisted on a complete separation of the law as it is from any external system of values. Unlike Kelsen, RKF members did evaluate halakha on its ability to deal with “reality.”

In a 1957 article about the kibbutz mode of halakhic interpretation, Simha Friedman, who had attended the University of Berlin at around the time that Kelsen was a professor in the University of Cologne, expressed clearly the belief that halakha had to respond to a reality beyond the boundaries of its own internal system:

> Reality is never static: it is continually undergoing change. But whereas the reality of Jewish social life in previous generations changed sometimes gradually and sometimes rapidly, the new Jewish society that has come into being in the Land of Israel is of a very dynamic character, and it is changing with unprecedented rapidity. Furthermore, the Jewish national movement has led to a preoccupation with certain aspects of economic and social life with which halakha has not concerned itself for many generations; for example, the fact that there are now Jewish farmers tilling the soil of the Land of Israel. How, then, can Jews live in accordance with religious law when they are constantly being faced with situations which were not formulated in halakha?  

In this passage, Friedman placed himself in tension with Kelsen’s positivism by stating that halakha has to respond to values outside of its own system. A careful reading of the example that Friedman used to illustrate his point indicates that he had German positivism in mind:

> Let us illustrate this problem with an example taken from a totally different context – that of secular law. When electricity was first installed in Prussia, some time towards the close of the last century, a case was brought against a man for leading a wire from the main cable to his house. The prosecution charged him with the

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65 Simha Friedman, “The Extension of the Scope of Halakhah,” in *The Religious Kibbutz Movement: The Revival of the Jewish Religious Community*, ed. Aryei Fishman (Jerusalem: Religious Section of the Youth and Hehalutz Dept. of the Zionist Organization, 1957), 38. This article was based on a speech originally delivered by Friedman in the Jerusalem Community Center in 1954. In 1957, the same year as its publication in English, it was published in Hebrew in the religious kibbutz journal *Amudim*. The translation here is based on the English version and the page numbers also refer to it.
theft of public property. In defense he pleaded that his action did not constitute theft, since theft, under Prussian law, was defined as *Entwendung von Gegenständen*, i.e. the actual removal of physical objects, whereas in this respect electricity was not an “object.” The court upheld the plea and discharged the accused. The logical implication of the court’s action was that the law was found wanting, and that it required alteration to meet the changed conditions brought about by technological progress. Here we have a phenomenon common to every type of law: no law can be so drafted as to provide for every future contingency. This applies also to the formulation of the laws contained in the Torah.  

The Prussian case of the theft of electricity to which Friedman referred was an important case in Prussian law. It was scarcely a current example, however, as it had taken place more than a decade before Friedman was even born, in a judicial system that no longer existed. Of all the examples Friedman could have used to prove his point, why did he resort to one that was so remote, geographically and chronologically, from the current circumstances of his readers? And how did Friedman have such intimate knowledge, down to the precise legal formulation in the original German, of the Prussian judge’s ruling?

It is most likely Friedman encountered this case during the Weimar period when he was a student at the Hildesheimer rabbinical seminary in Berlin and later at the University of Berlin. It was, in fact, the exact example used by Kelsen to address the question of legal gaps. Significantly, however, Friedman used the same example in exactly the opposite way from Kelsen. Kelsen

66 Ibid., 39.

67 *Entscheidungen des Reichsgerichts in Strafsachen* = *Decisions of the German Imperial Supreme Court in Criminal Matters*, 29, 111.

68 See: Kelsen, *Pure Theory of Law*, 246. *Pure Theory of Law* was published in 1960, after Friedman’s article was published, but it seems that Kelsen had been using this Prussian case as an example for some decades beforehand. He certainly referred to it as early as 1933, as it was mentioned in an article of that year. See: Josef L. Kunz, “The Vienna School and International Law,” *New York University Law Quarterly Review* 11 (1933).
used the Prussian case in the course of his argument that it is nonsensical to talk of gaps in the law. He argued that the judges were entirely correct to acquit the accused and that the case in no way indicated that the law had any gaps because gaps can only be judged on the basis of values external to the legal system:

The judgment, according to which the lack of a legal norm of a certain content is inequitable or unjust, represents a very subjective value judgment which in no way excludes an opposite value judgment.69

The legal order, according to Kelsen, is entirely self-contained. “The legal order permits the behavior of an individual when the legal order does not obligate the individual to behave otherwise.”70 In other words, there can by definition be no gap in the law. If is something is not prohibited by the law, it is permitted by it.

Friedman, on the other hand, used exactly the same case to prove the opposite point. According to him, the acquittal of the accused indicated that “The law was found wanting, and that it required alteration to meet the changed conditions brought about by technological progress.” Friedman must have been aware of Kelsen’s argument from decades earlier. Why else would he have chosen a nineteenth-century Prussian case to prove his point? He engaged with it by employing Kelsen’s own example to subvert his argument. I demonstrated above that Moshe Una, in his discussion of general jurisprudence, was deeply engaged with German legal theory of the Weimar period, and argued strongly against the positivism of Kelsen and his school. In this article, Friedman argues against legal positivism in the halakhic context. Once again, German

69 Kelsen, Pure Theory of Law, 247.
70 Ibid., 246.
legal theory forms the backdrop to the discussion on the kibbutz and once again legal positivism represents the position which the RKF opposed.

**Halakhic Reasoning and Rabbinic Authority**

Just as the RKF rejected the positivist mode of halakhic interpretation, they were deeply skeptical of rabbinical authority. To some degree, this skepticism was a reflection of the anarchic streak in kibbutz life in general. But it also reveals something deeper about the approach to law and halakha in the RKF.

The RKF did not often refer halakhic questions to rabbis. They allowed halakha to evolve in the lived circumstances of the kibbutz. Despite the fact that many of the leaders of the kibbutz movement had the scholarship that would have enabled them to acquire a rabbinic qualification, (the pages of the kibbutz journals frequently featured debates over points of halakha, as we will see below,) the formal role of the rabbi was very limited on the kibbutz.

There were occasions on which the RKF consulted with rabbis. Many kibbutzim, for example, implemented a method for milking cows on the Sabbath (which is forbidden when done actively, by hand,) that used an automatic milking machine. The machine was designed in consultation with Rabbi Avraham Yeshayah Karelitz, the ultra-Orthodox leader known as the Hazon Ish, and
with Rabbi Herzog.\textsuperscript{71} On the whole, however, the members of the RKF were suspicious of rabbinical authority and skeptical of the ability of rabbis to address the religious needs of the people. They were reluctant to appoint rabbis over its kibbutzim who were not themselves kibbutz members. There was therefore an acknowledgment of the “difficulty of finding someone appropriate for the kibbutz who could serve as a halakhic advisor and spiritual guide.”\textsuperscript{72} Most Orthodox rabbis, the kibbutz members felt, did not share the revolutionary attitude of the RKF. As a general matter, they considered rabbis to be halakhically and socially conservative. They preferred to avoid halakhic questions for fear of having to make a change. The ultra-orthodox refrain of “the new is forbidden by the Torah” was the typical rabbinical response and this was resisted by the RKF.

\begin{quote}
[Rabbis would] tend to answer a questioner who saw the need to break new ground in halakha because of changing circumstances: ‘Better not to do it.’ In addition [they were] suspicious of those who were ready to contend with new circumstances as if they had a ‘lenient’ approach to halakha.\textsuperscript{73}
\end{quote}

This was echoed in the complaint of another leader of the RKF, Tsuriel Admanit (1915-1973), who like Una had been educated in Berlin and immigrated to Palestine in 1937, joining the Rodges group.

\begin{quote}
…Nor could we accept the advice of that rabbi who, when approached on this problem, replied that it would be advisable to
\end{quote}

\textsuperscript{71} See: Auerbach, Weiser, and 'Emanuel, \textit{Ha-qibuts be-halakha}, esp. pp. 214-5. Significantly, perhaps, the solution seems first to have been used on Kibbutz Hafets Hayim, a religious kibbutz that was founded not by members of ha-Po’el ha-Mizrahi but by members of the ultra-Orthodox party Po’alei Agudat Yisra’el.

\textsuperscript{72} Moshe Una, \textit{Ha-gehilah ha-hadashah: iyunim be-mishnah ha-kevutsah ha-datit: asupat ma’amarim 1940-1983} (Tel Aviv: ha-Qibuts ha-me’uhad, 1984), 63.

\textsuperscript{73} Ibid.
forgo any economic activity that entails even the possibility of Shabbat desecration and seek other work.\textsuperscript{74}

This was not way of a kibbutz society committed to a full national life in the Land of Israel. As Simha Friedman put it: “Our rabbis have not been touched by any revolution; they are unfamiliar with national life, and lack a perspective of statehood.”\textsuperscript{75}

Given this, it is surprising that even Friedman himself explicitly argued that rabbinical halakhic decisions do need to be obeyed:

\begin{quote}
If the competent authorities make a ruling based on the interpretation of Halakha, we will under no circumstances contravene it. For we realize that even if there is room for differences of opinion with regard to Halakha, there has to be a recognized body to make decisions and an instant at which such decisions become operative. As in the case of every law once a decision has been taken it must not be flouted. Here we find ourselves accepting the Socratic principle that the law is binding even when it is not convenient. Laws cannot be obeyed only as long as they suit one; otherwise they cease to be laws.\textsuperscript{76}
\end{quote}

This is not, however, a typical traditional call for obedience to rabbinical authority. The reason Friedman gives here for obedience to the rabbis is telling. Classical Orthodox arguments in favor of rabbinical authority tend to draw on teachings like the biblical exhortation that “you shall not diverge from what they tell you, to the right or to the left.”\textsuperscript{77} Alternatively, they attribute the authority of the rabbis to their greater scholarship or religious standing. Friedman used neither argument, appealing instead to the pragmatic value of legal predictability. He ignored the


\textsuperscript{75} From the protocol of the Meeting of the Central Religious Committee, Dec 12 1946. Quoted in: Fishman, \textit{Judaism and Modernization on the Religious Kibbutz}, 149.

\textsuperscript{76} Friedman, “The Extension of the Scope of Halakhah,” 39.

\textsuperscript{77} Deuteronomy 17:11
religious veneer of rabbinical authority and pointed instead to their role as duly authorized participants in the legal hierarchy. He appealed not to the Talmud or to any Jewish source, but to the “Socratic principle,” (he was presumably thinking of Plato’s *Crito*, in which Socrates obeys the law even at the cost of his own life,) that a properly authorized law is binding.

It was entirely consistent for Friedman, therefore, and the RKF in general, to submit to rabbinical authority only when they deemed it necessary to retain the integrity of their religious lives. On other occasions, Friedman had no qualms about arguing that certain issues fell outside of the purview of rabbinic authority. A primary example of this was the debate over women’s military service. Most religious parties, including the two chief rabbis, Herzog and Uziel, opposed the conscription of women into any kind of national service.  

78 Ben-Gurion and the secular parties, however, insisted upon it. The disagreement was so severe that it helped to bring about the dissolution of the government in late 1952.  

79 The RKF, almost alone in the religious sector of Israeli Jews, supported the drafting of women into national service. Their justification for simply ignoring rabbinical ruling on this matter was, according to Friedman, that the matter fell outside of the realm of rabbinic justiciability. It was a matter of public policy, not of halakha.

As long as the Chief Rabbi did not state that the prohibition was based upon Halakha, we could not regard his decision as being more than the expression of a certain point of view on a matter of public interest. And on matters of public interest we had just as much right to voice opinions as he.  

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78 See Herzog’s position paper on the National Service Law for Women in the Israel State Archives RG 72.102/P4251/8.


Because the chief rabbis did not claim that their ruling was made on halakhic grounds, Friedman believed that this was a matter of public policy and not of halakha and that therefore no submission to rabbinical authority was necessary.

The skepticism of the RKF regarding rabbinical authority should not be mistaken for a dismissive attitude to the halakha more generally. The goal of the RKF was not to bypass halakha but to update it for the purposes of modern living in the sovereign Jewish state. In doing so, however, they placed a great emphasis on what they considered to be authenticity in halakhic reasoning. In particular, they disdained the use of two halakhic mechanisms: legal fiction and the involvement of Gentiles. One halakhic decision in which both of these mechanisms had been used was the “permission by sale” [heter mekhirah] that was used to address the problem of the Sabbatical year. According to the Torah, farming is forbidden in the Land of Israel during every seventh year, the sabbatical year. During the years of the turn of the twentieth century, it was apparent that observing the letter of the law would have been disastrous for the Jewish community of Palestine. Although food for the year could be acquired from Gentile farmers, Jewish agricultural communities would be destroyed if they received no income for the entire year. Famously, Rabbi Kook exploited a detail of the law of the sabbatical year that required farming to cease on any Jewish-owned land in the Land of Israel. He therefore allowed Jewish farmers to notionally sell their land to a Gentile, for a nominal sum, during the course of the sabbatical year. The land could then be farmed, even by Jewish farmers, and the food thereby produced could be sold to and eaten by Jews. The procedure was similar to the old practice of Jewish merchants, who owned a large stock of grain-based produce, selling their stock to Gentiles for the Passover holiday rather than destroying it. The ruling of Rabbi Kook was
tremendously controversial and gave rise to a series of fierce polemics.\textsuperscript{81} It remained, however, a popular and inventive ruling that was considered indispensably important for the sustainable livelihood of Jewish farmers who wished to abide by the halakha.

Rulings of this kind were deeply unpopular within the RKF. Its members were very reluctant to rely on legal fictions which seemed like an inauthentic way to approach halakha. One kibbutz member spoke of these kinds of legal fiction as “dangerous permissions” that relied on sophistry which created a “juridic-formalistic situation” and divorced genuine intention from legal action.\textsuperscript{82} This seemed to go against the entire ethos of the kibbutz which was dedicated to a revival of a “total Jewish society, possessing its own organic political-economic substructure, existing by its own power and discharging the functions necessary for it to live and flourish.”\textsuperscript{83} In this context, halakha was expected to “unfold its potentialities.”\textsuperscript{84} The use of legal fictions “indicated that the people of Israel are not leading an independent life, but are subject to an alien life-order, inasmuch as the people ceases to create its own life…an antagonism is created between Torah and life.”\textsuperscript{85}

This alienation was doubly apparent when the legal fiction required the help of a Gentile. This was a sure indication that the halakha as it existed did not allow for a fully independent Jewish


\textsuperscript{83} Fishman, \textit{The Religious Kibbutz Movement}, 12.

\textsuperscript{84} Ibid.

society and that Jews were reliant on Gentiles just as they had been in the exile. Displaying a clear debt to Kant’s categorical imperative, Simha Friedman insisted that a halakhic solution to any modern question must have “universal application.” An independent Torah-based Jewish society could not rely on the activity of non-religious Jews or of Gentiles.

We have now in Israel a sovereign community which has the duty of upholding halakha. Thus, …[we should] bear in mind the question: “How would I act if I were responsible for the life of the community as a whole, and not just an individual of a member of a small sect?” …[The solution must be applicable to] the entire complex of modern economic and industrial life, of the army, the public administration, and so on.86 The reliance on Gentiles, then, was “to the detriment of our independent existence as a nation.”87

Kibbutz Halakha in Practice

The practical application of halakha on kibbutz did not always fully express the revolutionary halakhic philosophy of the leaders of the RKF. The tensions between two conflicting commitments of the RKF – its dedication to the Orthodox tradition and to halakhic precedent on the one hand and its attempt to create a new, fuller Jewish life even at the cost of a commitment to precedent on the other – often surfaced in debates about the application of halakhic norms to daily life. When talking about their approach to the Jewish tradition in the abstract, the leaders of the kibbutz were quite revolutionary and repudiated legal positivism with regard to law in general and with regard to halakha in particular. When it came to certain practical questions,

87 Ibid., 48.
however, the radicalism was tempered. The kind of legal positivism against which they argued so forcefully often became a touchstone in practical halakhic decisions.

One burning question for the RKF was how to deal with a *bekhor*, the firstborn male offspring of a kosher animal. An overview of a rather intricate area of halakha is required in order to understand the debate on the kibbutz. According to halakha, the firstborn of a kosher animal is holy. This means that it cannot be put to work or used in any way and must instead be given to a priest who sacrifices the animal in the Temple of Jerusalem and eats its meat. A different law applies when the *bekhor* is blemished, because such an animal may not be sacrificed in the Temple. In this case, the *bekhor* is still given to the priest but the priest may then slaughter the animal, even outside the Temple, and eat the meat. After the destruction of the Temple, the procedure was modified somewhat. The law of a blemished *bekhor* is unaffected; it is still given to the priest, slaughtered and eaten. What of an unblemished *bekhor*, which is still holy and must therefore be given to a priest but cannot be sacrificed because the Temple no longer stands? The priest must protect the animal without deriving any benefit from it. In the unlikely event that it happens to develop a blemish of its own accord, it may then be slaughtered and eaten. If a blemish does not develop, it is protected at the priest’s expense until its natural death. Because of the undue burden this put on priests, the practice developed to exploit a detail in the law. A *bekhor* is holy only if it belongs exclusively to a Jew. It was therefore recommended that when a kosher animal is about to give birth for the first time, the Jewish owner should sell part of the birthing animal to a Gentile who thereby becomes a partner not only in the ownership of the
mother but also of the firstborn animal which therefore never becomes a holy bekhor and may be treated exactly like any other animal.\textsuperscript{88}

This law presented difficulties to the RKF. As agricultural societies with limited resources, they relied on being able to use all of the animals born on the kibbutz. It would have been prohibitively expensive to bear the cost of feeding and looking after every bekhor without the ability to reap any benefit from it. The common solution to this problem, however, i.e. entering into joint ownership with Gentiles, offended the sensibilities of the kibbutz in two ways. It both depended on a legal fiction and required the reliance on Gentiles. In the absence of an alternative, however, this is what they generally did.

In 1952, a kibbutz member called Meir Or (1911-1975) took issue with this practice. Or was born in Latvia and educated in a yeshiva in Riga. A Zionist from his youth and a member of the Shahal group, he immigrated to Palestine in 1933 and joined Kibbutz Tirat Tsvi in 1937.\textsuperscript{89} In the RKF journal, \textit{Yedi’ot ha-Kibbutz ha-Dati}, Or challenged the current halakhic practice with regard to the bekhor:

> It is logical that someone whose approach to religion is in the mode of “it is an edict from God and you have no authority to question it” will use legal moves like this without concern because it is natural for people to use edicts as loopholes. But one who seeks the reason for the commandment[s], which were given to realize certain ideas and ideals … will stay away from a legal move that, so to speak, deceives God by creating a fictitious ownership of a Gentile over the property of a Jew. And if, with difficulty, it is possible to understand an approach like this at a time that we were living among the Gentiles and subordinate to

\textsuperscript{88} For further elaboration of the law of bekhor, see Meir Bar-Ilan and Shlomo Yosef Zevin, \textit{Entsiklopedia talmudit le-inyane halakha} (Jerusalem 1947-), vol. 3, 283-99.

\textsuperscript{89} Many of his writings are collected in: Meir Or, \textit{Or ha-meir} (Tirat Tsvi: Tirat Tsvi, 1987).
foreign rule, it is totally impossible to accept this approach in the free state of Israel which is not subordinate in theory or in practice.  

Or emphasized the ways in which the current practice went against the spirit of the RKF’s approach to halakha. His argument was couched in a criticism of legal positivism. From the positivist outlook, Or noted, there is no objection to the resort to legal fiction because according to the separability thesis which distinguishes between law and values, the law is the law and the reasons for it are irrelevant to the judicial process. For the RKF, however, which rejected positivism and understood law in terms of the “ideas and ideals” that lay behind it, reliance on such a loophole was unacceptable.

As a result, Or suggested a different solution based on the precedent of the halakha concerning a first-born donkey. A donkey, not being kosher, could never be sacrificed in the Temple. Even in Temple times, therefore, the practice was to transfer the sanctity of a first-born donkey onto a kosher animal, or onto money, that would be given to a priest. This was a process known as “redemption.” Given, Or said, that today, in the absence of the Temple, kosher animals can no more be sacrificed than non-kosher ones, perhaps kosher animals should also be “redeemed,” their sanctity transferred so that the animal could be used. He even suggested that a prayer be made in place of the sacrifice. Or recognized that his suggestion would “raise the question of how to overcome a clear law.” He felt, however, that the exigencies of the time called for decisive action to overturn explicit law. In Or’s words, “It makes sense in certain circumstances to permit the forbidden as an emergency ruling.” The suggestion followed the spirit of the RKF’s attitude to halakha that we elaborated above. It avoided dependence on Gentiles and

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91 Ibid., 14.
rejected the use of legal fiction. Furthermore, it was predicated on the basis that because the reality of Jewish life in its sovereign state was different from that of previous generations, it should be permitted to alter the letter of the law in order to observe its spirit. It is highly reminiscent, for example, of Una’s statement, one year previously, that the RKF had sometimes found it necessary to make changes in religious practice for the sake of forming their new religious society:

A community is able to withstand the violation of an accepted religious practice… Only with this can we explain to ourselves how we have dared to touch areas which, from the formal point of view, we were unqualified to touch. 

Despite its apparent consistency with the halakhic philosophy of the RKF, Or’s suggestion was met with a scathing counterattack in a number of articles, which not only disagreed with his opinion but claimed that it should never have been published in the first place. The editor of the journal published the responses and a brief closing remark from Or, before closing down the discussion with the following remark: “We do not see Yed’iot ha-Kibbutz ha-Dati as an appropriate stage for the clarification of matters like these and we hereby close the debate.”

The common claim of the attacks against Or was that his rejection of legal positivism had gone too far. Despite the frequent claims among RKF thinkers that the law should not be seen as a mechanistic system with no relation to external values, Or’s opponents insisted that there yet remained a technical legal procedure that could not be overlooked entirely. The practice of analyzing the purpose behind the commandments was valuable, but it should not be used to

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subvert the law entirely. As Eliezer Goldman put it in a footnote to Or’s original article, “the search for the goal of the commandment … does not justify ignoring halakhic categories.”94 In this spirit, Eliezer Rosenthal, the rabbi of Kibbutz Yavneh, bombarded Or with pages of examples of legal precedent that contradicted Or’s suggestion.95

Other respondents took a more nuanced approach. A. Ron wrote an article that aimed to defend the current halakhic practice by re-examining the whole nature of legal fictions. All definitions, he argued, draw their meaning from their context. The terms in the fields of aesthetics and justice all have their own definitions. The same goes for legal definitions which must be understood purely on the basis of their legal context. If an acquisition is deemed valid by the law, it makes no sense to claim that the acquisition is fictional. The partial acquisition of a birthing animal by a Gentile, he wrote,

…[is a] real idea in the legal context, and its reality flows only from the law. Therefore there is no meaning to the phrase “fictitious sale” in the judicial sphere. Every sale that the law recognizes is real.96

Here Ron executed two Kelsenian moves: he established the total autonomy of the legal sphere and he maintained that the validity of the law flows from within the law and not from any external measure. From this perspective, it makes no sense to call a sale “fictional”. If the law recognizes a sale, it is a legal sale.

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94 Or, “Al ha-gisha ha-formalit le-qiyum mitzvot,” 3.
95 “Pidyon bekhor.”
96 Ibid., 4.
In response to this very severe criticism, Or backtracked. In a short article, he claimed that his suggestion was only intended as a concession to the inability of his contemporaries really to understand the halakha as it stood, without a psychological justification from outside the law. Given the choice, he argued,

between losing the commandment and retaining a remembrance of the commandment which maintains its ethical basis even if it is against the details of the halakha, in my opinion we have to choose the second way. 97

Notwithstanding this re-casting of his position, Or’s original suggestion contained no indication that it was a post facto concession. In reality, Or and his opponents were arguing right past each other. Their debate was a fundamental disagreement over the nature of law itself. Along the lines of many theoretical statements by his colleagues in the RKF, Or was advocating a radical legal change on the basis of an appeal to extra-statutory values. However, for most kibbutz members, even those who had previously espoused similar ideas in theory, the practice was too radical to adopt. They fought against him with exactly the arguments they had previously repudiated, by limiting the appeal of the law to values beyond the statutes themselves.

A similar exchange took place in 1957. This time the legal issue rested on the four species that are “taken” on the festival of Sukkot. Jewish law requires the person taking the four species to be their exclusive owner. This raised a special problem for the RKF because kibbutzim did not allow their members to own private property. How, then, could they own the four species in order to fulfill the law?

97 Ibid., 14.
A helpful way into the problem was found in a medieval precedent. According to a Talmudic story, an etrog (one of the four species) was once bought by four people in partnership. Because the user of the etrog needs to own it completely for ritual use, medieval rabbis assumed that as each one of the four used the etrog, the other three implicitly granted him ownership for the duration of his time of use.\(^98\) Some thought the precedent was not helpful for the RKF. One contributor argued that it would be better for every man on kibbutz to own his own etrog, especially considering that the etrog is a symbol of the agricultural settlement of the Land of Israel, a key ideological goal of the RKF. Furthermore, he argued, actual ownership is more attractive than the use of complicated legal transactions because people in general “do not have juridical knowledge and an understanding of abstract legal ideas” and would therefore be unable to understand this intricate procedure.\(^99\) Another advocated embracing the legal fiction of presumed transfer of ownership between the etrog owners because it embodied another ideal of the kibbutz: that “individual and communal property coincide.”\(^100\)

Although each of these positions made reference to the values of the kibbutz (the settlement of the land of Israel and the coincidence of communal and private property), neither of them suggested that these values should have any serious impact on the way that the halakha operates. Each one of them ended up advocating a very conventional halakhic position. In a sense this is startling. The very notion of the four species being privately owned, through legal fiction or otherwise, surely contravened the very basis of the socio-economic life of the kibbutz. Once again, it was left to Meir Or to adopt an uncompromising position. Or claimed that even if the

\(^98\) Sukkah 41b and Rosh ad loc.

\(^99\) Auerbach, Weiser, and Emanuel, Ha-qibuts be-halakha, 116.

\(^100\) Ibid., 118.
etrog is bought with collective funds, it can never become the property of an individual member of the kibbutz. The collective is not able to give the etrog to an individual member as a gift because there is simply no private property allowed; the collective has no power to give the etrog, even temporarily, into the property of an individual. He stated this in the starkest terms:

There is no possibility whatsoever within the framework of the kibbutz to fulfill those commandments which require private property for their fulfillment.\textsuperscript{101}

Or then offered his own solutions. He first suggested a technical way out of the problem, whereby some of the property that members bring into the kibbutz upon joining could be placed into a fund for the future purchase of the four species for individual members. But, clearly concerned about the ideological shortcomings of that suggestion, he made a more radical one:

To avoid “legal sophistry” there is perhaps one possibility: to establish that the halakhic emphasis on private ownership for the fulfillment of certain commandments only applies in a regime in which possessions are defined as private, meaning in a regime of private property. But in the regime of the kibbutz, where property is not the private possession of the members but the possession of the community, one may fulfill one’s obligation of the commandments also with communal property like this.\textsuperscript{102}

In other words, Or argued that rather than finding a way to satisfy both the statutes of the halakha and the structure of the kibbutz, the halakha should change to fit its new social circumstances. In the new kibbutz regime, perhaps the four species no longer need to be privately owned.

Given the hostile reception of Or’s suggestion about \textit{bekhor} only five years earlier, it will come as no surprise that his suggestion was ignored here, too. The religious kibbutzim continued to

\textsuperscript{101} Ibid., 124.

\textsuperscript{102} Ibid.
operate on the assumption that the four species had to be privately owned. Indeed, the rules of the kibbutz movement were subsequently changed to allow kibbutz members to own private property in those few circumstance that it is required for religious purposes.\textsuperscript{103} Once again legal positivism prevailed. The statutory law resisted challenges that appealed to values that lay outside it.

Both these examples demonstrate that even as the religious kibbutzim struggled to apply halakha to their unprecedented socio-political conditions of communal frontier living, their approach to law remained in some ways conventional. Even as they expressed distaste for traditional legal tools like legal fiction and the reliance on Gentile involvement, they maintained fidelity to the structures and statutes of the law they had received.

In this sense, the RKF failed in its stated goals. Whereas its early ideologues spoke boldly about “holy rebellion,” the actual activity of the religious kibbutzim often rejected rebellion in the name of the holy. Legal fictions and sales to Gentiles remained fixtures of kibbutz life. While skeptical of rabbinical authority, the RKF was keen to preserve its ties with the Orthodox establishment and the attempt at halakhic interpretation was in effect abandoned. As one RKF member put it as early as 1942:

> Seeing the great danger of a diminishing of the stature of halakha, we are forced against our will into a position of defence and protection of the framework of halakha…into an alliance with the conservative elements within the people, although we feel closer in spirit to the innovative and revolutionary elements.\textsuperscript{104}

\textsuperscript{103} See footnote at: ibid., 121.

In a retrospective published in the RKF journal in 1959, the same point was once again made:

We have not made progress towards the goal to which we aspire, regeneration of our Torah, and finding solutions for the questions that come up again and again... We even adhere strictly to customs sanctified by previous generations, without knowing how to sanctify our own life-patterns.\(^{105}\)

The legal and religious philosophy of the RKF constituted a serious challenge to the more conservative approaches to law that characterized the mainstream of religious Zionism. Given the later rise to dominance among religious Zionists of a completely different legal philosophy, which emphasized the centralized state and positivist interpretation of the law, this study of the early ideology of the RKF reminds us of the contingency of history and the availability of alternative approaches. The failure to pursue their legal ideology in practice was not unique to the RKF. Other religious Zionists who did not subscribe to the radical doctrines of the RKF also failed in their attempts to implement their ideas about law and halakha in the context of the new state. We turn now to an investigation of the widespread commitment to legal pluralism amongst even more conservative religious Zionists and to the beginnings of its eventual demise under the powerful new centralism of the Chief Rabbinate.

2. The Rise and Fall of Religious Zionist Legal Pluralism

Religious and political power have been separated from each other … throughout the course of Jewish history.

- Shimon Federbusch

The main concern of the religious kibbutzim, as described in Chapter 1, was how to think about Jewish law in the radically new environment of the religious socialist commune. As the founding of the state drew nearer, however, a more fundamental challenge posed itself to religious Zionist leaders: the democratic nature of the modern state. It was self-understood that the new Jewish state would be democratic. The majority of its Jewish citizens were secular or even anti-religious Zionists who were committed to democracy. Indeed, the United Nations itself required the new Jewish state to have a democratic constitution, to elect a legislative body by universal suffrage and not to allow political, civil, or any other discrimination against any person.¹ This was well understood by religious Zionist leaders, but it posed a serious challenge to their commitment to a synthesis of nationalism and religion. Halakha, after all, discriminates in numerous areas of the law between men and women, as well as between Jews and Gentiles. Of particular concern in the realm of constitutional law were the halakhic impediments to Gentiles or women being appointed to the judiciary, or even giving evidence in court. The egalitarian principles of democratic politics therefore posed a special challenge to religious Zionists who had to imagine a state in which women, Gentiles and non-religious Jews could hold positions of power that was also compatible with their understanding of the Jewish tradition. Could the halakha be

¹ United Nations General Assembly Resolution 181.
accommodated to a Jewish state in which a woman could be president and an Arab Muslim a judge?

This chapter deals with two distinct methodologies that were mobilized to address these questions, based on two distinct approaches to the theory of law: pluralism and centralism. Legal centralism is a state-centered way of thinking about law. It posits that all law within the state derives from the authority of the state and that each state has one centralized legal system into which all law within its boundaries has to fit. Legal pluralism, on the other hand, recognizes that even within a single political unit like the state there may be a number of overlapping legal regimes, each with its own rules, procedures and sources of authority.

This chapter shows that in the years before the founding of the State of Israel, most religious Zionist thinkers adopted a pluralistic approach to law when laying out their vision of the relationship between halakha and politics. They felt that distinguishing the law of the state from halakha was a crucial for a Jewish state to be viable. They were supported in this position by generations of precedent. Legal pluralism had been the favored approach to law of major Jewish thinkers and leaders for most of Jewish history. The end of this chapter will introduce the challenge to Jewish legal pluralism spearheaded by Isaac Herzog, the chief rabbi. This will set the scene for the remaining chapters which will describe, and try to explain, the process by which Herzog’s position eventually eclipsed legal pluralism in religious Zionist circles.

The early popularity of the pluralist position is indicated by the way in which even Herzog, who unrelentingly resisted it, acknowledged that it would have been the easiest way to address the
challenges of religious Zionism, entailing the smallest change to the halakha and its institutions. In the midst of a lengthy tract outlining his intricate suggestions for making Jewish inheritance law more egalitarian, Herzog makes the following comment:

> Before I labor to find a fitting solution for the accommodation of Torah law to a democratic regime, especially in a state of the Jews, I see that there are those who ask: Why all this trouble? Surely one of the later medieval jurists, the Ran, of blessed memory, made light of this whole thing. In his sermons, the Ran claims that there are two types of laws in Jew[ish society]: the law of the Torah and the law of the state or the king’s law.²

Known as “the Ran,” Nissim of Gerona (?1310–?1375) was a medieval Talmudic commentator and legal scholar. In his *Eleventh Sermon*, he articulated a comprehensive constitutional theory which posited that the ideal Jewish polity has a dualistic legal regime comprising the Law of the Torah, i.e. halakha, on the one hand, and the “king’s law” on the other.³ He noted that “every nation needs some form of political organization,” and yet halakha is deficient in its ability to govern a state.⁴ The halakhic punishment for theft, for example, requires the thief simply to return the stolen object and to pay a fine of the same value, which is scarcely a deterrent, especially for people of means. It would be, furthermore, extremely difficult to convict someone of a crime in a halakhic court. A halakhic conviction would require two eye-witnesses to the crime and that the accused be warned of the punishment for the crime immediately before carrying it out. According to the Ran, halakha is a perfectly just law but it is not effective for keeping social order. Indeed, he wrote, “some of the laws and procedures of the [Gentile] nations

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⁴ Michael Walzer, *The Jewish Political Tradition*, 1: Authority, 156.
may be more effective in enhancing political order than some of the Torah’s laws.” In the Jewish polity, the Ran believed that there should be courts run by religious judges according to the laws and procedures of halakha. But these courts would not be intended for the practical running of a state. Their value would be exclusively religious and metaphysical:

[Unlike] the nomoi of the nations of the world, the laws and commandments of our Torah… include commandments that are ultimately not concerned with political order. Rather their effect is to adduce the appearance of the divine effluence within our nation and [to make it] cleave unto us.

Because the laws of the Torah do not achieve the necessary political ordering, that task is left to a parallel legal regime which was originally associated with the king. Since Biblical times, the Ran maintained, Jewish kings and their governments enacted and enforced legislation designed to keep social and political order in the state. After the end of the monarchy in Israel, in the absence of a king, the “king’s law” remained in force under the authority of other kinds of political leaders. Sometimes these happened to be rabbis but even in that case they did not preside over the “king’s law” based upon their halakhic authority but in their role as political leader. For the Ran, while it is the job of rabbinical courts to draw down metaphysical benefits of halakhic law, the laws that run the Jewish polity in practice derived from the king or other political leaders.

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5 Ibid., 158.
6 Ibid., 157-8.
Hayyim Ozer Grodzinski

In the context of the State of Israel, a constitutional outlook like the Ran’s solved many problems for religious Zionists. To make halakha commensurate with a democratic regime and to give it the tools to govern a modern state would entail a significant re-working of traditional law.

According to the Ran’s model, however, rabbinical courts could continue to run according to traditional Jewish law as a religious enterprise while the real government of the state could be left to the political authorities, which could build a legislature and judiciary on the model of the “king’s laws.”

This was indeed the solution suggested by Rabbi Hayyim Ozer Grodzinski (1863-1940), a deeply respected leader of Lithuanian Jewry. He offered the suggestion to Herzog who had turned to him for advice shortly after he took up the post of Chief Rabbi of Palestine. In Herzog’s words:

After the Peel Commission,\(^8\) when we were faced by the partition plan and the founding of a Jewish State, I corresponded with the great Rabbi Hayyim Ozer Grodzinski, suggesting ways to overcome the difficulty confronting us in the matter of public appointments of Gentiles [to positions of political authority] …In his reply he alluded to the above-mentioned sermon of Ran of blessed memory.\(^9\)

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\(^8\) The Palestine Royal Commission under Lord Peel, which issued a report in 1937 advocating the partition of Palestine. It was not ultimately implemented. Ten years later, the United Nations recommended a similar plan after which Israel declared independence.

\(^9\) Herzog, *Tehuqah le-Yisra’el al-pi ha-torah*, 2, 75. This translation follows that in Michael Walzer, *The Jewish Political Tradition*, 1: Authority, 474-5. A letter from Grodzinski to Herzog, published at Herzog, *Tehuqah le-Yisra’el al-pi ha-torah*, 2, 75 fn. 10., contains the suggestion of Grodzinski to which Herzog referred. See also: ibid., 1: 31 fn. 19. Grodzinski’s suggestion was as follows:

In regard to furnishing a constitution for the rule of Torah in the Hebrew state: regarding [civil] law, this is truly a difficult matter in need of much reflection. My initial thought is perhaps to arrange matters so that the judges in cases of...
Herzog, though, was quite unwilling to accept Grodzinski’s advice:

I replied that in my view this is not an acceptable solution, but received no further response. I maintain my position that it is inconceivable that the laws of the Torah should allow for two parallel authorities.\(^{10}\)

Some scholars have suggested that Grodzinski was able to make such a suggestion only because, being firmly anti-Zionist, he did not invest as much significance in the idea of a Jewish state as Herzog did. According to this understanding, the resort to the Ran’s constitutional model was used by Grodzinski as a way of bifurcating between the state and religion and thereby preserving a pristine realm of Jewish law to remain undisturbed by the challenges of modern society. Thus, one scholar of Jewish law has argued:

It does not require much guesswork to discern the motivations behind Grodzinski’s response. Grodzinski was opposed to the state’s creation altogether. For him, Zionism was blasphemy, the human forcing of a messianic ideal and, potentially, idolatry — the setting up of an alternative sovereign. He wished to protect the garden of religious halakha from any state but especially a Jewish state, by separating the two at the outset. Herzog, by contrast, dreamt of reviving Jewish law as a religio-national law by developing the nascent democratic strains within it. All sorts of questions relating to affairs of state had barely been addressed by

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\(^{10}\) Herzog, *Tehuqah le-Yisra’el al-pi ha-torah*, 2, 75. This translation is from: Michael Walzer, *The Jewish Political Tradition*, 1: Authority, 475.
the tradition... Nonetheless, Herzog thought it would be possible to develop the sources from within.\textsuperscript{11}

This interpretation, though, sheds light on only one aspect of the Herzog-Grodzinski debate. This chapter will show that Grodzinski was not the only contemporary of Herzog who recommended the implementation of a version of the Ran’s constitutional order in the State of Israel. Many Jewish thinkers who were as committed to Zionism as Herzog made suggestions similar to Grodzinski’s. In fact, as I hope to show, these suggestions grew far more naturally out of the Jewish political tradition than Herzog’s alternative suggestions. Ultimately, it will be necessary to show not why some religious Zionists agreed with Grodzinski but why Herzog persisted in rejecting his position.

\textbf{Legal Pluralism and the Jewish Political Tradition}

The study of legal pluralism begin in earnest in the 1980s. According to John Griffiths, in his foundational study, the “liberal hegemony” regnant in the West has led to the almost universal adoption of a particular approach to law and politics that Griffiths called “legal centralism.”\textsuperscript{12}

According to legal centralism,

\begin{quote}
[\textit{L}aw is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state…}
\end{quote}

\textsuperscript{11} Stone, “Religion and State: Models of Separation from within Jewish Law,” 641.

\textsuperscript{12} J. Griffiths, “What is Legal Pluralism?,” \textit{Journal of Legal Pluralism} 24 (1986).
In the legal centralist conception, law is an exclusive, systematic and unified hierarchical ordering of normative propositions.\(^\text{13}\)

In practice, however, Griffiths argued, real socio-political relations do not conform to this notion of legal centralism. In fact, any political unit has within it any number of overlapping and often competing normative regimes with their own rules and their own sources of authority, often distinct from the state, that exert claims on individuals:

A situation of legal pluralism – the omnipresent, normal situation in human society – is one in which law and legal institutions are not all subsumable within one ‘system’ but have their sources in the self-regulatory activists of all the multifarious social fields present, activities which may support, complement, ignore, or frustrate one another, so that the ‘law’ which is actually effective on the ‘ground flow’ of society is the result of an enormously complex and usually in practice unpredictable patterns of competition interaction, negotiation, isolationism, and the like.\(^\text{14}\)

In short, “legal pluralism is the fact. Legal centralism is myth, an idea, a claim, an illusion.”\(^\text{15}\)

If the presence of many overlapping legal regimes with independent sources of authority characterizes the modern state, it was even more apparent in the pre-modern polity. One scholar has summarized the various legal regimes in the pre-modern European context:

The mid-to-late medieval period was characterized by a remarkable jumble of different sorts of law and institutions, occupying the same space, sometimes conflicting, sometimes complementary, and typically lacking any overarching hierarchy or organization. These forms of law included local customs (often in several versions, usually unwritten); general Germanic customary law (in code form); feudal law (mostly unwritten); the law merchant or lex mercatoria — commercial law and customs

\(^{13}\) Ibid., 3.

\(^{14}\) Ibid., 39.

followed by merchants; canon law of the Roman Catholic Church; and the revived Roman law developed in the universities. Various types of courts or judicial forums coexisted: manorial courts; municipal courts; merchant courts; guild courts; church courts and royal courts.16

This picture of legal pluralism equally characterizes pre-modern Jewish communities. Jews and their communities were governed by halakha which pertained to civil, tort and criminal law as well as ritual law such as the Sabbath and dietary laws. The authority for the halakhic regime derived from the divine revelation on Sinai and its transmission and interpretation by authorized rabbis and scholars. However, Jews also recognized that they were simultaneously subordinate to other legal regimes. Alongside their commitment to the halakha, they were governed by Gentile political authorities – kings, emperors and nobles – who laid their own normative claims on the Jewish community. Jews submitted themselves to the authority of these Gentile legal regimes not only out of the fear of coercive force or the need for protection, but also out of a principled obedience to governmental legal authority.17 There was an understanding that without laws and government, there would be no social order. An early rabbinic source taught: “Pray for the welfare of the monarchy, for without fear of it people would swallow each other alive.”18 Over time, there developed a principle of dina de-malkhuta dina, “the law of the land is the law,” which articulated the acceptance of Jewish communities of the binding authority of the laws of

16 Tamanaha, “Understanding Legal Pluralism,” 377.


18 Mishnah Avot 3:2.
Gentile governments. Certainly, there were limits on the obligation to obey the law of the land; it was not to be followed if it openly contravened ritual aspect of halakha, for example. On the whole, however, Gentile kings and other political leaders had to be obeyed. The law of the land was not incorporated into halakha; it remained outside of it. Its source was with the Gentile government, not Sinaitic revelation. And it was adjudicated by governmental institutions, not rabbinical courts. It was, then, not part of halakha, but an independent parallel legal regime that was recognized as authoritative in the Jewish tradition.

In addition to the halakha and the law of the land, there was yet another parallel legal regime that governed Jewish communities: the political authority of the community leadership itself. In around the 10th century there emerged the kehilla or kahal as “an autonomous body that fulfilled internal political functions in all areas of communal life.” The leaders of the kehilla, often called the tuvei ha-ir, the “good men of the city,” were powerful communal lay-leaders who served alongside the rabbinical authorities. The historical origins of Jewish political authority are very old, stretching back earlier than Talmudic times. Almost all religious leaders in the middle

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19 The principle of dina de-malkhuta dina is attributed in several places in the Talmud to Samuel, a Jewish leader of the third century.

20 For a thorough examination of the principle in Jewish law and history, see: Shmuel Shilo, Dina de-malkhuta dina (Jerusalem: Defus akademi bi-Yerushalayim, 1974).


22 Yitzhak Baer placed the origins of the kehilla in the Talmudic period or earlier. Others have argued that the dual political-religious leadership of Jewish communities was structurally evident in the institutions of monarchy and priesthood in the Bible. See: Baer, “Ha-yesodot veha-hathalot shel irgun ha-qehillah ha-yehudit be-yemei ha-benayim.” See also: Michael Walzer, The Jewish Political Tradition, 1: Authority; Stuart A. Cohen, “The Concept of the Three Ketarim: Their Place in Jewish Political Thought and Implications for Studying Jewish Constitutional Theory,” in Kinship & Consent: The Jewish Political Tradition and its Contemporary Uses, ed. Daniel Judah Elazar (New Brunswick, N.J.: Transaction Publishers, 1997); Bernard Susser and Eliezer Don-Yehiya, “Prolegomena to
ages recognized the authority of the leaders of the kehilla to enact binding legislation and to tax its members. Extensive communal legislation known as taqanot ha-kahal comprised the public and administrative law which effectively governed Jewish communities.\textsuperscript{23}

There was an ongoing debate among medieval Jewish jurists about the theoretical basis for communal authority. They grappled with the question of why a small group of communal leaders should be allowed to extract money and impose regulations on individuals without their consent.\textsuperscript{24} Some suggested that the tuvei ha-ir drew their authority from the fact that they represented all individuals in the community, although that begged the question of how they held authority over individuals who refused to recognize their authority. Others posited that they were a kind of court and in that capacity wielded the extraordinary powers of judges to extract property from others. Others suggested that there was a herem, a vow, implicitly taken by all members of the kehilla to obey their leaders. Still others believed that the political authority of the kehilla was inherited from the authority of the ancient kings of Israel.\textsuperscript{25} In any case, the political and legal authority of the tuvei ha-ir was distinct from both that of the rabbis and that of the Gentile government. It was the product of neither the word of God and its rabbinical interpretation nor the power of the Gentile king. It was drawn from a different source of

\textsuperscript{23}For a historical overview of this communal legislation, see: Finkelstein, \textit{Jewish Self-Government in the Middle Ages}.

\textsuperscript{24}This is a question that lies at the foundation of all political theory. Social contract theory is the most commonly suggested foundation for political authority in the modern period.

authority and ran in parallel to those other systems. Halakha was most certainly not the only legal regime in the pre-modern Jewish community.

According to a recent study on medieval Jewish political theory “these two types of legislation [halakhic and communal] represent two distinct spheres of authority each generating different rules of action.”\(^2\) The relationship between these spheres was not always peaceful; they did, occasionally, clash.\(^2\) The political authority of the kehilla was, however, generally embraced by the rabbis who recognized that halakha was incapable of ruling the polity alone. As one example of many, this is a comment of Rabbi Shlomo ben Adret (Rashba; 1235-1310) in his approval of the workings of a non-rabbinical court operating according to non-halakhic procedure:

> If the communal leaders find the witnesses trustworthy, they are permitted to impose monetary fines or corporal punishment as they see fit. Society is thereby sustained. For if you were to restrict everything to the laws stipulated in the Torah and punish only in accordance with the Torah’s penal code in cases of assault and the like, the worlds would be destroyed, because we would require two witnesses and proper warning.\(^2\)

Above, we examined the constitutional vision of the Ran, which espoused:

> the radical autonomy of politics. According to Gerondi, the policy governed by the Torah will have two legal systems operating side by side; royal law, ensuring social order, and Torah law, ensuring the “divine” standards of the polity.\(^2\)

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\(^2\) Rashba, Responsa, 3:393. This translation is based on that in Michael Walzer, *The Jewish Political Tradition*, 1: Authority, 402.

\(^2\) Lorberbaum, *Politics and the Limits of Law*, 93.
We have seen, however, that the Ran was not alone in this. Our survey of legal pluralism in the pre-modern Jewish community demonstrates that the Ran may have been the most extreme proponent of legal pluralism, or the thinker who wrote most extensively about it. But his opinion was merely one more version of a universal acceptance of a plurality of legal regimes, sometimes with conflicting procedures and regulations, all governing the Jewish community in parallel.

Grodzinski drew upon this deep history of Jewish legal pluralism in his suggestion for a sovereign Jewish state. When Herzog dismissed the suggestion, rejecting legal pluralism for legal centralism, he was also dismissing an ancient model of Jewish political arrangement. As mentioned above, it has been suggested that the root of the Herzog-Grodzinski debate was their difference over the value of Zionism. We will now see, however, that legal pluralism was seen as the key to the legal-political arrangement in the Land of Israel by many other Jewish thinkers who also embraced Zionism. Before the 1950s, Herzog’s legal centralism was the exception.

**Reuven Margulies**

An early treatment of the constitution of a Jewish state from a religious Zionist perspective came from the pen of Reuven Margulies (1889-1971). Born in Lwow, Margulies was a rabbinical scholar who moved to Palestine in 1935 and wrote prolifically on Jewish law and thought. He dealt with the question of religion and law in a Jewish State in a 1922 work called “Courts of
Law in the Land of Israel.” Margulies’ approach in this work indicates that even among modern religious Zionists, legal pluralism was considered the constitutional norm.

At the beginning of his work, Margulies immediately made both his religious and his Zionist commitments clear. In that time, he wrote, the years following the Balfour Declaration:

Higher providence has placed this generation at a time of great value and consequence, a time of laying the foundation stone for Hebrew life in the land of Israel upon which the Israelite people will develop as it arises from the dust of exile … A voice has gone out from the mountain of the Lord calling to all upright people to help build the land and create a spiritual center for Israel and its Torah. To this giant task it is required of Knesset Israel that all its children will be builders, some with money, some with Torah. Together they will lay the economic and spiritual foundation stones.

He was clearly, then, dedicated to both the building of a Zionist state and also the primacy of the Torah and traditional Judaism in that state. The constitutional ordering of the Jewish state could not be left to laws and politics taken from other peoples:

We cannot choose for ourselves a political program according to the processes of other lands and their laws because all our ways of life are one unique package according to the laws of the Torah.

Margulies, however, recognized the potential problems in this outlook. The Jewish tradition had not dealt with national sovereignty for centuries. So much so that “any institution founded to correlate to the spirit of the Torah and Judaism is like a new creation ex nihilo.”

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30 Reuven Margulies, *Tal tehi’ah* (Lwow 1922).
31 Ibid., 39.
32 Ibid., 41.
33 Ibid.
noted that halakha as a legal system is deficient in its ability to deal with the realities of a national polity. For one thing, it has no workable criminal law:

[The Torah is missing] an important lawbook in an area which is important and urgent for sustaining society. We know today [in the modern state]...in addition to the civil law there is also a lawbook especially for criminal law [onshim].

Margulies recognized, exactly as Rashba, the Ran and many others before him, that halakha does not have a rigorous criminal law sufficient for deterring and dealing with criminals.

He also noted the presence of non-Jews in Palestine and the necessity of creating a social order that could accommodate in an egalitarian way the members of all religions.

We have to take account of the fact that even when the percentage of Jews in the land of Israel increases, we will not be there a people dwelling alone...There will be members of three religions living there. Therefore we, who request minority law in all the lands of the Diaspora and who have to set an example to the nations about the extension of the rights of another people who lives in our land, we have to take account also of their opinions.

This meant that the discriminatory elements of halakha made it unsuitable for governing a polity with Jews and Gentiles living side by side:

Let’s assume that the government of the land has already been transferred to us and we have to appoint judges. Will we not appoint Gentiles because they are invalid witnesses? And what of their testimony? Will the law of the land distinguish between residents?

34 Ibid., 43.
35 This is a paraphrase of Numbers 23:9.
36 Margulies, Tal tehi'ah, 41.
37 Ibid.
Margulies addressed these issues by way of his own historical reconstruction of the constitutional history of the Jewish people. His emphasis was on legal pluralism and the presence of political authority that was distinct from the halakha even as it was condoned by God. Initially, he wrote, before the age of monarchy, the Judges ruled in Israel. In this period, there was chaos “because the laws of the sages of Torah… could not alone govern social life. Then they asked for a king who would stand the earth on justice.” Kings had the power to rule differently from the halakha: “When the Torah permitted the appointment of the king who has in his power the strength of rulers like all the nations, it gave him through this also an unlimited power of legislation.” This power was not only vested in kings but passed to every “leader of the people.” This political authority continued to the present:

From this historical investigation we learn that the Torah authorized the current leader of the people to make governmental institutions in the land to run national courts which punish on the authority of the government.

So for Margulies, a non-halakhic legal regime had existed throughout Jewish history. What was the relationship between this regime and the halakha? He argued that the difference between the halakhic courts and kings or political leaders was that halakhic courts ruled on the basis of fixed law and kings could rule on the basis of their discretion in the moment. This explained why very few of the kings’ laws have survived. They were not intended to be a fixed legal code but rather laws for the moment to deal justice in particular circumstances. Margulies, then, distinguished

38 Ibid., 42.
39 Ibid., 45.
40 Ibid., 47.
41 Ibid., 51.
between two kinds of law. One, halakha, is a rigid law with fixed procedures which operates according to pure normativity without concern for the judicial discretion that might be required in particular circumstances. The other, the law of the king or communal leader, is a fluid law intended to soften the rigidity of the halakha by operating with discretion in the particular moment.

For Margulies, the king’s law would be the basis of the constitutional regime of a Jewish state with one small modification. Courts which operated purely by the discretion of the ruler lacked legal predictability. The modern equivalent of the king’s law, the government of a contemporary Jewish state would have to establish clear laws:

We have also seen the problems that arise from the lack of an authorized book of laws... Therefore today when we have to set up these urgent institutions for political life, the head court has the obligation to set up... a clear law in a logical order. And it is understood that these laws will not be the evil laws of Rome but laws of Israel which have the spirit of righteousness and ethics of ancient Israel and its Torah and these Torah laws will be the state laws in the land of the Hebrews.  

The outcome, in other words, is a national law that is not based on the halakha but is nonetheless approved by the tradition and can be seen as a specifically Jewish law which is distinct from the laws of other nations. Areas of law with a ritual aspect such as marriage and divorce would remain under the purview of the halakha proper. But other areas of law would fall under the control of the government and would not be dependent on halakha or rabbinic authority. This satisfied Margulies’ Jewish nationalism as well as his commitment to the Torah and it also allowed him to imagine a legal-political regime that was consistent with the Jewish tradition without discriminating against Gentiles:

42 Ibid.
It is in the power of the head of state to enact a general law that every resident who is presumed to be honest may testify, and that one who knows the laws may judge. And this state law is authorized by the authority that the Torah gave to the head of state to enact whatever he thinks will be for the benefit of the State.\textsuperscript{43}

This was exactly the kind of argument Grodzinski made in 1937, which was utterly rejected by Herzog. Here, however, it was advocated by a committed Zionist. Indeed, Herzog was aware of Margulies’ argument but he rejected that too.\textsuperscript{44} In his comments about Margulies, Herzog noted that “we are not dealing here with historical research and anyway it will not help us.”\textsuperscript{45} Herzog therefore implicitly acknowledged that Margulies had described the Jewish political tradition accurately from a historical perspective but nevertheless took a different approach with regard to the Jewish state. Herzog continued:

\begin{quote}
From the perspective of halakha only the authorized sources of Torah law may enter discussion and according to them there is no basis for this suggestion of a double system of justice or two parallel authorities.\textsuperscript{46}
\end{quote}

If governing were left to political authorities and taken out of the hands of the rabbis, Herzog claimed, then “the Sanhedrin descends into being a kind of legal researcher and this makes no sense.”\textsuperscript{47} For Herzog, the king in the Israelite constitution had powers limited to the extraordinary situation of punishing a criminal who was blatantly guilty but happened to escape conviction under the halakhic system. However, he insisted, “this does not mean that the

\textsuperscript{43} Ibid.

\textsuperscript{44} Herzog referred directly to a section of Margulies’ \textit{Tal tehi’ah}: “I came upon a pamphlet written by a great and famous rabbi called ‘Courts of Law in the Land of Israel,’ that appeared some years ago, the fruit of the enthusiasm born by the Balfour Declaration and the subsequent appointment of Herbert Samuel.” Herzog, \textit{Tehuqah le-Yisra’el al-pi ha-torah}, 2, 75.

\textsuperscript{45} Ibid., 76.

\textsuperscript{46} Ibid.

\textsuperscript{47} Ibid.
monarchy in Israel had its own law, not according to the Torah according to which it judged and according to which it appointed judges and approved witnesses.” Margulies the Zionist proposed a solution very similar to that of Grodzinski the anti-Zionist. Herzog, while implicitly recognizing the grounding of their solutions in Jewish history, rejected them both.

Shimon Federbusch

Margulies advocated the use of the king’s law in the modern Jewish state over twenty years before the state of Israel was established. One might have thought that his particular legal and political philosophy could belong only to a period without the immediacy and urgency that the establishment of the state imposed upon those who would ultimately design its constitutional structure. This was not the case, however. A similar approach was taken by religious Zionists in Israel and outside of it in the late 1940s. Given the deep resonance of legal pluralism with constitutional precedents throughout Jewish history, this is unsurprising. We turn first to the United States.

Shimon Federbusch was a religious Zionist leader from Galicia who from 1940 lived in New York. In 1952 he published *Mishpat ha-melukhah be-Yisra’el*, an attempt to outline a constitutional framework for the Jewish state based on traditional sources. For Federbusch too, state legislation was legitimate because it derived its authority from the ancient category of the

\[48\] Ibid.

“king’s law” about which the Ran had written so extensively. For Federbusch, “Every law of a state institution today, has the force of the King’s Law in its time.”

To lend authority to this opinion, Federbusch quoted a comment by the great leader of religious Zionism, Rabbi Abraham Isaac Kook, who had written years earlier:

It seems to me that when there is no king, since the king’s laws relate to the general state of the nation, the rights of these laws return to the hands of the nation in its generality.

In other words, Kook had said, in the absence of a king, the governmental authority resides in the entire people. This comment was repeatedly quoted by those who, like Federbusch, wanted to find traditional precedent for the legitimacy of the laws of the modern state of Israel.

Federbusch, however, did not stop there. He went beyond this simple comparison of the king of old with the government of today. He insisted that a democratic outlook with its emphasis on equality and freedom is not only commensurate with the Jewish tradition, but is a fundamental component of its legal and political theory. Jewish political theory, Federbusch declared, begins with the premise that all people are created equal under God. One striking passage reveals the full extent of his self-conscious awareness of his intellectual environment. Writing, we must not forget, in Hebrew, he appealed to de Tocqueville in a comparison of the egalitarianism of America with that of the Jewish tradition:

The democratic order in America has its source in the lack of social divisions of the first immigrants. ‘The immigrants who founded America,” emphasizes Tocqueville, “all belonged to one class. In this society there were no lords, no commoners, no rich and no poor.” Because of this, they laid the foundation for a democracy with no class distinctions. So with the Jews, the Torah emphasizes that they were formed in the house of bondage in order

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50 Ibid., 50.
to stress the total social equality of all parts of the people and in order thereby to argue from this for the justice of the legal and financial equality of every individual, including aliens and foreigners. 52

This insistence on the inherent equality of all people in society is underlined by Federbusch’s emphasis on another element of democratic theory: that all people are fundamentally free. This means that the only legitimate laws or social orders are those that have been accepted freely.

This applies not only to human laws even to those of God:

The democratic spirit in Israel is clearly apparent in the essence of the covenant between the Jews and God…. The idea of the covenant is that Israel did not accept the entirety of religious and political legislation out of duress or coercion but out of goodwill, by free choice on the basis of a contract undertaken with the people on the basis of democratic agreement. 53

If this is true of the relationship between the people and God, it is certainly true of human leaders of Jewish society whose authority, argued Federbusch, depends entirely on the consent of the governed. 54

Federbusch embraced democratic ideals even further in his discussion of the relationship between religion and state. Perhaps influenced by the Jeffersonian mode of American politics, Federbusch presented a narrative of Jewish history in which “religious and political power have been separated from each other not just in theory in Jewish philosophy but also in practice in the course of Jewish history.” 55 He remained, of course, deeply committed to the halakhic system and traditional values. He argued, however, that religion’s role in the state is as a persuasive

52 Federbusch, Mishpat ha-melukhah be-Yisra‘el, 32.
53 Ibid., 33.
54 Ibid., 35.
55 Ibid., 27.
moral force. Halakha does not have, and is not intended to have, coercive force. Religious institutions, he wrote, should be strong in order to have a positive role in society and to avoid the state interfering with private religious practice. The state, however, should have no role in enforcing religious laws.\textsuperscript{56} Halakha is, on the whole, left to voluntaristic religious communities while political government is left to the state and its machinery.\textsuperscript{57}

Federbusch went even further than Margulies in his approach to the potential tensions between the state and the Jewish tradition. Margulies had relaxed the tensions; Federbusch subverted them entirely. By holding up equality and freedom as fundamental principles of the Jewish tradition, he constructed a worldview wherein Judaism and the modern democratic state both aimed at the same goal. Furthermore, by locating the separation of religion and state firmly within the Jewish tradition, he created room for the state to act according to the principles of democracy without running into any resistance from halakha. Federbusch was clearly a relatively modern thinker, who was familiar with modern political ideas. We turn now to a contemporary writer with a very different profile.

\begin{center}
\textbf{Eliezer Waldenberg}
\end{center}

\textsuperscript{56} Ibid., 28-9.

\textsuperscript{57} In the rest of his book, Federbusch applies these theories to minority rights, criminal law, workers’ rights, military law, and many other issues. There is sometimes a tension between his vision of a rather paternalistic state and his insistence on personal liberty, and between his doctrine of separation of church and state and his belief in religion as a moral presence in society. For an overview of Federbusch’s book, see: Alan Mittleman, \textit{The Scepter Shall Not Depart From Judah: Perspectives On the Persistence of the Political In Judaism} (Lanham, MD: Lexington Books, 2000). Chapter 8, “The Constitution of a Jewish State: The Thought of R. Shimon Federbusch”
Eliezer Waldenberg (1917\textsuperscript{58}-2006) was born in Jerusalem and served for most of his life as a rabbi on the rabbinical courts of Tel Aviv and later Jerusalem. He was best known for his work as the rabbi of Sha’arei Tsedek hospital in Jerusalem. In that post, he wrote many responsa regarding medical ethics which were collected, along with his rulings on other matters in his *Tsits Eliezer*. He made his own contribution to the question of the relationship between halakha and modern Jewish sovereignty in a three-volume work called *Hilkhot medinah* published in 1952-5.\textsuperscript{59} The work includes a discussion of the general theory of Jewish statehood and its practical and mystical elements as well as many chapters on specific questions such as proper halakhic behavior during a military exercise, and whether it is acceptable to elect Gentiles to public office in Israel.

Waldenberg’s treatment of the Jewish political tradition and his suggestions for the state of Israel deserve our attention because they highlight the central place of legal pluralism in the Jewish canon. I showed above how helpful the notion of legal pluralism was for Shimon Federbusch, who employed it in his defense of a highly modern (and highly American) model of a Jewish state in which religion and politics were kept firmly apart. Had Federbusch and people like him been the only modern Jewish halakhists to grant legal pluralism such a central role, we could be forgiven for wondering if it was simply a strand of the Jewish tradition that was exploited by more modern interpreters for their own ends. Waldenberg, however, was a far more traditional thinker, confirmed in his ultra-Orthodoxy. The fact that Waldenberg’s treatment of Jewish politics also relied heavily on the notion of legal pluralism underscores its centrality in the

\textsuperscript{58} *Encyclopaedia Judaica* 1\textsuperscript{st} ed. has 1917; 2\textsuperscript{nd} ed. has 1912. Other sources have 1915.

\textsuperscript{59} Eliezer Waldenberg, *Hilkhot medinah*, 3 vols. (Jerusalem 1952-5).
Jewish tradition and raises even more sharply the question of why Herzog was so dismissive of it.

*Hilkhot Medinah* is not a very systematic work and contains a number of statements that are in tension with each other. It is possible, though, to determine Waldenberg’s general approach to law and politics in the Jewish tradition. Waldenberg had a very metaphysical approach to Jewish law. In his view, Jewish civil law no less than ritual law engendered a relationship with the divine:

> [There is no difference between] laws regarding God and laws between one person and another. They all recognize the central supernal point from which the Torah and the teaching of law goes out to the entire world.  

Against Margulies, (and the Ran,) Waldenberg maintained that halakha in principle was capable of governing a state and that “the written and oral Torah have the capacity to solve all the institutional and political problems for the enlightenment and success of the foundation of the state.”

Nevertheless, he also recognized that alongside halakha there had always been a political authority that was responsible for governing the polity and that the authority of the governing power was not identical to that of halakha. The authority of halakha was rooted in the Sinaitic revelation. Political power, however preceded revelation. Waldenberg quoted with approval the opinion of Moses Sofer (1762–1839,) a founding leader of ultra-Orthodoxy, that the

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60 Ibid., vol. 1 p. 12.
61 Ibid., vol. 1 p. 6.
authority to govern is based on a kind of natural law with its roots in the nature of human
society:

Even if the Torah had not been given, before the giving of the
Torah there were laws and mores for everyone. Every king would
keep the land in justice. 62

A distinct legal regime parallel with the halakhic system is necessary, asserted Waldenberg, in a
theme by now very familiar to us, because halakha does not adequately cover all aspects of legal
governance. It has laws covering theft and torts, to be sure, but there is no punishment, for
example, for damage to property that does not entail a physical change to the damaged object. 63
The fact that halakha, as revealed on Sinai, did not cover every aspect of social order is not
surprising. Again following Moses Sofer, Waldenberg pointed out that no legal regime, not even
halakha, could legislate for all future circumstances. The Torah sets out the general rules and
principles and it is the responsibility of leaders in each generation to produce particular laws for
their own time. Thus the Torah gives authority to the governing power to enact the necessary
regulations as long as they do not contravene the laws of the Torah. These laws “take on binding
governmental force.” 64

Waldenberg clearly believed that the legal regimes of the king and of halakha have different
rules and procedures. For example, he explained, a Sanhedrin may not pardon someone that it
has convicted of a capital crime. A king, however, may pardon the convict. In Waldenberg’s

62 Ibid., vol. 1 p. 175. The original source is in the Repsonsa of Hatam Sofer, Orah Hayyim 208.
63 Ibid.
64 Ibid., vol. 1 p. 252.
view, this is because the king and the Sanhedrin make their convictions on the basis of different authorities and therefore follow different legal procedures:

When the Sanhedrin has sentenced [a convict] to death… it is the Torah which sentenced him to death and therefore the Sanhedrin does not have the power to reverse [the sentence] and to pardon, for they have no ability to pardon a law of the Torah. But when the king sentences a capital case, it is by his own royal power and not by the law of the Torah. … The Torah gave the authority to the king to sentence differently from the law of the Torah… Therefore, since it is he himself who sentenced [the convict] to death, he has the power to reverse the sentence and to pardon him according to the principle of “the mouth that forbade is the mouth that permitted.”

This legal pluralism, Waldenberg suggested, was the key to making sense of the contemporary State of Israel. He quoted the same responsum of Rabbi Kook as Federbusch, where Kook had stated that the political authority originally vested in the king has, since the demise of the monarchy, devolved back upon the people and that all leaders of the Jewish people have the authority to make and enforce new legislation. Although Kook, like the Ran, located the original source of this authority in the monarchy, Waldenberg was ultimately agnostic as to the source of contemporary political authority. It may either, he wrote, derive from the monarchy, or from the natural principles of judicial authority, or from the very nature of communal rule. Whatever the reason for it, all leaders have this authority. Waldenberg attributed great significance to the sovereign state of Israel. If communities in the medieval period, were invested with political authority independent of halakha, then the State of Israel most certainly possesses this authority:

If the heads of the kehillot in exile had this power, who were only representatives of one kehilla, how much more so where there is full authority for the representatives of the entire people here in our

65 Ibid., vol. 1 p. 170.
66 Ibid., vol. 1 p. 175.
land when they have gathered together in the Knesset building to consult on the way that they should go for the good of the people and the state, to enact excellent legislation for the state that is not opposed to the Torah, when the drafts of that [legislation] will be approved by the majority and fixed as the law of the people.\textsuperscript{67}

For Waldenberg, then, the political authorities of the state of Israel have the power to legislate any necessary laws that do not contradict the laws of the Torah. Such laws would have full authority even though they would not be founded on the authority of halakha.\textsuperscript{68} It is important to make clear that despite this recognition of non-halakhic legal authority, Waldenberg was quite a conservative thinker who advocated a high degree of rabbinical involvement in the workings of the state. He was aware of Margulies’ recommendations from three decades earlier and was unsatisfied by them, perhaps because they left too much room for the state authorities to act independently from rabbinic authorities.\textsuperscript{69} Within the general framework of legal pluralism, he believed that halakha took precedence over other legal regimes in the polity.\textsuperscript{70} For Waldenberg, rabbis and their institutions had to be part of the government and in fact had to be the most important institutions in the state.

\begin{quote}
It was always the case that Torah and politics… went arm in arm together and the Torah establishment is an inseparable part of the institutions of the state. It was furthermore placed at the head of
\end{quote}

\textsuperscript{67} Ibid., vol. 1 p. 259.

\textsuperscript{68} Significantly, Waldenberg terms this kind of legal power “statist authority” [סמכות ממלכתית]. See: ibid., vol. 1 p. 259, 56 and vol. 3 p.19. There are many other words he could have used to mean “political” (medini, or menshali, for example). The word mamlekti is a neologism that was coined not by rabbis but by secular Zionists to describe a particular ideology, closely associated with Ben Gurion, that represented the investment of national sovereignty in strong and centralized institutions of state. See: Nir Kedar, “Ben-Gurion’s Mamlakhtiyut: Etymological and Theoretical Roots,” Israel Studies 7, no. 3 (2002).

\textsuperscript{69} Waldenberg, \textit{Hilkhot medinah}, vol. 1 p. 254.

\textsuperscript{70} Ibid., vol. 1 p. 190.
[political] leadership and all institutions operated in its framework.\textsuperscript{71} Waldenberg also believed that political leaders who were authorized to make legislation had themselves to be well educated in the Torah.\textsuperscript{72} Even then, they could legislate only under rabbinical supervision so as to ensure that their new laws were compatible with halakha:

The legislation of state and criminal law is placed under the strict supervision of a great Torah sage who deeply scrutinizes every aspect of state law based on the Torah and decides whether it is against the laws of the true God before he will authorize it.\textsuperscript{73}

Waldenberg’s prioritizing of rabbinical authority over that of political leadership is further revealed in an apparently unassuming comment:

The sages of Torah were always among those who stood at the head of the people in order to introduce proper social order to the people and to prevent a situation of people swallowing each other alive.\textsuperscript{74}

Waldenberg here paraphrased and implicitly subverted the rabbinical teaching: “Pray for the peace of the kingdom, for were it not for fear of it, people would swallow each other alive.”\textsuperscript{75} In the original, it is the kingdom, i.e. the political authorities, (more precisely, Gentile political authorities,) who are credited with the maintenance of order and are charged with preventing social disintegration. In Waldenberg’s paraphrase, however, this becomes the role of the rabbis. This literary usurpation by the rabbis of government authority echoes the central role that Waldenberg laid out for rabbinical institutions in the State of Israel.

\textsuperscript{71} Ibid., vol. 1 p. 261. See also ibid., vol. 1 p. 10-11.
\textsuperscript{72} Ibid., vol. 1 p. 265.
\textsuperscript{73} Ibid., vol. 1 p. 261.
\textsuperscript{74} Ibid., vol. 3 p. 3.
\textsuperscript{75} Mishnah Avot 3:2.
Waldenberg shared with Shimon Federbusch the basic framework of legal pluralism but he emphatically opposed the separation of religion and state that Federbusch championed.

Federbusch’s *Mishpat ha-melukhah* was published in 1952, the same year as the first volume of Waldenberg’s *Hilkhot Medinah*. The third volume, published three years later, contained a shift in emphasis. It opened with an implicit response to Federbusch and others like him, criticizing

“the vain teaching of the separation of the religious authority from the political and of the separation between the judicial system of the state and its laws and the religious judicial system.”

This position, Waldenberg insisted, is wrong even when it is held by people who “pretend to be acting in interests of the Torah.”\(^7^6\) He continued to endorse the existence of a political legal authority distinct from halakha. The Jewish tradition, he wrote, knows of “two houses: the house of Torah on the one hand and the house of kingship on the other.” Underlying this division, though, was a unity: “[The houses] are, in truth, one… There was peace between them and each one stood in firm connection with the other - an unbreakable bond.”\(^7^7\) This change in emphasis was accompanied by a substantive change in his constitutional vision. Earlier, Waldenberg had allowed for the legislative independence of the kingship or its modern equivalent, albeit under the supervision of the rabbis. In the later volume, however, he promoted the rabbinic authority to a position of far greater prominence in the way he described a Jewish constitution:

The house of Torah would serve as the legislative house of the house of kingship in all matters of leadership of the state, and the Torah and its laws encompassed the entire life of the people and the state like a crimson thread.\(^7^8\)

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\(^7^7\) Ibid., vol. 3 p. 3.

\(^7^8\) Ibid.
Notwithstanding this change in emphasis, however, Waldenberg remained committed to his position that legal pluralism was the appropriate constitutional structure for a Jewish state, as it had always been in the past. Despite his differences with Margulies and Federbusch, he agreed with them on that point.

**Shlomo Gorontchik**

The thinkers surveyed so far were content to restrict themselves primarily to the theoretical realm or a discussion of general policy. Rabbi Shlomo Gorontchik (1918-1994) translated the framework of legal pluralism into a more practical vision of judicial institutions for the new Jewish state. Gorontchik was born in Zambrów and immigrated with his parents to Palestine at the age of seven. He served in the Haganah and was appointed by the chief rabbinate to be the chaplain of the newly constituted Israel Defense Force, later becoming its chief rabbi. In 1972, having changed his name to Goren, he was elected to the position of Ashkenazic Chief Rabbi of Israel. When the state was established, Gorontchik was barely thirty years old. Only weeks before the Declaration of Independence, the young Gorontchik offered his own constitutional proposition for Israel in the journal *Ha-tsofeh.*

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Like many before him, Gorontchik believed that it would be impossible to base a constitution solely on halakha because:

The halakha of judges and witnesses will impinge on the rights of minorities, women and others and will arouse a strong opposition both from the secular population of the Yishuv and from the United Nations. The Torah constitution disqualifies sinners and, it goes without saying, Gentiles, from being judges or witnesses. It disqualifies women from testifying, except in certain circumstances. These difficulties almost preclude the practical possibility of a full Torah constitution for the ordering of the new courts.  

Gorontchik’s solution was not to change the procedures of halakhic courts, but to establish an entirely new judicial and legislative system parallel to that of the halakha. He wanted to provide, from within the Jewish tradition, “the legal and practical possibility of establishing a new court, according to the Torah in the Jewish state, for full equal rights, so that all parts of the population may be appointed as judges and to be accepted as witnesses.” This new court would judge both civil and criminal matters. Citing the long tradition of extra-halakhic communal legislation, Gorontchik wrote that “the community is able to enact legislation…according to the discretion of the judges or legislators for the sake of public order.”

Critical for our discussion is the way in which Gorontchik’s position is founded on a pluralistic jurisprudence. Gorontchik emphasized that the new court system he was proposing would not replace, but would run in parallel to halakhic court system. Each court system would operate according to different laws and procedures and draw their authority from different sources.

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81 Ibid., 149.

82 Ibid., 147.
Rabbinical judges would judge according to halakha. Judges in the other courts would judge according to a different law, a new civil code distinct from halakha. The courts would even be differentiated by their names:

The new courts… will not be considered full Torah courts [בתי-דין תורניים] but rather courts [בתי משפט] that have received their legal authority from the power of public consent… These courts will not have the name “Torah court” because their Torah authority comes from the community, and not directly from the Torah, and by this authority even those disqualified from judging or giving testimony will be qualified [in those courts.]

As precedent for his proposal, Gorontchik turned to a Talmudic passage which mentions “Syrian Courts” [عسكرאות שבסוריא]. The context of the passage in the Babylonian Talmud indicates that these were Jewish courts that were distinct from regular rabbinical courts: “They taught [the teaching mentioned in the passage] with regard to Syrian courts and not with regard to experts.” To drive home his point that these courts did not rule according to halakha, Goren quoted also a lesser-known parallel passage in the Palestinian Talmud that makes the distinction between these courts and halakhic courts more explicit: “They said [the teaching] with regard to Syrian courts and not with regard to Torah law.” To clarify the nature of the courts, Gorontchik then examined several medieval commentaries before concluding:

The “Syrian Courts” were permanent courts [בתי משפט] of Jews for civil law and similar matters. The power of their authority was derived from the general consent of the community. They judged cases according to their “reasoned discretion” [אומד דעתם] and not

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83 Ibid., 149.
84 In the Talmud, ”Syria” generally refers to the area of the Roman Empire North and East of the Land of Israel.
85 BT Sanhedrin 23a.
86 PT Sanhedrin 3:2.
according to the law of the Torah because they were not knowledgeable in Torah law.\textsuperscript{87}

Gorontchik’s supported his interpretation with the words of Menahem Meiri, a 13\textsuperscript{th} century Provençal rabbi. He wrote that the judges of the Syrian Courts were not fluent in Torah law but judged according to their reasoned discretion and statutes and mores… And if all the people of the land accepted them in this way, then I say that there is no claim [against their validity.]\textsuperscript{88}

Gorontchik conceded that some interpreters said explicitly that such a court is only valid in a situation where no experts in Torah law are available so this is the only option for establishing justice. Such an interpretation obviously limited the applicability of this precedent to Israel where rabbis were in no short supply. Other interpreters, however, including Meiri and Moses Isserles (1520-1572), held that such courts may operate even in the presence of a Torah scholar. Following their position, Gorontchik concluded that his analysis of the Syrian Courts was ample precedent for non-rabbinical courts that judged according to non-halakhic rules:

So we have clarified two fundamental matters… 1) Courts of this type are not connected to any Torah courts but rather are permitted to establish special laws to judge “according to their reasoned discretion and statutes and mores.” 2) It is possible and lawful to establish [such courts] on a state-wide political [מדיני-ארצי] basis “if all the people of the land accept them.”\textsuperscript{89}

\textsuperscript{87} Gorontchik, “Huqah Toranit Ketzad?,” 150.

\textsuperscript{88} Ibid., 151. This is the consensus of most traditional commentaries. One modern scholar has suggested that these courts were under the auspices of the Roman Empire, but were run by Jews and were expected to judge by Jewish law. Saul Lieberman, “Achievements and Aspirations of Modern Jewish Scholarship,” \textit{Proceedings of the American Academy for Jewish Research} 46-47 (1979): 375. It seems likely, however, that although their Jewish judges were sometimes familiar with Jewish law, or were willing to consult with rabbis, they were often ignorant of Jewish law and judged by precedent or common sense. See: Gedalyahu Alon, \textit{Mehkarim be-toldot Yisra’el}, 2 vols. (Tel Aviv: ha-Qibuts ha-Me’uhad, 1957-8). vol. 2 p. 30

\textsuperscript{89} Gorontchik, “Huqah Toranit Ketzad?,” 151.
Gorontchik then turned to a question that many asked before him: If there a Jewish state would have a court system that is independent from rabbinical law and authority, what would become of the laws of the Torah? Would they be completely replaced? After acknowledging the seriousness of the question, Gorontchik turned it on its head. Legal pluralism may put the primacy of halakha at risk. But halakha is incapable of ruling a polity alone. A non-halakhic system is therefore necessary for the proper functioning of a Jewish state:

One has to ask if a fastidious and exact dominion of all the laws of the Torah in the life of the state, as they relate to corporal and financial punishments and to criminal transgressions and the like, without any supplement of statutes and mores and special legislation by virtue of communal will, can support private and public order in the state.\(^90\)

Gorontchik quoted from the Rashba and the Ran, who were discussed above, to support his position that a Jewish state requires non-halakhic law and courts to maintain proper order. He then referred to the same statement of Rabbi Kook quoted by both Waldenberg and Federbusch, in which Kook discusses the political authority that resides in the people as a whole. In short, Gorontchik continued, the exercise of non-halakhic legal authority is necessary to enact laws by which the state can be run without offending the rights of any of the minorities among the population.\(^91\)

Gorontchik concluded by summarizing his vision:

In the Jewish state that is about to be established with the help of God, we therefore are required to establish a dual system of courts. The first will comprise a network of rabbinical courts based fully on the Torah [בתי דין תורה מלאים], in which all the laws of the Torah will have force… The second system of courts will comprise

\(^90\) Ibid.

civil courts [בתי משפט], in which a special civil code, in accordance with international law, will be followed, with care that it will not contravene the laws of the Torah.  

He noted that in such a dual system, there will need to be rules about which court system would have jurisdiction in which cases. Without discussing the matter in full detail, he suggested that generally speaking the parties in a case should have the choice of which system to use. In the case of a disagreement between them, if all parties are Jewish the default should be the rabbinical court but if any party is Gentile, the default should be the civil court.

In sum, Gorontchik’s was a striking constitutional proposal from the heart of the religious Zionist camp that would, under certain circumstances, allow for a Jew in a Jewish state to be judged according to a secular law by a Gentile judge. It must be emphasized that his proposal was not rooted in some kind of laissez-faire legal relativism or a lack of commitment to the halakhic system. On the contrary, his ultimate intention was to devise a practical strategy “to fight to instill the spirit of the Torah and its laws into the state until it is seen as the path to complete redemption.” He in fact considered one of the advantages of his parallel system that the halakhic courts would be protected from too jarring a change in order to “safeguard the purity of the Torah law.” Gorontchik’s pluralism allowed the halakhic system to remain almost untouched because the existence of civil courts would insulate the rabbinical courts from concessions to modern rights and egalitarianism.

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92 Gorontchik, “Huqah Toranit Ketzad?,” 156.
93 Ibid., 146.
94 Ibid., 156.
At the same time, Gorontchik, unlike Grodzinski, was an unapologetic Zionist. He was deeply invested in the theological and eschatological significance of the establishment of the State of Israel. He ended his articles with a kind of Religious Zionist prayer which make clear his differences with those like Grodzinski, who denied that the Zionist enterprise had any messianic significance:

Religious Judaism bears the responsibility at this time of the great and holy task to work on a detailed Torah constitution for the State of Israel that is gradually being established. In this way the path will be paved for the return of the crown of the Torah to its former glory, for the establishment of the Sanhedrin and for the complete redemption.95

Isaac Herzog had opposed Grodzinski’s idea of a parallel judicial system in the late 1930s and he similarly opposed Gorontchik’s plan in the late 1940s. Chapters three and four will investigate Herzog’s own constitutional thinking in depth. At this stage, however, it makes sense to outline his own rebuttal of Gorontchik.96 Herzog was deeply opposed to the idea of a dual judicial system. His ambition was that the state as a whole should base its law on the halakha and that the state’s judiciary be unified in a single structure. As will be discussed in detail in chapter 4, Herzog acknowledged the claim of Jewish thinkers from the medieval period to his own day that an unmodified halakha did not have the capacity to govern a national polity. He also agreed with Gorontchik that for halakha to have a role in the modern state – for it to be both effective and accepted by all – it would need to be modified. Laws of procedure would have to make room for female and Gentile witnesses and the laws of inheritance would have to become more

95 Ibid.

egalitarian. Herzog’s approach, however, was not to allow for a parallel system of non-halakhic courts, but to introduce supplementary regulations into the halakhic system itself. Herzog’s approach will be analyzed in greater depth in due course. At this stage, the salient point to stress is that Herzog utterly rejected legal pluralism as a way to structure the Jewish state and championed instead a legal centralism whereby the state would not make room for an alternative, halakhic, legal regime within its borders but would incorporate halakha into its unified centralized structure:

Our main ambition is that the constitution should include a clause that lays down that the law in the state is based on the Torah.\(^97\)

Of particular significance is not only the fact that Herzog rebutted Gorontchik’s plan but the methodology he uses to make his argument. In his extended essay, Herzog undertook close reading of countless canonical authorities and made reference to many more. His writing is rigorous and persuasive. Still, Herzog, perhaps more than usual, relied also on rhetorical, rather than analytical moves. His comments, and his deviation from a purely textual rebuttal of Gorontchik, give the impression that his disagreements with Gorontchik were based less on a conflict over the reading of authoritative texts and more on a matter of a priori ideology; a fundamentally different approach to law in general that made it impossible for him to accept a pluralistic jurisprudence, however much legal pluralism arose from the Jewish sources.

At times, Herzog’s rebuttal descended into an attack on Gorontchik over minor semantic points. Gorontchik had said, for example, that under his proposal the civil courts would be governed by

\(^{97}\) Ibid., 174.
“a special civil code, in accordance with international law.” He meant that his system was intended to address the requirement of the UN for all of Israel’s citizens to be equal under the law, a requirement that Herzog was equally concerned to address. Herzog’s response, however, rather than engaging with any substantive point, merely picked holes in Gorontchik’s formulation:

Firstly, international law is only applicable to international matters and does not involve itself with the internal law of any state. Secondly, if he is referring to paragraph 4 of the decision of the United Nations “that there be no discrimination in the state on the basis of race, religion or sex,” then if this is applied to family law then we will God forbid be required to carry out civil marriages that do not distinguish at all on the basis of sex and religion so that, God forbid, mixed marriages between Jews and Gentiles will have legal force…

However, we have a basis to interpret this decision in a way that will not lead to such a situation. For in another paragraph it says that “religious courts should remain as they are,” meaning that the authority in personal law will not be taken from [the rabbinical courts].

Herzog’s comments are quite sound in their legal interpretation but, other than the pedantic note about Gorontchik’s misuse of the term “international law,” they have little to do with Gorontchik’s proposal. Gorontchik agreed with Herzog that rabbinical courts should continue to operate on the basis of halakhic law. And he agreed that the rabbinical courts would not have to alter their approach to laws of personal status. Herzog’s choice to grapple with this straw man

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98 Gorontchik, “Huqah Toranit Ketzad?,” 156.

99 Herzog is presumably referring to Part I.C.2. of UN Resolution 181: “No discrimination of any kind shall be made between the inhabitants on the ground of race, religion, language or sex.”

100 See ibid.: “The family law and personal status of the various minorities and their religious interests, including endowments, shall be respected.”

gives the impression that he not only disagreed with Gorontchik but was impatient with his position arising from an a priori aversion to it.

This impression is reinforced with Herzog’s argument that the parallel judicial system proposed by Gorontchik would cause an assault on the primacy of the halakha. Gorontchik had written that under his proposal care would have to be taken to make sure that the laws of the civil courts were “not against the laws of the Torah.” Herzog pounced on this phrase. How, he asked, could the civil courts possibly avoid contravening the laws of the Torah?

Surely there are very few laws that the Torah does not already cover. If so, is it not the case that in any case that is not judged according to the Torah, the verdict will be against the Torah?102

On the face of it, Herzog’s critique is sound. Gorontchik had proposed that the civil courts judge cases according to specially written non-halakhic legislation. The halakha, however, already has laws that cover theft, murder, embezzlement, contracts etc. According to Herzog, legislation covering any of these areas of law would by definition contravene the pre-existing halakha. Does this not make nonsense of Gorontchik’s plan to have a parallel judicial system that nonetheless does not contravene halakha?

In fact, however, Herzog’s critique is less devastating than it first appears because it is not a critique of Gorontchik alone, but of any Jewish legal pluralism. As Herzog was no doubt aware, halakhists had for centuries grappled with the problem of what it means that Jews are required to obey the law of the land only if it does not contravene halakha. If halakha covers all areas of life

102 Ibid., 175.
then surely almost all law clashes with halakha in some fashion. Historically, this question had been answered in various ways. The most common approach was to draw a distinction between ritual and civil areas of law and to hold, for example, that the law of the land must be obeyed when it comes to contract law but not if it requires Jews to work on the Sabbath.¹⁰³ Others took a more minimal view of the role of communal law and reduced its validity only to those areas with which the halakha does not deal at all.¹⁰⁴ Either way, however, Herzog’s critique of Gorontchik was no less a critique of centuries of precedent, to which many thinkers had already offered answers.

Herzog also addressed the historical precedents that Gorontchik had marshaled for his case, particularly that of the “Syrian courts.” He was very resistant to the notion that a Jewish court could judge by a law other than the halakha. He initially tried to prove that the “Syrian courts” in fact did judge by halakha and that their unique feature was that the judges were not experts in halakha and had to consult with Torah scholars. Ultimately, though, because one “must follow the interpretation of the commentators,” he reluctantly conceded that they judged not by halakha but by some other system of law.¹⁰⁵ Still, Herzog posited, this was a function of particular historical circumstances: in the absence of Torah sages, relying on a lay-led Jewish court was the

¹⁰³ See Elon, Jewish Law: History, Sources, Principles, 1, 132-37 and 2, 707-12. For a classic example of this distinction, see the statement of the Ribash in 14th century Spain, in his Responsa 305 quoted in: ibid., 2, 708.: If a community enacted that legal documents accepted in non-Jewish courts [but invalid in Jewish courts] are as fully valid for us as they are for non-Jews under their law…the community certainly may legislate on such matters, as these are conditions involving civil law and it is as if every single individual in the community so stipulated an undertook for himself…Nevertheless, the community may not enact legislation that involves condoning usury, since usury is prohibited by the Torah even when the debtor pays it voluntarily.

¹⁰⁴ Herzog referred to one proponent of this latter view – Siftei Kohen on Hoshen Mishpat 73:14 – at: Herzog, “Be-qesher le-ma'amara,” 175.

¹⁰⁵ Ibid., 163.
only way to avoid resorting to Gentile courts, which was entirely forbidden. This historical precedent was therefore inapplicable to the new state of Israel where Torah scholars were abundant. True, many Israeli judges were not yet familiar with the halakhic system, but they could learn it. Most fundamentally, it was unthinkable to Herzog that a sovereign Jewish state in the Land of Israel could have a legal system that was not based on halakha:

> With regard to a Jewish settlement in Syria which is not in any case part of the Biblical Land of Israel… it is at least possible to imagine a circumstance like this [where Jewish courts do not judge by halakha]. But in the Jewish state in the Holy Land, which is the only place where our law could be established and enforced with state power, if a [non-halakhic] justice system like this is established, it seems to me, God forbid, like writing a divorce for the Torah and raising a hand against the law of Moses.\(^\text{106}\)

So much for historical precedent. What about the theoretical work of the Ran and his comments about the need for a “king’s law” alongside halakha? Herzog had already dismissed the approach of the Ran in his rejection of Grodzinski’s opinion and he expanded on that position in his rebuttal of Gorontchik. Herzog first questioned the authorship of the Ran’s Eleventh Sermon, presumably to diminish its authority by distancing it from such an authoritative medieval jurist.\(^\text{107}\) He conceded, though, that it must nevertheless have been written by a competent jurist. Herzog pointed out, however, that whoever wrote the piece “did not bring proofs from the Talmud.”\(^\text{108}\) Besides, he insisted that the Ran’s approach was both impractical and nonsensical. If, as the Ran maintained, the halakhic system was incapable of governing and the system of the king’s law was necessary for real government, why have the rabbinical courts in the first place?

\(^{106}\) Ibid., 163-64.

\(^{107}\) At the time of Herzog’s writing, the authorship of the sermon was under question. It has since been demonstrated beyond doubt that Gerondi was the author.

What was the point of having two legal systems with overlapping jurisdictions, one of which was effective and the other ineffective? Surely the Ran’s constitutional vision would make the halakha and its courts entirely redundant. “At the end of the day,” Herzog claimed, “it is very difficult to build a fixed structure on these words of the Ran.”109

For Herzog to claim that halakha alone is sufficient to govern a state without any resort to the king’s law or communal legislation, he had to explain the deficiencies in the halakhic system. Even Herzog agreed that halakha as it had developed made it too difficult to convict and punish criminals in the context of the modern state. He speculated that in ancient times halakha was sufficient because Jews were simply more ethical. Because society was more ethical, more restrictive procedures regarding witnesses and the relative lack of punitive measures did not impede the ability of the halakha to keep order.110 In time, the ethics of the people declined and changes to halakha were required. Crucially for Herzog’s position, he claimed that these changes were not made on the authority of the “king’s law” as Gorontchik had claimed. Rather, they were brought about by rabbinic enactments within the halakhic system itself and so did not draw their authority from an external source.111 For Herzog the very fact that halakha has the ability to respond to changing circumstances was itself a further argument that the “king’s law” must not be as expansive as the Ran and Gorontchik claim. If halakha itself has the internal resources to meet new circumstances, then “king’s law” is redundant. While the traditional sources did not allow him totally to disregard the category of “king’s law”, Herzog vastly limited its application.

109 Ibid., 166-7.

110 Ibid., 169.

111 Ibid. See also Herzog, Tehuqah le-Yisra'el al-pi ha-torah, 1, 53, 80-1.
to the rare occasion on which a murderer escapes proper punishment in rabbinical courts. Only then is “king’s law” employed to execute true justice.

Herzog, then, rejected Gorontchik position from a platform of legal centralism. For Herzog the idea of a plural legal regime was simply unthinkable. His criticism of the legal pluralism of the Ran, Gorontchik and others goes beyond textual arguments to an appeal to common sense. Elsewhere, Herzog wrote: “It is impossible that in the days of the rule of the Torah there were among the Jews and in Israel two legal authorities which were unrelated to each other.”\(^\text{112}\) For a legal pluralist, the existence of two legal authorities would in fact be possible, even likely. It was only Herzog’s a priori commitment to a centralist definition of law that made it “impossible.” Herzog simply refused to accept that there were ever “two authorities, a Torah bet din authority and a bet din by the power of the king, two authorities ruling as one.”\(^\text{113}\) This is legal centralism par excellence.

Herzog’s legal centralism requires an explanation. The brief outline of Jewish political thought in this chapter makes it clear that legal pluralism had been the norm, both in theory and in practice, throughout Jewish history.\(^\text{114}\) Indeed, legal pluralism was the way that most religious Zionists, in the earliest years of the State of Israel, attempted to map out a vision for the state. This was true even for the quite different thinkers surveyed above. Grodzinski was a conservative anti-Zionist

\(^{\text{112}}\) Herzog, *Tehuqah le-Yisra’el al-pi ha-torah*, 1, 55.

\(^{\text{113}}\) Herzog, “Be-qesher le-ma’amara,” 169.

\(^{\text{114}}\) Menachem Lorberbaum has argued persuasively that Jewish political thought has always left room outside of halakha for an independent realm of politics. “The central question of Jewish political theory should not be whether to choose a secular or theocratic state but instead how to draw the line between the secular and the sacred.” Lorberbaum, *Politics and the Limits of Law*, 156.
whereas Gorontchik was a Zionist with a bold eschatological outlook; Federbusch had a radically Western approach to the religion-state divide whereas Waldenberg thought that rabbis had to oversee all legislative activity of the state. Yet despite their diverse viewpoints, they all agreed that legal pluralism was an authentically Jewish and pragmatic way to address the challenges ahead. Given this, why was Herzog so consistently and emphatically opposed to this position? Furthermore, why was the pluralistic approach to law gradually sidelined by the religious Zionist movement in the early 1950s and eventually dominated by the legal centralism of Herzog and others? To answer these questions, it is first necessary to understand the place of Herzog’s own legal thinking in the context of European jurisprudence. It is to this context that we now turn.
3. Isaac Herzog Before Palestine

The world’s jurists … may yet come to realize that the utter neglect of Jewish law on the part of students of law, and of cultured persons generally, had meant a serious loss to the cultural progress of humanity.

- Isaac Herzog

Yitshak Isaac ha-Levi Herzog was born in Łomża, Poland, in 1888.¹ When Herzog was nine years old, his family relocated to Leeds, England so that his father, Yoel, also a rabbi, could take up a rabbinical position there. Isaac Herzog was by all accounts a prodigious student. He received an extensive education in traditional Torah scholarship and, even as a young man in England, corresponded with seasoned rabbinical scholars in Eastern Europe who were deeply impressed with his erudition. In 1908 he was formally ordained by three leading rabbis in Eastern Europe, Yaakov Dov Vilovski of Slotzk, Yosef Skuper of Slonim and Meir Simha of Dvinsk.²

Herzog’s father instilled in him rabbinic aspirations and a commitment to Zionism. One of the earliest memories he related was of his father’s dedication to Zionism in the face of severe opposition:

¹ There is no comprehensive biography of Herzog. A somewhat hagiographic, but nonetheless useful, biographical essay is: Sha’ul Meizlish, “Toldot ha-rav Herzog,” in Masu’ah le-Yitshak, ed. Shulamit Eliash, Itamar Warhaftig, and Uri Desberg (Jerusalem: Yad ha-rav Herzog; Mekhon Ha-Entsiklopediah Ha-Talmudit; Mekhon Ha-Talmud Ha-Yisraeli Ha-Shalem, 2008).

² Ibid., 14. Herzog’s correspondence with Vilovski and Meir Simha of Dvinsk is appended to his books, respectively, Or ha-Yashar (London, 1921) and Imrei Yo’el (London, 1921).
[In the Shas and Magen Avraham Synagogue] my father, his memory be blessed, delivered his sermon on *Hibat Zion* and the settlement of the Land of Israel. In the town a ruckus broke out because several of the zealots strongly opposed the Hovevei Zion movement and they locked the shutters around the platform of the holy ark. The community broke the lock and father, his memory be blessed, delivered his sermon, which made an immense impression on the hundreds of listeners who crowded in. From that evening the love of Zion begin to burn in me – an eternal flame that will never be extinguished – and I began to plan for my immigration to the Land of Israel.³

Alongside his traditional religious training, Herzog also pursued an extensive general education. In 1909 he received a BA from the University of London, where he concentrated on mathematics and Classical and Semitic ancient languages. In 1912 he received an MA in ancient languages from the same institution. In the same year the family once again relocated to follow Yoel Herzog’s rabbinical career, this time to Paris, where Isaac received another MA from the Sorbonne. He later returned to the University of London where he received a doctorate in marine biology in 1914. His dissertation, *Hebrew Porphyrology* was a scientific and historical investigation of *tekhelet*, the blue dye used for ritual purposes by ancient Jews.⁴

In 1916 Herzog moved to Ireland and took up the post of rabbi of Belfast before moving in 1919 to Dublin. Ireland at the time was in the throes of a war with the British which concluded with the Anglo-Irish Treaty of 1922, establishing the Irish Free State as a political entity independent of the United Kingdom, although still under the sovereignty of the British monarch. After the

³ Quoted in: ibid., 13. The author does not provide a reference for passage.

war, Herzog officially became the chief rabbi of Ireland. He remained in that post until 1937. In that year, a new constitution established the Irish Free State as Éire, The Republic of Ireland. The constitution, composed under the auspices of Éamon de Valera made Ireland into an entirely independent country for the first time. De Valera, a friend of Herzog’s, consulted him about the constitution, particularly about its provisions for religious minorities like Protestants and Jews. A few months later, Herzog took up his post as the Ashkenazic Chief Rabbi of Israel.

Herzog was a committed and energetic leader of the Jewish community of Ireland. He repeatedly spoke out, in the press and in private communications with political and religious leaders, against anti-Semitism and Nazi sympathizers within Ireland.⁵ He defended kosher slaughtering methods before the Irish parliament and delivered public lectures on Judaism and Zionism. His lecture, “The Hebrew language, its Position and Revival,” for example, aired on Irish radio in 1934.⁶ The most significant focus of his political activism was perhaps his fight to raise immigration quotas for Jews fleeing Nazi Europe. He dedicated himself to this task while still in Ireland and continued to pursue it after his move to Palestine.⁷

Aside from his political activity, Herzog produced a steady scholarly output. Like many rabbis of his stature, he wrote halakhic responsa, sermons and Talmudic commentary and novellae.⁸ He

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⁸ His most significant halakhic writings are his collections of responsa Isaac Herzog, Shu’t hekhal yitshak (Jerusalem 1960-72); Isaac Herzog, Pesaqim u-ketavim, ed. Shlomo Shapiro, 9 vols. (Jerusalem: Mosad ha-rav
also wrote many articles about Jewish thought and law for non-specialist audiences.\(^9\) They were published in Jewish publications such as London’s *Jewish Chronicle* and *Jewish Forum*, a journal for Orthodox Jews published in New York.\(^10\) Many of his articles concentrated on matters of Jewish jurisprudence and legal history, (such as his four-part article, “The Administration of Justice in Ancient Israel”), on the relationship between Jewish tradition and science, (such as his three-part “The Talmud as a Source for the History of Ancient Science”), or the relationship between Judaism and other civilizations, (such as his three-part “The Attitude of the Ancient Palestinian Teachers of the Torah towards Greek Culture”).\(^11\) He also wrote a number of articles about Jewish law which, considering the journals in which they were published, seem to have been primarily intended for a Gentile audience.\(^12\) This period of Herzog’s scholarship culminated in the late 1930s with the publication of two volumes of his magnum opus, *Main Institutions of Jewish Law*.\(^13\) These works display Herzog’s mastery of the Jewish canon as well as his deep familiarity with non-Jewish sources and scholarship, both ancient and modern.

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\(^9\) Many of his English-language articles were collected into a volume overseen by his son: Isaac Herzog, *Judaism: Law and Ethics* (London: Soncino Press, 1974).


\(^11\) These articles were all republished in: Herzog, *Judaism: Law and Ethics*.


In order to understand Herzog’s works properly, it is necessary first to explore the intellectual contexts in which they unfolded. Such contextualization attunes us to his interlocutors and to significant themes in his work and allows us to situate his later writings about the Israeli Constitution in relation to his earlier writings. It also provides the background required to approach the puzzle at the core of this dissertation: Why, given the justified popularity of legal pluralism among religious Zionists, did Herzog fight so strongly against it? Herzog’s legal and constitutional writings are best considered in the context of two jurisprudential ideas that were particularly popular in the first half of the twentieth century: legal positivism and legal evolution.

**Legal Positivism**

Legal positivism is a jurisprudential doctrine that arose in England in the early nineteenth century and slowly came to dominate legal philosophy not only in England, but also in Europe and America. Even after many assaults on its central theories from legal realists, feminists, pluralists and others, it remains even today “by far the biggest camp in legal theory.”

Positivism, especially before the second half of the twentieth century, had two major components. The first was what became known as the “separability thesis”; the second was the impulse for legal reform on scientific principles.

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The separability thesis was derived from David Hume’s distinction between the descriptive and the prescriptive, the “ought” and the “is”. It postulated that it is possible to separate between law and morality. Natural law theories, which had dominated pre-Reformation Europe, held that law derived from a natural morality. Positivists, by contrast, insisted that there was a difference between law and morality and that the job of a legal philosopher was to analyze law as it is, not as it should be. In the words of one of the earliest of legal positivists, writing in 1832:

The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.

To achieve this philosophical distinction, legal positivists had to devise a sound theory of law that was independent from morality. The earliest attempt came from Jeremy Bentham and his younger contemporary John Austin. It was predicated on the relationship between law and sovereignty. They devised the “command theory” of law whereby law is a command of a sovereign, backed by threat of force. This theory was later criticized on several grounds, but the association of law with the sovereign state remained a fundamental component of legal positivism. In the 1930s and 1940s, when Herzog was focusing in earnest on the constitutional

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18 To the best of my knowledge, Austin and Bentham never used the term “legal positivism” but the jurisprudential literature generally includes considers them positivists and I have adopted that convention, despite the slight anachronism.


21 In Anglo-American jurisprudence, the most prominent critique of legal positivism, (which nonetheless agreed with it in several important respects,) came in 1961 in: H. L. A. Hart, *The Concept of Law*, 2 ed. (Oxford, New York: Clarendon Press; Oxford University Press, 1994). Hart pointed out that the command theory of law did not, for example, adequately describe laws giving power to public officials, or international law. Hart, however, did not
theory of a modern Jewish state the most influential version of legal positivism was that of Hans
Kelsen, who was discussed in brief in chapter 1, for whom all law derived its validity from the
state’s constitutional hierarchy.22

So the first component of legal positivism from Bentham to Kelsen and beyond was that the
validity of law derived from the state and that all valid law was part of a single normative
system. The second component, especially in its early days, was it scientific and reforming
impulse. Just as positivism in the social sciences sought to study society with scientific methods,
legal positivism aimed to place the study of law on a rigorous scientific footing. For Jeremy
Bentham, a critical early figure in positivism, the scientific study of law was the first step in a
comprehensive project of legal reform.23 In Bentham’s time, English law was a disorganized
amalgam of laws overlapping systems, each with different historical roots. In addition to the
ecclesiastical courts and courts of the admiralty, there were also courts of common law and
chancery courts. Chancery courts had begun in the middle ages as a mechanism for the Lord
Chancellor to impose more equitable solutions in cases where the common law fell short of
justice. By the nineteenth century, however, chancery and common law had each developed into
fully independent systems which had virtually co-extensive jurisdictions and competed for
business.24 This state of affairs was widely considered to be deeply unsatisfactory. English law

intend to dismantle the entire theory of positivism but rather to place it on firmer theoretical footing. This is the
function of his “Rule of Recognition.”

22 For an overview of British and Kelsenian legal positivism, see: Dias, Jurisprudence, Chapters 15-16.

23 Morton Horowitz argues that there is a distinction between Bentham, whose legal positivism led naturally to a
project of reform, and John Austin who neutralized this aspect of positivism and used it as part of a more

was convoluted, expensive and difficult to use. The Chancery courts were particularly vilified, especially by reformers like Bentham, who called its procedures “a volume of notorious lies.”

He wanted to reform all of English law to produce a systematic, scientific, legal code. His legal positivism was to be a first step in the modernization of English law.

It was not just Bentham who was frustrated with the state of English law. Two special parliamentary commissions were instituted in the early 1850s to report on the consequences of the existence of a plurality of court systems in the state. They noted in particular the legal chaos that could ensue from the fact that the different systems were liable to produce different answers to the same legal question. Already in the previous century, William Blackstone, who was in many ways a great admirer of English law, conceded that:

> It seems the height of judicial absurdity, that in the same cause [sic] between the same parties, in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminster Hall, and denied on the other.

The parliamentary commissions recognized that the problems arising from “the system of several distinct courts proceeding on distinct and in some cases on antagonistic principles, are extensive and deep-rooted.” As a result, a series of far-reaching reforms were enacted, primarily in 1867-73, culminating in the Supreme Court of Judicature Act (1873), but in effect continuing until the end of the century. Under the reforms, all the courts systems in England were unified into a single legal system with the same rules of legal procedure. The reforms were so far-reaching that

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Walter Bagehot considered them to have ushered in a “new Constitution… a change not of particular details but of pervading spirit.” The reforms were popular; criticisms were generally limited to claims that they were not as effective as they should have been, rather than disagreeing with the need for unifying the legal system. By Herzog’s time, it was universally recognized that the shift from a pluralistic to a centralized monistic legal system in England had been necessary and welcome. The impulse of legal positivism to move towards a rational, scientific, codified system of law had been adopted by virtually the entire legal establishment of Great Britain.

Herzog’s positions often arise from his embeddedness within a jurisprudential discourse in which legal positivism was entirely dominant and in which any other system of legal organization was deemed inferior at best. He consistently, from the 1920s to the end of his life, portrayed halakha in positivist terms. Even before analyzing his writings in greater detail, it is clear that the legal pluralism of Gorontchik and the other thinkers surveyed in chapter 2 was incommensurate with positivism. The existence of two parallel legal systems (“several distinct courts,” in the language of the parliamentary commissions,) within a single state is entirely inconsistent with the basic assumptions of legal positivism and the great value placed on simplicity, predictability and order in a nation’s legal regime. In short, legal centralism was a natural corollary of legal positivism and legal pluralism was foreign to both doctrines.


On one occasion, Herzog explicitly connected his disapproval of legal pluralism with the history of pre-Reform Britain. To Hayyim Ozer Grodzinski’s suggestion that there be “a separate [system of] royal law alongside the rabbinical court administering Torah law,” (discussed above, on p. 66,) Herzog had responded as follows:

I maintain my position that it is inconceivable that the laws of the Torah should allow for two parallel authorities – like the courts of law and the courts of equity, the latter stemming from the authority of royal law, that operated in the past in England.30

Given the background of British legal reform, Herzog’s reference to “the courts of law and the courts of equity” is clearly more than just an analogy. Most readers of Herzog’s Hebrew prose would have been quite unfamiliar with nineteenth century English legal history. Herzog’s analogy is best read not as illustration but as explanation. He was referring to the fact that in England there had been distinct courts, each with its own procedure and laws and that this system had resulted in widely derided chaos. Herzog could not tolerate the possibility that the Torah, a perfect and divine law, could only be useful in practice if it were based on a system that had become so unsuccessful in England. The legal pluralism that many Jewish thinkers considered to be a natural and viable system of law was “inconceivable” to Herzog because his approach to the organization of law and its institutions was colored by the domination of legal centralism and positivism in Britain and in Europe in general.

Legal Evolution

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30 Herzog, *Tehuqah le-Yisra’el al-pi ha-torah*, 2, 75. This translation is from: Michael Walzer, *The Jewish Political Tradition*, 1: Authority, 475.
Another context necessary to understand Herzog’s writing is the discourse of legal evolution. There was a widespread belief among British and European thinkers in the nineteenth and the first half of the twentieth centuries that religious law was intrinsically inferior to modern secular European law. Religious law was imagined as violent, tribal, disorganized and un-evolved. In arguing that halakha worked according to positivist principles and emerged from an ordered state hierarchy rather than a diffuse collection of tribes, Herzog hoped to defend halakha against attacks grounded on these ideas.

In the second half of the nineteenth century, the newly articulated theory of the evolution of species, which first arose in the field of biology, came to inform many areas of scholarship, including law. The application of evolutionary theory to law was an outgrowth of the historicist study of law that began in Germany in the late nineteenth century. Friedrich Carl von Savigny (1779-1861), a central figure in the German Historical School of Law, claimed that law could not be studied according to abstract universal scientific legal principles but had to be understood against the background of the historical peculiarities of specific peoples.

In England, the most prominent heir to Savigny’s legal historicism was Henry James Sumner Maine (1822-1888), a jurist and historian. Maine’s most influential work, *Ancient Law*, was

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published in 1861, two years after Darwin’s *Origin of the Species*, by the same publisher.\textsuperscript{32} Certainly, evolutionary processes form the basis of Maine’s description of the development of law. Maine claimed that law develops from the commands of heroic kings, through the emergence of aristocracies and the beginnings of law as a body of knowledge, to a fully-fledged regime of customary law and, finally, to codification.\textsuperscript{33} This development mirrors that of the political institutions in which law is embedded, which begin as collections of families, gradually forming into tribes. Eventually, societies develop the capacity to create legal fictions which allow individuals to enter into legal relationships independent of their blood-ties. Family and tribe give way to a society formed from voluntary association. This is what Maine famously described as “a movement from Status to Contract.”\textsuperscript{34} Maine considered these historical shifts to be more than neutral developments; they were an evolution from lower to higher. He talked in terms of “the upward march of society.”\textsuperscript{35} In other words, his work painted a picture of legal Darwinism. Just as Darwinism in the social sciences portrayed considered the later stages of social development to be socially and morally superior to earlier stages, so Maine considered the later stages of legal development to be not only more effective and advanced, but also morally inferior to its earlier stages. Tribal law was inferior to that of the nation state. Similarly, religious law of earlier epochs was inferior to modern secular European law.

\textsuperscript{32} It has been suggested that Maine intended to indicate his debt to Darwin by using the same publisher, but this is far from certain. See: Elliott, “The Evolutionary Tradition in Jurisprudence,” fn. 22; Burrow, *Evolution and Society: A Study In Victorian Social Theory*, 139-40.


\textsuperscript{34} Ibid., 165.

\textsuperscript{35} Ibid., 18.
Despite the high reverence in which Maine was held by his contemporaries, his historicist methodology failed to have a serious impact on English jurisprudence. Much more pervasive among jurists in the years after Maine’s death was an analytical methodology which sought to uncover the pure categories of law rather than trace its historical development. Legal scholars and legislators were suspicious of a theory which understood law to develop from the bottom up. They preferred a vision of law that could justify reform imposed from above by a political and academic elite.  

Despite this, however, Maine’s work remained hugely important in the late Victorian era and the early twentieth century, particularly in the colonial context. Maine remained influential because although his historical methodology was largely rejected when it came to the study of contemporary law, his theory of legal evolution was a seductive conceptual framework in a triumphalist imperial society which both romanticized and scorned the cultures of “oriental” colonies. Maine himself was an important figure in Britain’s colonial apparatus. He served as a member of the council of the governor-general of India and was heavily involved with the codification of Indian law. His jurisprudence laid the theoretical ground for the widespread conceptualization of the religious and tribal law of the colonies as less evolved than the law of the civilizing imperial power. Imperial rule both drew power from and contributed towards the formation of the myth of modern, secular, state-centered, codified law as the pinnacle of an evolutionary sequence.

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37 To be sure, the evolutionary aspects of Maine’s work were also dissected and criticized but the general idea remained deeply influential. See: Elliott, “The Evolutionary Tradition in Jurisprudence,” 45-6.


This orientalist and evolutionary understanding of law also characterized the British approach to the law of the Ottoman Empire after its decline. In Mandate Palestine, British judges portrayed the local laws as “outdated and archaic, intricate and obscure, illogical and unreasonable, harsh and monstrous,” not to mention inefficient and corrupt. For example, one British judge in Palestine considered the Mejelle, the Ottoman legal regime, to have a “barbarous” air and believed that its backwardness indicated “how remote is the working of the Asiatic mind from that of the European.” Another referred to the Ottoman Penal Code as “a delightful piece of juridical nonsense,” a comment that simultaneously belies both the condescending romanticism and the disdain of imperial judges towards colonial law.

Legal positivism and legal evolution were really two sides of the same coin in the jurisprudence of Imperial Western Europe. Legal positivism taught what good law is; legal evolution taught what it is not. According to these theories, good law is the centralized, hierarchical, secular, modern law of the European nation state as opposed to the under-evolved, decentralized, tribal, violent, disorganized and corrupt law of ancient religions, or contemporary oriental peoples.

This intellectual context is vital for a proper understanding of Herzog’s own writing. A close reading of Herzog’s works indicates that he had largely assimilated the idea that the most

The colonized are relegated to a timeless past without a dynamic, to a ‘stage’ of progression from which they are at best remotely redeemable and only if they are brought into History by the active principle embodied in the European. It was in the application of this principle that the European created the native and the native law and custom against which its own identity and law continued to be created.


41 Judge Anthony Bertram in 1909, quoted in: ibid., 54.
advanced law was law on the modern European model. He sensed, however, that many considered Jewish law to be akin to those tribal and religious legal cultures that belonged to an earlier stage of history. As a result, in several different works, he embarked upon a project that attempted to depict Jewish law in the image of modern European law. Herzog was deeply convinced that Jewish law was eternal and perfect and therefore as evolved and efficient as any other legal system. As a result, he dedicated himself to the apologetic task of presenting Jewish law in as positive a light as possible to those who had a tendency to dismiss or deride it as archaic and obsolete. Herzog’s work then, was a product of his intellectual context, both in the sense that he adopted many of the commonplaces of the discourse in which he was embedded, and also because his work must be read, in part, as a reaction to the assumptions of that same discourse.

**Herzog’s Early Writings on Judaism and Jewish Law**

Herzog’s apologetic streak is readily apparent in a 1930 article, “The Outlook of Greek Culture Upon Judaism” published in *The Hibbert Journal*, a London liberal Christian quarterly. 42 Although not relating to Jewish law in particular, this article pertains to our subject as it sheds light on the way in which Herzog wrote about Judaism for audiences who might not naturally be well-disposed towards it, in this case a Christian audience, and the way in which he presented Judaism as entirely compatible with modern attitudes to both morality and science.

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Herzog gave a wide-ranging survey of pagan Hellenistic attitudes to ancient Judaism. He quoted extensively from ancient sources across the Greek world, as well as from contemporary scholarship in French and Hebrew. The article is strongly defensive of Judaism. Herzog noted that among some Greeks, like Aristotle, Clearchus and Theophrastus, there was “the profoundest admiration amounting to reverence for Judaism and the Jewish race.” This was, natural considering that:

The pure monotheistic faith of the Jews, distinguished by its spirituality and by its sublime ethical trend, which towered so high above the religions of all the “barbarian” nations and even above the religion of Greece herself, was bound to arouse the admiration of the early philosophers of Greece whose soul in reality militated against her polytheistic and grossly sensualistic national religion.

Other Greeks, however, particularly Hellenized Egyptians, produced accounts that can make the reader “outraged beyond words.”

The Egyptians of the cultured Hellenized type, envious of the growing strength of the Jewish community and lashed into fury by the Jewish account of the Exodus, so uncomplimentary to their ancestors, felt impelled to produce a version of their own which would place the Jews in a very lurid light.

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43 For example: Théodore Reinach, *Textes d’auteurs grecs et romains relatifs au judaïsme* (Paris: E. Leroux, 1895); David Neumark and Samuel Solomon Cohon, *Toldot ha-pilosofiyah be-Yisra’el* (New York: A.I. Shtibel, 1921). Reinach was a French Jewish scholar. Neumark was a German scholar who had recently moved to Hebrew Union College in Cincinnati.

44 Herzog, “The Outlook of Greek Culture upon Judaism,” 215.


46 Ibid., 218.

47 Ibid., 215.
Herzog concluded his article by remarking that the existence of ancient anti-Semitism is unremarkable given that “even now the Jewish people and Judaism, in particular, are largely misunderstood.”

He went on, however, in a more optimistic tone:

Civilization exhibits two forces – religion and science – contending for mastery over the human mind. Science is ultimately traceable to the contribution made by the Hellenic race. Israel, on the other hand, has brought into the world the light of religion in its highest and purest form. The fact that the first encounter between these two principal cultural forces generated mutual sympathy cannot fail to grip our attention. The Greek mind, repelled at last by its ancestral world-outlook, or religion, and struggling from light, was thrilled by the phenomenon of an entire nation professing a religion which comprised a God-idea, a spiritual, imageless cult and a system of morality, all singularly congenial to the circle of ideas which Greek thought was now evolving. The Jewish mind, on the other hand, was powerfully attracted by the high flights of the Greek intellect in its effort to grapple with the riddle of the universe…

Short lived as that mutually sympathetic understanding was, it yet offers a deep and stirring interest not only to the student of Jewish history, but also to the student of civilization in general. It goes to illustrate how much in common religion and science really have.

Drawing on the long-established dichotomy between Hebraism and Hellenism, Herzog argued that Judaic religion and Greek science are not only compatible but are in fact are mutually reinforcing. The subtext was that even in Herzog’s own period, after the ascendance of scientific positivism was in Europe, Judaism could still be held up as a beacon of religious and ethical enlightenment.

This apologetic stance also characterized his writing on the subject of Jewish law for non-specialist and Gentile audiences. In 1930 he delivered a paper before the Society for Jewish

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48 Ibid., 222.

49 Ibid., 222-3.
Jurisprudence in Inner Temple in London which was soon published in the *Journal of Comparative Legislation and International Law* entitled “John Selden and Jewish Law.”\(^{50}\) The article is an overview of all of the works relating to Jewish law written by John Selden, the seventeenth century English politician, scholar and jurist. Selden wrote several such works, which mined the Jewish canon, including rabbinical literature and Maimonides’ *Mishneh Torah* on subjects such as tithes, inheritance, marriage and divorce, courts and the calendar. Many of Selden’s works were written in Latin and Herzog read them in the original.\(^{51}\)

Herzog recognized that Selden was “undoubtedly one of the most erudite men that England had ever produced” and was generally impressed with his writings on rabbinical law. He was, however, unforgiving of some elementary mistakes in Selden, calling one “a blunder unworthy of the merest beginner” and at one point suggesting that “the barest acquaintance with post-Talmudic Jewish history would have saved him from the subsequent pitfall into which he fell.”\(^{52}\) He also lamented Selden’s digressive style, noting sharply at one point: “We can see at a glance that Selden tries to be exhaustive. But he succeeds in doing much more than that: he exhausts the patience of the reader.”\(^{53}\) Ultimately, he paid Selden the somewhat muted complement of recognizing that “very few non-Talmudists, Israelite or non-Israelite, have reached Selden’s level of Talmudic-Rabbinic erudition,” and admiring that “a man who certainly was not a Talmudist should have been able to produce what Selden has produced in the domain of Rabbinica.”

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\(^{50}\) The article was republished in Herzog, *Judaism: Law and Ethics*. Page numbers refer to that edition.

\(^{51}\) Herzog informed the reader that “I decided to read no reviews or criticisms of Selden until I had covered the whole of his Rabbinic writings form beginning to end and had formed an independent opinion free from all external influences.” Herzog, “John Selden and Jewish Law,” 68.

\(^{52}\) Ibid., 77,79.

\(^{53}\) Ibid., 71.
concluded by emphasizing Selden’s inferior understanding of Jewish law compared with its truly great practitioners: “I would remark that if, instead of launching out on his own, he had simply produced a translation of Maimonides’ Code, he would have rendered far greater service to learning.”54

A key theme that arises in this article is Herzog’s articulation of Jewish law as a superior system of law which has played a critical role in the development of Western civilization. Herzog’s opening paragraph notes that modernity drew many Jews “into close contact with the cultural activities of the outside world.”55 The reverse, however, was also true: the beginnings of the modern period also marked a renewed interest in Jewish culture on the part of Gentiles:

The Renaissance did not confine itself to the resuscitation of classical antiquity, but also brought about the re-awakening of a deep interest in Hebrew scholarship. Christian savants in many European centers of learning began to apply themselves with an ever-increasing zest to the study of Hebrew, and, gradually widening the scope of their studies and researches, they also began to pay considerable attention to Talmudic and Rabbinic literature.56

The subtext of this statement is the assertion that Jewish law was an important subject of study in its own right and formed the basis of Christian religious exegesis. Thus, Herzog wrote with approval of Selden’s appreciation of the Jewish tradition:

There can be no doubt that Selden had great faith in Jewish tradition, which represented to him the vehicle of the true meaning of the Law of Moses. He generally treats the sages of the Mishnah and the Talmud with the profoundest respect and now and again he censures even Jewish Biblical exegetes like Ibn Ezra andRalbag for giving interpretations at variance with tradition. With Christian writers, both Catholic and Protestant, who ignore Jewish tradition

54 Ibid., 79.
55 Ibid., 67.
56 Ibid.
in explaining Pentateuchal law he deals very summarily. This, says Selden, is like attempting to interpret Roman law independently of the standard Roman jurists, Ulpian, Palinian, etc.\textsuperscript{57}

Far from being of merely archaic interest, Herzog argued, the Jewish legal tradition is a worthy area of study and estimation in its own right.

**Main Institutions of Jewish Law**

Herzog’s article on Selden was one part of his increased dedication, from the end of the 1920s, to the goal of bringing the appreciation of Jewish law to a wider audience of both Jews and Gentiles. Between 1929-31 he published a further seven articles on Jewish law and jurisprudence in the Scottish *Juridical Review* and the American *Temple Law Quarterly*, the Law Review of Temple University in Philadelphia. The articles were comprehensive overviews, impressively detailed given that they were survey articles, of the sources of Jewish law, and the topics of possession, rights and duties, norms and morality in Jewish law.\textsuperscript{58} This spate of legal writing culminated in February 1935 and in August 1938 with the publication of the first two volumes of Herzog’s monumental *The Main Institutions of Jewish Law*.\textsuperscript{59} Proper treatment of these

\textsuperscript{57} Ibid., 78.


publications is beyond the scope of this dissertation. We will limit ourselves here to a few comments about those elements of Herzog’s work which shed light on his understanding of Jewish law and his motivations for publishing studies of Jewish law for a Gentile audience.

Herzog was very clear about his high estimation of Jewish law. In his opinion, it was an “elaborate, massive towering structure… of such hoary antiquity, of so majestic, awe-inspiring an origin.” He was dismayed, therefore, that its true genius was not recognized by the world at large. After all, he claimed, Jewish law is a major contribution to the progress of human civilization and scholars ignore it to their own detriment. He lamented, however, that Jewish law had not received the attention it properly deserved.

In Herzog’s mind, the cause of the undeserved lack of attention to Jewish law was twofold. It was, firstly, the result of an ancient and persistent anti-Judaism:

Rome… destroyed the Jewish state and drove the Jewish people out of its magic land. She thus sapped in no small measure, directly and indirectly, the process of natural growth and development inherent in Israel’s legal system. She has been admired throughout

That a relatively long interval has elapsed between the appearance of Volume I and the present volume has been due to the fact that in the meantime I was suddenly transferred by the directing hand of Providence to an infinitely wider sphere of activity. My election to the Chief Rabbinate of the Land of Israel at a critical and momentous juncture in our history has had the inevitable effect of diverting my attention to other channels, while the severe trials and tribulations of Palestine Jewry, which, alas, have not yet ended, have not been conducive, to say the least, to that state of mind which is a necessary pre-requisite of literary work of this kind. On the other hand, the deep-rooted consciousness that we are on the threshold of a new era which, with the help of the Eternal Guardian of Israel, will bring with it the revival of Israel’s nationhood in his ancient, prophetic, cradle-land and the rehabilitation of Jewish law as a living and vivifying force, has acted all along as an incessant inward urge and as a powerful incentive.

60 Herzog, Main Institutions, 1: The Law of Property, xvii.
the centuries for her juristic genius. Her victim, Judaea, on the other hand, has not yet received due appreciation for her achievement in the field of law, an achievement which so strikingly attests the intellectual powers of the Jewish race as well as its noble passion for righteousness…Judaea has not yet received the meed of recognition and appreciation to which she is justly entitled upon that score.  

This passage speaks not only to Herzog’s disappointment at the lack of recognition for Jewish law per se, but specifically to his disappointment that Jewish law was considered inferior to the legal system of Rome, which in Herzog’s day still formed the basis for European and, to a lesser extent, for Anglo-American jurisprudence.

The reason that Jewish law had not been given proper recognition was not, however, limited to the conquest of Rome and the subordinated position of Jewish communities. Herzog claimed that Jews themselves were also at fault because even Jewish scholars did not give Jewish law its due:

> It is, I regret to have to say, the inferiority complex from which some of our people suffer that prevents them from attaching importance to the treatment of a purely Jewish subject unless it is presented from the comparative standpoint.

The Jews with an “inferiority complex” to whom Herzog referred were the scholars of the Mishpat Ivri movement. The movement provided an important foil to Herzog’s work throughout his life and it is worthwhile briefly to digress from the analysis of Main Institutions to describe it.

At the end of the nineteenth century the academic study of Jewish law was “born out of an affair between German professors and Zionist students.”  

German law professors who were heirs to

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61 Ibid.

62 Ibid., xvi.

von Savigny’s Historical School of law became interested in Jewish law from the perspective of legal ethnology. Their Zionist students embraced the academic study of Jewish law as part of a movement of Hebrew national revival. Just as Zionists, influenced by romantic nationalist movements in Eastern Europe, considered the revival of the Hebrew language to be an essential aspect of their own national revival, so they believed that the retrieval of Hebrew law as an organic aspect of their national character was an important component of their Zionist aspirations. Societies arose that were dedicated to this task, the first being the Hebrew Law Society established in Moscow in 1918 under the leadership of the Swiss-educated Russian Jew, Shmuel Eisenstadt. Eisenstadt later immigrated to Palestine with colleagues such as Paltiel Dickstein and continued his attempts to revive Hebrew law in the interest of Hebrew national revival. By far the most ambitious and expansive work on Jewish law to emerge from the movement was Asher Gulak’s *Yesodei ha-Mishpat ha-IVri*, published in Berlin in 1922, three years before Gulak took up his position as Professor of Law at the newly established Hebrew University of Jerusalem. According to a current Israel scholar, the book was “unparalleled in its objectives and its scope.” In its four volumes, Gulak attempted systematically to cover all areas of Hebrew civil law. Herzog himself recognized that Gulak deserved “the credit of having made

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the first attempt to produce a synopsis of law within a framework of general concepts and principles.\textsuperscript{67}

The Mishpat Ivri movement shared a great deal in common with Herzog and his work. Both wanted a revival of the culture of the Jewish people based on ancient rabbinical law and both devoted efforts to research Jewish law to that end. However, despite being a member of the Hebrew Law Society in London, Herzog expressed serious reservations about the entire enterprise.\textsuperscript{68} Fundamentally, the Mishpat Ivri movement was a secular project. It was an attempt to construct a workable national law which was based upon religious law, but was not identical to it. Mishpat Ivri scholars, much like the Zionist movement as a whole, regarded Jewish religious history as a resource for national revival but not as a binding source of law and custom.\textsuperscript{69} This is clear from Eisenstadt’s articulation in a 1910 article:

Mishpat Ivri reveals its full depth and breadth out of the confusion of the Talmud and demands its redemption from the chains of time and the rust of generations. It demands elucidation and modern illumination. It demands a new Hebrew attire, to appear in all its splendor to its people and it demands an academic scientific apparel so that it can appear in the pantheons of human knowledge.\textsuperscript{70}

Partially as a result of this secularizing impulse, Mishpat Ivri scholars used a heavily comparative methodology. Jewish law for them was not any different from the national laws of

\textsuperscript{67} Herzog, “Possession in Jewish Law [Part I],” 329.


\textsuperscript{69} This is particularly, but not exclusively, true of the cultural Zionist program. See: Joseph E. David, “Beyond the Janus Face of Zionist Legalism: The Theo-Political Conditions of the Jewish Law Project,” Ratio Juris 18, no. 2 (2005): 223.

other peoples and was therefore be studied with the normal tools of legal analysis. Especially for those who had been trained in the German Historical School, this meant historicization and comparison.

This was anathema to Herzog. Although he admired the scholarship of Gulak and others, Herzog could not affiliate with a position that secularized halakha. For Herzog, Jewish law was the product of divine revelation and so was entirely *sui generis*. This also meant that for Herzog, a comparative approach to the analysis of halakha was fundamentally flawed. He felt that it was less likely to highlight the authentic contributions of Jewish law and more likely to judge its significance only by virtue of its relationship to other, more prominent, legal systems such as Roman law. Furthermore, the methodology of comparative legal theory tended to emphasize the origins of law and Herzog balked at the notion that any aspect of Jewish law was derived from an external system rather than revelation. Herzog noted his differences with Mishpat Ivri on a number of occasions. On one occasion in the early 1950s, for example, he delivered a lecture to a group of lawyers entitled “Knowledge and Will in Contract and Property in Torah Law.” The organizers of the lecture, however, added “in comparison with English law” to his title. Herzog objected:

> Before beginning my lecture, I would like to correct an error in its title, and I would ask that the correction also be published in the press. The subject I chose to lecture on was “Knowledge and Will in Contract and Property in Torah Law [*Mishpat Ha-Torah*].” The words “in comparison with English law” were added subsequently, without my knowledge. In my introduction to the second volume of my English work on Torah Law [*Mishpat Ha-Torah*], I have

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already condemned a conspicuous proclivity in large portions of the modern literature on Mishpat Ivri, to invariably search for comparison and analogies from external sources. In essence, from an internal, spiritual perspective, such a comparison, God forbid, is inconceivable. For as the heavens are higher than the earth, so the divine Torah from heaven is higher than any kind of jurisprudential system produced by human intellect and spirit. At the most, it is useful for explanatory purposes, enlisting human intellect to invoke external concepts in explaining certain concepts of Torah Law [Mishpat Ha-Torah] for those who are not conversant with the classical Jewish sources, but are familiar with other legal systems. Therefore, my lecture is not devoted to comparison but rather to explanation, in other words explaining with the assistance of concepts and definitions taken from English law.  

Herzog’s reservations about the comparative methodology of Mishpat Ivri are here articulated very clearly. Indeed, no doubt because of these reservations, Herzog hardly ever used the term “mishpat ivri” to refer to Jewish law.

With this background, we can return to our analysis of Main Institutions with a greater understanding of what Herzog meant by targeting his work at Jewish scholars with an “inferiority complex.” His goal was to create an alternative scholarly approach to Jewish law that respected its divine origins and its religious significance in addition to its role in Jewish national revival. This explains his continuing critique of the comparative legal methodology throughout the work. Herzog described Main Institutions as “neither a history nor…a comparative study of Jewish law” and it is smattered with critiques of Mishpat Ivri scholars. The book took issue with Gulak and other Mishpat Ivri scholars, including earlier scholars like Nahman Krochmal, on

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74 Herzog, Main Institutions, 1: The Law of Property, xvi.
several occasions.\textsuperscript{75} Herzog was particularly resistant to hypotheses that proposed that Jewish law was influenced by other systems of law. He intended his book to give the reader “some idea of the specific nature of Jewish jurisprudence” and therefore approached Jewish law on its own terms without trying to fit it into legal categories borrowed from other legal systems or tracing alien influences.\textsuperscript{76} Indeed, he sometimes suggested that other systems of law were influenced by halakha rather than the other way round. Remarking, for example, on a legal concept in the Palestinian Talmud that occurs also in the Code of Justinian, Herzog wrote:

\begin{quote}
The Palestinian Talmud is much older than Justinian, and although direct dependence is improbable, the idea of the all-embracing praescriptio longissimi temporis may have been partly suggested by some juridic practice in the eastern provinces.\textsuperscript{77}
\end{quote}

This theme of precedence of Jewish law to other kinds of law was particularly evident in Herzog’s claims that Jewish law is morally superior. In one aside, for example, he claimed that Roman law “undoubtedly moves upon a lower ethical plane than Hebrew law.”\textsuperscript{78}

Beyond its critique of the comparative methodology of the Mishpat Ivri movement, \textit{Main Institutions} was intended to portray Jewish law in a favorable light for its Gentile readers. Herzog’s strategy was to provide a systematic presentation of Jewish law in English in a structure that would be recognizable to English-speaking jurists. His goal was to distill “the intricate, the bewildering, semi-enigmatic nature and often semi-chaotic state of so much of the stupendous mass of material” of the totality of Jewish law into a “methodized, reasoned

\begin{quote}
\textsuperscript{75} For example: ibid., 62-64, 77-78, 112-17, 225-28. See also: Radzyner, “Between Scholar and Jurist: The Controversy over the Research of Jewish Law Using Comparative Methods at the Early Time of the Field,” passim.
\textsuperscript{76} Herzog, \textit{Main Institutions}, 1: The Law of Property, xvii.
\textsuperscript{77} Ibid., 231-32.
\textsuperscript{78} Ibid., 232.
quintessence, presented in a Westernized and modernized form.” To a certain degree, this was a paradoxical endeavor. Having criticized others for their comparative methodology, Herzog sought to present Jewish law to non-specialists by translating it into English legal terminology. Herzog did not, however, embrace the methodologies of Gulak and others. Rather than suggesting historical relationships between Jewish and other legal systems, Herzog attempted to bolster appreciation for Jewish law by mapping it onto an English idiom.

One example of this strategy occurs early in Main Institutions, where Herzog listed all of the categories of Jewish law and explicitly compared them to European categories:

The following classes of laws taken together would seem to constitute a body of legal matter corresponding approximately to law in the modern Western sense. Although in the ensuing pages, Herzog repeatedly pointed out the ways in which “modern Western” and Jewish categories do not precisely overlap, he nonetheless persisted in drawing the comparison. “Dinin,” for example, “would nearly but not absolutely correspond” to “civil law.” “Dinê makkoth” in Jewish law “might suggest correspondence with criminal law.” “Sanhedrin may be taken as the Mishnaic-Talmudic approximation of what modern jurisprudence would class under administration of the law.” And so on. Indeed, Main Institutions is peppered with references and comparisons with contemporary English jurists. Herzog referred most often to

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79 Ibid., xv.
80 Ibid., xxi.
81 Ibid.
82 Ibid., xxii.
83 Ibid., xxiv-xxv.
John Salmond’s *Jurisprudence* and Anson’s *Law of Contract*, both of which were very popular among British jurists in Herzog’s time.\(^8^4\)

These comparisons between halakha and Roman and English law were intended to demonstrate to Gentile jurists that Jewish law was not the backward and violent tribal law imagined by proponents of the theory of legal evolution. By describing Jewish law as similar to, but not quite the same as, modern legal systems with which his readers were familiar, Herzog put the case that although Jewish law was a law in its own right, it was on a par with the most evolved legal systems like those of England and Rome. This argument sometimes even overrode Herzog’s interest in presenting Jewish law as morally superior to other laws. A salient example is his discussion of Gulak’s distinction between the Jewish and Roman approaches to possession in law:

> In distinguishing between the Roman *possessio* and the Jewish *hazakah*, Gulak attributed the difference to the fact that in Roman law, “the actual possession of an object, being a manifestation of a ruling power, receives the protection of the law until a greater power, the sovereign power of the state, intervenes and annuls it through the claim of the owner. Hebrew law, on the other hand, is the divinely ordained law in which there is no room for the worship of might, nor for its juridic protection.”\(^8^5\)

Herzog agreed with Gulak to a degree: “I share to the full the author’s sentiments in regard to the lofty ethical pedestal occupied by Hebrew law.”\(^8^6\) He was reluctant, however, to confirm the idea that Roman law emanated from the “sovereign power of the state” whereas Jewish law depended

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\(^8^6\) Ibid., 227.
purely on religious morality. This would have been to admit that halakha was lower down the chain of legal evolution, that it was a religious customary law incapable of properly enforcing law and order rather than an efficient law enforced by a sovereign state. Herzog took pains to emphasize the efficiency and sovereignty of Jewish law:

As an intensely patriotic Jew I can hardly think of ancient Rome, to which we must attribute a large measure of the troubles and woes which still beset us, with a mind entirely free from prejudice, and yet I consider Gulak’s estimate in this connection as altogether unfair … My own impression, albeit that of a non-expert in Roman law, is that the interdicts were measures intended to safeguard the maintenance of public peace and order … Jewish law was likewise eager to maintain public peace and order, but it was not so ready as Roman law to enact sweeping measures by which the rights of the individual would be sacrificed in the interest of mass … Jewish law was not altogether devoid of a system of discipline, but it kept that system within certain limits and bounds. [Emphasis mine.] 87

One of Herzog’s interests was to increase the estimation of Gentile jurists for Jewish law, which explains his emphasis in this case to insist upon the ability of halakha to maintain public order. The moral superiority of Jewish law is a recurrent refrain in Herzog’s opus. However, if Jewish law were based exclusively on the moral conscience of the Jews, it would have failed to stand up to the standards of modern positivist law, with its mechanisms of state-backed coercive enforcement and its efficient control over public order. In short, Herzog’s goal in Main Institutions was to make Jewish law accessible to a general audience and to elevate it from its role as a curiosity for jurist ethnographers to its proper place as a beacon of justice and civilization:

It has been my ardent striving throughout to afford the general student of jurisprudence at least an elementary conception of the elaborate, massive towering structure of Jewish law. When its literary sources have been made more accessible and its accumulated treasures of the ages have been laid bare, the world’s

87 Ibid., 227-28.
jurists may awake one day to find to their utter amazement that Jewish law, so sadly neglected, if not contemned [sic], offers one of the most arresting and thought-compelling manifestations of the Jewish mind. They may yet come to realize that the utter neglect of Jewish law on the part of students of law, and of cultured persons generally, had meant a serious loss to the cultural progress of humanity.  

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**Herzog’s Early Constitutional Writing**

So far, we have analyzed Herzog’s early writings to demonstrate that his work on Jewish law can best be understood in his intellectual context, and specifically in the context of European legal philosophy of the early twentieth century. Herzog emphasized both the unique sacral nature of Jewish law and also its similarity to the “modern Western” legal systems of contemporary Europe. He wanted to draw a sharp distinction between Jewish law and the archaic and un-evolved systems of law described by Maine and others. Chapter 4 will demonstrate how this background enhances our understanding of Herzog’s work on his proposed constitution for Israel. Before moving on to his constitution writings in the Israeli context, however, we will explore a series of four articles entitled “The Administration of Justice in Ancient Israel,” first published in *The Jewish Forum* between March 1931 and May 1932. 89 These articles deserve careful analysis because they contain Herzog’s reconstruction of the ancient Jewish constitution.

88 Ibid., xvii.

Even here Herzog implicitly engaged in apologetics against the prevailing belief that Jewish law was tribal, uncivilized, archaic, brutal, disorderly, detached from the authority of a state and incapable of responding to modern circumstances. On the contrary, he argued, Jewish law, even in ancient times, was not an ad hoc collection of primitive rules but a system of law no less structured than a modern constitution. It was hierarchical, methodical, attuned to the realities of government and capable of developing to deal with any situation that a legal system may have to confront.

One of the main aspects of the ancient Jewish constitution that Herzog had to address was the fact that it prescribed the death penalty as the sentence for a large number of crimes, including purely ritualistic transgressions. Capital punishment for collecting sticks on the Sabbath was certainly barbaric by modern standards. Herzog was sensitive to this:

> I have often heard it remarked that the restoration of the Jewish State in accordance with Jewish law, would isolate the Jewish people from the modern civilized world; for, the Hebrew penal code includes the death-penalty for purely ritual offences, such as the willful desecration of the Sabbath, etc.\footnote{90 Herzog, “Administration of Justice,” 141.}

It is interesting to note that even before the Peel Commission and before Herzog’s appointment as Chief Rabbi of Palestine, he was thinking about the application of Jewish law to a Jewish state. Herzog addresses the problem by pointing to the fact that the rabbinical tradition made it very difficult ever to impose capital punishment. “This difficulty is…more apparent than real.”\footnote{91 Ibid.}

Capital, and even corporal, punishment was highly restricted, requiring

> that the culprit had been warned immediately before the commission of the offence in the presence of two adult male Israelites of unimpeachable character and conduct…and that he
had expressly defied the warning and said that he would commit
the act in the full knowledge of the penalty awaiting him. 92

The result was that the Jewish penal code “is more theoretical than practical” and by the time of
the Roman destruction of Jerusalem had almost been abolished in practice. 93 The real fault for
the continued presence of these archaic rules in the Jewish legal system lies with the Romans
who interrupted the natural course of Jewish history.

Had Jewish law continued along a normal line of development,
capital punishment would probably have entirely dropped out of
practice, though the law of the Torah would not, of course, have
been altered in theory. 94

Far from being brutal and archaic, Herzog claimed, the Jewish attitude to punishment it is in fact
very civilized. “In this, as in many other respects, it is superior to the law of the majority of the
most highly civilized modern states.” 95

Herzog reproduced this section of his “Administration of Justice” in a footnote of Main
Institutions. There, he was even more explicit about the fact that the ancient death penalty should
not prevent the implementation of Jewish law in a new Jewish state, pointing out that even the
theoretical existence of the death penalty rests on the restoration of the Temple and its sacrificial
cult, which entails “insurmountable” problems and “could only be restored under prophetic
directions.” The death penalty, then “is therefore a matter which could only arise in the
Messianic age and need not enter into any practical calculations affecting the reconstitution of

92 Ibid.
93 Ibid.
94 Ibid., 142.
95 Ibid., 141.
the Jewish State in Palestine. [Emphasis in the original.]” In the meantime, “no Jewish court could inflict the death-penalty even for the crime of homicide.”

Herzog was sensitive to a possible consequence of his line of argument. While claiming that the Jewish penal code, when it came to corporal and capital punishment, was only of theoretical interest and not fit for practical application, he was sure to avoid giving the impression that the Jewish legal system is incapable of preserving law and order. Were that the case, Jewish law would not be the equal of modern legal systems whose first priority is to preserve the order of the state. Indeed, Herzog insisted, the Jewish legal system had ample resources to deter crimes even without the threat of capital punishment:

It must not, however, be thought that murder could be committed with impunity in the Jewish State governed by Jewish law. We are told that when the court was convinced that willful murder had been committed but could not, owing to the technical restrictions, pass the death-sentence, the convict was condemned to life-long imprisonment.

The specific nature of Herzog’s portrayal of the ancient constitution is also apparent in his discussion of judicial institutions. According to Talmudic and medieval sources, there were three kinds of courts in ancient Israel. The Great Sanhedrin of 71 judges sat in Jerusalem. A Small Sanhedrin of 23 judges sat in cities of more than 120 residents. Smaller towns could have ad hoc courts of three judges, made up of hedyotot, laymen, rather than ordained judges. The Great and Small Sanhedrins could judge all cases, including capital cases, whereas the courts of three

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97 Herzog, “Administration of Justice,” 141.

98 Maimonides, *Mishneh Torah, Hilkhot Sanhedrin*, Chapter 1. See also Tractate *Sanhedrin*, especially chapter 1.
judges could judge only civil cases. Other sources mention a “tribal court,” whose meaning is ambiguous. Herzog set himself the task of explaining three features of this judicial structure that would have made it seem primitive and disorderly to modern European jurists: that in a town of only 120 residents, 23 must be judges capable of sentencing people to death; that untrained laymen administer justice in the ad hoc courts; that the courts are not organized in a centralized hierarchy and that they are separated by tribal affiliation.

Herzog noted that Asher Gulak was “fully cognisant of the difficulty entailed by the statement that every town of 120 citizens and upwards had to be furnished with a Sanhedrin of 23.”

In Herzog’s words, Gulak’s explanation for this phenomenon was that the Sanhedrin emerged out of a local assembly that comprised the heads of the clans and of the prominent families and the notable citizens, the elders, in general. In the process of time it became the practice for this assembly to include a few learned men, experts in law. the great majority of the Sanhedrin were, according to Gulak, ordinary laymen and this would, he thinks, explain the multiplicity of sanhedrins.

Herzog, though, was deeply dissatisfied with this description, which corresponded closely to Maine’s description of tribal law, almost at the lowest rung of legal evolution. As a result, he reinterpreted the traditional sources pertaining to the court of 23 judges. Contrary to the plain meaning of the rabbinical sources and their key interpreters such as Maimonides, Herzog claimed that the law did not require every town of 120 or more residents to have a court of 23 judges; it simply permitted it to have one. Any other reading, Herzog claimed, is inconceivable considering that local elders untrained in the law are hardly capable of sitting on capital cases:


100 Ibid., 137-38.
It will hardly avail us to assume that during the early periods such cases were tried by the assembly of citizens in each locality and not by a distinctive body possessing specific qualifications and specially appointed for that purpose.\textsuperscript{101}

The small sanhedrins, in Herzog’s view, were few in number and highly expert, “of the nature of a district court, covering by its jurisdiction a large and distinct area.”\textsuperscript{102}

What of the courts of three judges? The Talmud describes them as courts of hedyotot, normally interpreted as courts of laymen with no particular legal training, a kind of arbitration panel made up of peers of the disputants. Herzog noted the disparity between this kind of panel of peers and the contemporary judiciary:

This strikes us, prima facie, as rather startling. What kind of a judicial system would that be under which a plaintiff could compel the defendant to appear before any three men he may choose?\textsuperscript{103}

Herzog had two strategies to soften the disparity. He asserted that the application of these courts of arbitration was vastly limited to circumstances in which regular courts were unavailable:

We must bear in mind that this applies only to a locality where there is no regular Bet Din and to a case where the defendant refuses to go to the nearest Bet Din or to submit voluntarily to a court of arbitration.\textsuperscript{104}

In addition, he reinterpreted the meaning of hedyot to be a technical term meaning an expert without formal rabbinical ordination, but still fully trained in the law. Thus, he argued, the courts

\textsuperscript{101} Ibid., 136.
\textsuperscript{102} Ibid., 140.
\textsuperscript{103} Ibid., 120.
\textsuperscript{104} Ibid., 120-1.
of three were not made up of laymen at all but rather “expert-jurists, authorized by the [Jewish] Babylonian authorities.”

Herzog was also determined to demonstrate that the Jewish judicial structure is, and always has been, centralized and hierarchical after the pattern of a modern nation state. He pointed out that as early as the 6th century BCE, the royal charter granted to Ezra referred to judges by two different names, *shoftim* and *dayanim*. This, Herzog claimed, showed that it “contemplated a grading of the judiciary into a higher and a lower order.” According to Herzog, the first, higher order, court was the *Knesset ha-Gedolah*, the “Great Assembly,” which sat at the pinnacle of the national legal and political hierarchy. Herzog dismissed the scholarly consensus that the assembly never existed, or only existed in a form very different from the one described in the Talmudic sources. He identified it with a kind of combined legislative and judiciary body:

> Whatever the critics may say, the historicity of that body cannot be questioned by sound, really scientific criticism. The Great Assembly was not a court invested with a definite jurisdiction. it was rather a kind of academic-legal assembly charged with the reorganizing of Jewish life, private and public, in accordance with the letter and the spirit of the Torah and the Prophets.

In a later work, Herzog would make the comparison to modern constitutions more explicit, comparing the Great Assembly with the modern legislative assembly:

> This was a kind of legislating parliament [*פרלמנט מחוקק*], enacting laws in the framework of the limitations that the written and

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105 Ibid., 122.

106 Ibid., 113. The reference is to Ezra 7:25 where Ezra is commanded to appoint *shafi’in* and *daynин*, Aramaic for *shoftim* and *dayanim*.

107 Ibid., 114.
transmitted Torah set up; a parliament, only not in the modern sense.\textsuperscript{108}

According to Herzog, this assembly became in time the Great Sanhedrin of 71 judges, which he also identified in modern constitutional terms, calling it “the highest authority of the nation” and, more strikingly, its “Supreme Court and legislative body.”\textsuperscript{109}

As we have seen, a primary goal of Herzog’s early writings was to battle both European chauvinism and the Jewish “inferiority complex” and to present Jewish law in “modern Western” terms to show that it was the equal, or even the superior, of contemporary European codes and constitutions. All along, he was thinking ahead to the possibility of the application of Jewish law in a future Jewish state. He knew that success in such an endeavor relied upon the ability to demonstrate that Jewish law really could be equivalent to the law of other modern states. Until 1948, however, these considerations remained in the realm of theory. With the establishment of the State of Israel, the urgency of advocating for Jewish law in the Jewish state became acute. The next chapter explores Herzog’s efforts in that area.

\textsuperscript{108} Isaac Herzog, \textit{Tehuqah le-Yisra’el al-pi ha-torah}, ed. Itamar Warhaftig, 3 vols., vol. 3 (Jerusalem: Mosad ha-rav Kook and Yad ha-rav Herzog, 1989), 289.

\textsuperscript{109} Herzog, “Administration of Justice,” 136, 35.
4. A Constitution for Israel According to the Torah

The Israelite state, according to its traditional structure, is neither a complete theocracy nor a complete democracy, but a nomocracy.

- Isaac Herzog

From around the time he was appointed as Chief Rabbi of Palestine in 1937, Herzog’s writing about Jewish law and jurisprudence took on a new sense of urgency and pragmatism.\(^1\) The same year in which he took up his post, the Peel Commission produced its report which first recommended a partition plan for Palestine. Even though the British government later softened its support for the policy, there remained a feeling that a Jewish state somewhere within the borders of Palestine would soon be established. The question of a Jewish constitution was no longer just a matter of theory.\(^2\)

This chapter offers an analysis of Herzog’s main contribution to the topic: an unfinished book provisionally entitled *A Constitution for Israel According to the Torah*.\(^3\) Like his earlier work,

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\(^2\) Correspondence with rabbis in Palestine and abroad indicate that he applied himself to the project from the late 1930s. See the discussion on p. 37 for Herzog’s consultation with Hayyim Ozer Grodzinski in the aftermath of the Peel Commission. See also: Itamar Warhaftig, “Mavo,” in *Tehuqah le-Yisra’el al-pi ha-torah Vol. 1*, ed. Itamar Warhaftig (Jerusalem: Mosad ha-rav Kook and Yad ha-rav Herzog, 1989), 25. Rabbi Y. M. Tukachinsky also recorded Herzog’s consultation with him in about 1939. See: Y. M. Tukachinsky, “Shihur benei ha-yeshiva migius,” *Ha-torah ve-ha-medinah* 5-6 (1954-5); Warhaftig, “Mavo,” 25.

\(^3\) Herzog originally called the book *The Foundations of the Constitution, Law and its Orders, and the State Government in the Jewish State in the Framework of the Torah*. He also referred to it by other titles, however, such as *The Constitution in Israel According to the Torah*. It was published by Warhaftig under the title *The Constitution...*
Herzog’s constitutional writing is best understood in the context of the legal and political discourse that shaped his intellectual environment. A close contextual reading highlights the ways in which legal centralism and positivism continued to shape Herzog’s legal philosophy. Such a reading also helps us to situate Herzog against the backdrop of the legal and constitutional thinking of nationalist independence movements all over the world. Despite his deeply Jewish constitutional vision and the rabbinic idiom in which he wrote, his work has more than a little in common with others who, like him, were working to establish independent nations states in the wake of the gradual disintegration of waning empires.

Herzog’s work on the constitution was interrupted for several years, no doubt because World War II, and particularly Herzog’s efforts to save Jews displaced by the Holocaust, took up most of his energies. At the end of 1947, with the war over and statehood imminent, he revisited the issue. In August 1947 at a meeting of the Council of the Chief Rabbinate he urged a focus on “setting up a program for the constitution of the state in the framework of the Torah.”4 He was likely motivated by the fact that the Va’ad Leumi, the Jewish national council that would form the basis of the government of Israel, had constituted its own committee for the writing of the constitution. Its chairman was Zerah Warhaftig, a member of Mizrahi, who was eager to incorporate his consultations with Herzog and other rabbis into the committee’s deliberations.5 Herzog decided to write a constitution himself and created a committee of rabbis who would read it, clause by clause. He also conferred about this with others. He told Gad Frumkin, an

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5 Ibid., 26 fn. 6. See also Warhaftig’s own description of this period: Warhaftig, *Huqah le-Yisra’el: dat u-medinah*, esp. 22-85.
Orthodox Jew who would become one of the state’s first supreme court justices, about his plans to work on a constitution and indicated that he would be showing his drafts not only to rabbis but also to experts in secular law.  

Herzog planned to publish a constitutional draft of 18 chapters dealing with the theory of democracy and theocracy, political and judicial appointments, rabbinical enactments, elections, taxes, the presidency and ministries, the police force and army, education, the place of religion in the state, the chief rabbinate, and other matters. Ultimately, Herzog completed only six of the eighteen chapters, of which only one was published in his lifetime. In 1989, Herzog’s extant writings in connection with the constitution and related material were published by Itamar Warhaftig, Zerah Warhaftig’s son. The fact that the work was never completed can be attributed in part to the many pressing matters competing for Herzog’s attention after the foundation of the state, in part to his eventual recognition that his constitution would never be implemented and in part, perhaps, to failing health in his later years.

Although Herzog never finished Constitution for Israel, it is possible to piece together his constitutional and jurisprudential thinking from the chapters that do exist, in conjunction with

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6 Elyakim Rubinstein, Shoftei erets (Jerusalem and Tel Aviv: Schocken, 1980), 46.

7 A proposed table of contents for the work was found in Herzog’s archive and published in: Herzog, Tehuqah le-Yisra’el al-pi ha-torah, 1, Appendix 13 p. 243.

8 The chapter about the king’s law and its relationship to halakha was included in a pamphlet that Herzog wrote to attempt to make Jewish inheritance law more egalitarian. It was published in an American Jewish journal: Isaac Herzog, “Din ha-melekh ve-din ha-torah,” Talpiyot 7, no. 1 ([5]718=1947). It was republished in: Herzog, Tehuqah le-Yisra’el al-pi ha-torah, 2, 65-89. For Herzog’s writings on inheritance law, see: ibid. See also the discussion at: Greenberger, “Rabbi Herzog’s Proposals For Takkanot In Matters of Inheritance.”

Herzog’s other writings. We have already seen how Herzog utterly rejected the legal pluralism of other religious Zionists and embraced the centralist idea that a polity should have only one legal regime which flows from the sovereign state. Herzog remained entirely committed to this idea of law in his own constitutional writings. In Herzog’s vision, the entire state would be governed by a single law: halakha.

The aspiration of all of religious Judaism in Israel and the Diaspora should be that the constitution include a basic clause that the law of the land is based on the foundations of the Torah.\textsuperscript{10} Herzog readily acknowledged, however, that this plan would be resisted by many. It would require a concerted effort to produce a constitution according to the Torah that a majority would accept.

In order that this clause be acceptable for a large part of the Israeli public, which is far from knowledge of the Torah and to our regret does not totally adhere to our holy tradition, … we need to work immediately on a draft of the law that will be in accord with the democratic nature of the state.\textsuperscript{11}

The constitution of the state would therefore have to be both religious and democratic:

The Jewish state… must of necessity be neither a total theocracy, nor a total democracy, … but theocratic-democratic… But this hyphenation \textsuperscript{12} requires deep study and great attention and thought on the part of the scholars of the Torah.

Herzog’s \textit{Constitution for the Israel According to the Torah} was an attempt to describe this hyphenated theocratic-religious constitution.

\textsuperscript{10} Isaac Herzog, “Ha-tehiqah veha-mishpat be-medinah ha-yehudit,” \textit{Yavneh: kovetz akademai dati} 3 (1949). The article was published in 1949 but an editorial comment indicates that the article was received in Shevat 5708, which corresponds to January or early February 1948. Republished as: Herzog, “Ha-tehiqah.”

\textsuperscript{11} Herzog, “Ha-tehiqah,” 205.

\textsuperscript{12} Ibid., 209.
Challenges

The challenges to Herzog’s constitutional project were the same as those faced by all religious Zionists. Like the thinkers surveyed in chapter 2, Herzog noted that according to halakha, neither women nor Gentiles (according to many Jewish scholars) were permitted to take up positions of political authority, to become judges or to give testimony in a court of law.\(^{13}\) Furthermore, Herzog acknowledged, criminal and civil law is underdeveloped in halakha.\(^{14}\) A constitution which did not address these issues, Herzog recognized, could never be accepted as the constitution of the new state. They would pose problems “impossible to surmount”.\(^{15}\) Legal pluralists allowed the existence of a distinct legal regime separate from halakha. This allowed them to preserve halakha while also providing for a parallel state law that would be acceptable to all citizens. Herzog’s centralism prevented him from embracing this solution. With halakha as the only legal regime in the state, he had no option but to propose modifications to halakha in order to make it fit with modern democracy.

Herzog wrote with power and conviction about the necessity of modifying halakha. He knew that the non-religious majority would have to be convinced to go along with his constitutional plans.\(^{16}\) He also knew that the constitution of Israel also had to be in accord with the United Nations Partition Plan, which required the new Jewish state to have a democratic constitution, to elect a legislative body by universal suffrage and not to allow political, civil, or any other

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\(^{13}\) Herzog, *Tehuqah le-Yisra’el al-pi ha-torah*, 1, 39 and elsewhere.

\(^{14}\) Ibid., 26.

\(^{15}\) Ibid., 39.

\(^{16}\) Ibid., 3.
discrimination against any person. \(^{17}\) “The establishment of the Jewish state,” Herzog noted, “is largely dependent on the guarantee of those rights in the spirit of that pact.” \(^{18}\)

There is, however, a mood of reluctance that pervades his writings. He lamented the fact that “those Jews who are one hundred percent faithful and believing … do not constitute the majority.” \(^{19}\) He sometimes balked at the concessions that he felt forced to make. He was particularly reluctant to address the equality of the sexes with regard to judicial appointments:

> It seems to me that women are not appointed as judges in all democratic states, even for civil cases. So why should those who campaign for democracy be even more democratic than many democratic states? Surely we must oppose this with all force. \(^{20}\)

There had been a contentious history to women’s involvement in politics in the religious Zionist community. In 1919-20 Herzog’s predecessor as Ashkenazic chief rabbi of Palestine, Rabbi Abraham Isaac Kook, had ruled that women should not vote. (Women’s suffrage was, though, allowed by Rabbi Bentsion Hai Uziel, who was at the time the Chief Rabbi of Tel Aviv and in 1939 became the Sephardic Chief Rabbi of Palestine, shortly after Herzog took up his position there.) \(^{21}\) In an attempt to staunch the further spread of egalitarianism, Herzog argued that there was no reason for the Israeli constitution to be more democratic than other democratic states, which did not all allow women on the bench. It is difficult to say which states Herzog had in

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17 United Nations General Assembly Resolution 181.
18 Herzog, *Tehuqah le-Yisra’el al-pi ha-torah*, 1, 3. See also his similar comments at: ibid., 96.
19 Ibid., 3.
20 Ibid., 43-4.
mind but it is at least fair to say that even in countries where women *de jure* qualified for the judiciary, they were under-represented on the bench. In Britain, for example, the judiciary was officially opened to women in 1919 but the first female judge was not appointed until 1945. In the United States, as Herzog was writing, less than 1.5% of judges on State or Federal courts were women.\(^\text{22}\) Begrudgingly, however, Herzog recognized that this argument was unlikely to persuade others and acknowledged that there was:

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\ldots\text{a great doubt if we will succeed [in establishing a halakhic constitution without finding a way to approve of female judges] because influential people will mostly certainly be in favor of the appointment of women. We have to be ready for the evil day and to investigate [the matter] even now according to the halakha even if in practice we will oppose it to the fullest extent that we are able.}\(^\text{23}\)
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Ultimately, the need for a democratic constitution was so important that it overrode Herzog’s misgivings. In particular, he felt that a Jewish state that did not give full rights to Gentiles would imperil the lives of Jews around the world.

The great majority of the people of Israel is dispersed among the nations and wherever they are, their situation is more or less precarious. So it is clear that if we would establish the Hebrew state with all its executive, judicial and legislative functions run according to how the simple meaning of the halakha appears at first glance, in such a way that non-Jewish residents would be discriminated against to a large degree, we would endanger the situation of our brothers in the Exile, and expose them to retaliation. You might say that it would not be so terrible to suffer the denial of known civil and political rights in the exile. This is not so, for in this era known as modernity, dishonor will eventually result in total contempt and total contempt will bring the contemptuous to thoughts – which will result in actions – that


\(^{23}\) Herzog, *Tehuqah le-Yisra’el al-pi ha-torah*, 1, 43.
[Jews should be] denied human rights and that their blood and possessions are free for the taking.\textsuperscript{24}

The danger to Jews around the world that would result from the establishment of a discriminatory legal regime in Israel was so grave that it would override any halakhic reservations. Particularly in the aftermath of the Holocaust, Herzog recognized that the establishment of a State for the Jews that was also fair to its Gentile citizens, was simply a necessity:

We have been given the opportunity to accept from the [United] Nations the power to established in the land of Israel a Jewish state, but on condition that we tolerate those of other faiths, even idolaters, (as long as their worship does not disturb general morals or moral rule,) who will live in our land and worship in their own way. … What should we do? [Should we] tell the nations: We are unable to accept this condition because our holy Torah prohibits a Jewish state from permitting Christians, and \textit{a fortiori} idolaters to live in our land, and moreover it forbids us from permitting their worship in our land and forbids us from allowing them to rent land? It seems to me that there is no rabbi in Israel in his right mind who would think that we have to respond in that way, meaning that this is what the holy Torah requires of us. Even if the Jewish state would be sinning by fulfilling the condition[s of the UN], I would still say that the sin is overridden by the threat to the life of the Jewish people, given its state in the world.\textsuperscript{25}

Herzog, however, did not want to rely only on the legal leeway provided by the situation of pressing need. Herzog understood that his argument would be far more convincing from a halakhic perspective if his reasoning did not rely on there being a state of emergency.

However, we do not need to rely on leniencies arising from the fact that the Jewish state [is required to] save the nation and it is like setting up a refuge in a time of suffering, God forbid, until the righteous Messiah comes, given the awesome tragedy of the European exile in our days, and nearly before our eyes …

\textsuperscript{24} Ibid., 2-3.

\textsuperscript{25} Ibid., 18-19. According to halakha, almost any prohibition is set aside in case of danger to life.
[because] according to the law itself there is no sin here according to my opinion.\textsuperscript{26}

Herzog’s main goal in \textit{Constitution for Israel} was to expand on this last sentence and to set out the framework of a constitution that would be acceptable from the perspective of both halakha and democracy.

As with Herzog’s earlier writings, the rhetorical and jurisprudential strategies in \textit{Constitution for Israel} are best understood in the context of a wider legal discourse. Before engaging with an analysis of Herzog’s specific suggestions, the next part of this chapter will offer a profile of the legal discourse of the British Mandate and the early years of Israel and also of post-colonial states in general. This contextualization will continue to show how deeply embedded Herzog’s constitutional writings were in an intellectual discourse that went well beyond the boundaries of his religious tradition. Ultimately, it will become clear that even as he was enmeshed in the Jewish tradition, his attitude to law in the context of the nation state mirrored closely that of secular Zionists and, indeed, that of other post-colonial independence movements.

\textbf{The Discourse of Jurisprudence in Palestine/Israel}

As discussed in chapter 3, before coming to Palestine, Herzog had responded to an intellectual environment in which the highest form of law was the systematic and hierarchal expression of the will of the sovereign state and in which religious law was considered to be at a lower stage of legal evolution. The intellectual context in Palestine was no different. In fact, if anything, in the

\textsuperscript{26} Ibid., 19.
last years of the Mandate and the early years of the state the condescension towards religious law and the embrace of positivist centralism were even more pervasive.

The application of the evolutionary theory of law played a fundamental role in the British Mandate’s training of lawyers. Law was used as an imperial tool by the British. Although their judges were initially expected to implement the laws that had were already in place before the Mandate was established, the law was gradually anglicized, especially in areas pertaining to commerce.  

Lawyers for the Mandate were educated in the Law Classes, an institution established in Jerusalem in 1920 which heavily emphasized British jurisprudence.

The textbook for the course on jurisprudence was *An Introduction to the Study of Law: And Handbook for the Use of Law Students in Egypt and Palestine*, by Frederic Goadby, an English jurist who had taught in England and Cairo and was brought to Palestine to direct the Law Classes there.  

Goadby distinguished between religious and primitive legal systems and the law of the modern state. John Austin, a founder of modern legal positivism, was Goadby’s model. For Goadby, only state law, the will of the sovereign backed by coercive force, could be considered modern law and was the hallmark of “a high state of civilization.” Goadby believed that European law had reached a higher state of evolution that the “half barbaric” legal systems outside of Europe, including those in the Ottoman Empire and the Mandate itself. This was

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29 Ibid., 114-5.
certainly true of religious law which was backward compared to the mostly secular law of modern Europe.\textsuperscript{30}

This approach to religious law, including Jewish law, was widespread at the time. The Law Classes for which Goadby’s \textit{Introduction} was a textbook were founded by the Attorney-General of Mandate Palestine, Norman Bentwich. A British Jew, Bentwich was a Zionist who, after leaving his position with the mandatory government, remained in Palestine as a professor in the Hebrew University until 1951. In 1927, Bentwich published an article describing the role of Jewish law in the mandatory legal regime. He noted that the Jewish community, like all religious communities, had internal control over personal law like marriage and divorce. He did not express any concern with that arrangement in principle, but he did voice some reservations about the state of Jewish religious law:

There is reason to expect that in the free atmosphere of Palestine, Jewish law will be systematically developed to accord with the liberal views of our time as to the relations of men and women. That development has been impaired by the abnormal conditions of the Jewish communities in Eastern Europe since the Middle Ages. As soon as a Jewish religious centre is established in the national home, the authority of the rabbinical body to change the law would be recognized throughout the diaspora, and Jewish law on matters of family right could be modified, as it was modified in the happier days of the great jurists of Babylon, Persia, Egypt and Spain during what are known as the Dark Ages of Europe.\textsuperscript{31}

Bentwich, despite his general sympathy for Jews and Jewish law, was clear about the problems of its non-egalitarianism, which compared unfavorably with “the liberal views of our time.”

\textsuperscript{30} Ibid., 116.

Bentwich attributed this to the “abnormal conditions” of Ashkenazic Jewry in the previous centuries. On the face of it, this explanation is reminiscent of Herzog’s laying the blame for the unnatural development of Jewish law at the feet of the Romans. There was, however, another aspect to Bentwich’s comment. Although dismissive of the backwardness of the dominant strain of Jewish law in recent centuries, he talked nostalgically about Jewish jurists in “Babylon, Persia, Egypt and Spain.” Bentwich was presumably referring to the period of the Geonim and the subsequent ascendancy of Spanish Jewry during which time philosophers and rationalists like Sa’adiah and Maimonides dominated the world of Jewish law. This romanticization of the Sephardic legacy is part of “the myth of Sephardic Supremacy” that pervaded enlightened Jewish scholarship from the nineteenth century.\(^\text{32}\) It is a component of a kind of Jewish orientalism that repudiated the apparent backwardness of Eastern European Judaism and embraced a mythical older, truer Judaism that was more akin to the enlightened universalist monotheism of modern Europe. Therefore, in this passage, even as he defended the ability of Jewish law to evolve in line with contemporary liberalism, Bentwich implicitly agreed with Goadby and others like him, that Jewish law as it currently constituted itself was inferior to contemporary liberal European law.

This kind of jurisprudence was not limited to the British. It was equally pervasive among Zionists. The attraction to modern positivism even emerged in the Mishpat Ivri movement. The movement had been formed on the basis of the uniqueness of Hebrew national law. As early as the 1920s, however, Mishpat Ivri scholars changed their approach in an attempt to demonstrate the viability and enlightened nature of Jewish law. They began to downplay the uniqueness of Jewish law and to emphasize how similar it was to European law and how different from Muslim

and Ottoman law. They adopted the European evolutionary attitude when it came to talking about Muslim law. They characterized it as primitive, passive and tribal, in contrast to the evolved law of Europe which was based on the individual, not the tribe. They took pains to demonstrate that it was wrong to classify Jewish law in the same way, it being more refined and evolved.\textsuperscript{33}

The domination of European-style legal positivism was also apparent among Zionists in Palestine during Herzog’s tenure as chief rabbi and particularly after the establishment of the state. In the 1930s, the \textit{Mishpat Ivri} movement had lullled. In the late 1940s, however, on the verge of independence, there were renewed calls among Israel jurists and politicians for the creation of a national law that would be based on Jewish law.\textsuperscript{34} In 1947, a Legal Council was set up to discuss the legal system of the future state.\textsuperscript{35} The council had a special sub-committee to deal with Jewish law, headed by Abraham Hayyim Freimann.\textsuperscript{36} The interest in Jewish law, however, was primarily the function of a nationalist rather than a religious impulse. The new supporters of \textit{Mishpat Ivri} wanted a modern, secular positivist system which, in the interests of national expression, would be based roughly on Jewish precedent.\textsuperscript{37}

\begin{flushright}
\textsuperscript{36} The sub-committee did not complete its work, perhaps because Freimann was killed in the ambush of the convoy to Mount Scopus in April 1948.
\textsuperscript{37} Moshe Silberg, an Orthodox Jew who later became an Israeli Supreme Court Justice, was one of the most consistent supporters of \textit{Mishpat Ivri}. Even he, however, believed that Israeli law could not simply adopt traditional Jewish law wholesale. Discussing the proposal to write a law for Israel based on halakha, he wrote:
\end{flushright}
This positivist impulse was expressed in the Zionist interest in a constitution and in codification. The Israel Declaration of Independence of 14 May 1948 explicitly called for the adoption of a constitution no later than 1 October of the same year. It was assumed by almost all major jurists and politicians in the late 1940s and early 1950s that a constitution would soon be adopted.\(^\text{38}\) Many constitutional drafts were produced, the most viable and advanced version being a draft by Leo Kohn, a religious Zionist from Germany who worked for the Jewish Agency in Palestine and was an expert in constitutional law. Ultimately, a constitution was not adopted, primarily because of Ben Gurion’s reluctance to constrain his executive powers at a time of war and political fragility. Even Ben Gurion, however, wanted the State eventually to adopt a constitutional legal regime based on the British or European model.\(^\text{39}\)

Israeli jurists also desired a codified legal system on the European model. Although the Mandate had imported Britain’s common law tradition into Palestine, there was a strong move among

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Zionist jurists towards a continental-style codification.\textsuperscript{40} The codification project, like the constitutional project, stalled in 1948, in part because of the negative connotations of borrowing from German culture in the aftermath of WWII and the Holocaust. It did not, however, dissipate entirely. The move to codification re-emerged in the 1960s and especially in the 1970s under Aharon Barak when he was Attorney General of Israel. (A civil code was finally adopted in Israel in 2004.)\textsuperscript{41}

It was not just the British authorities, then, but also the Zionists themselves for whom the ideal legal system was based on a modern, positivist model, complete with a constitution and a civil code. This was unsurprising. For one thing, secular Jewish jurists had almost all been educated in Germany, or in universities that sought to emulate German legal scholarship. This legal education took place in period during which positivism, and particularly the theories of Hans Kelsen, were dominant.\textsuperscript{42} The legal culture among the Zionist elite was deeply rooted in continental Europe.

\textbf{Zionism, Post-Colonialism and Legal Centralism}


\textsuperscript{41} Kedar, “Law, Culture, and Civil Codification in a Mixed Legal System.”

The Zionist interest in state-centered positivist law was more than just a function of education; it was part of the deep structure of colonial and post-colonial legal history. Colonialism was bound up in legal pluralism; post-colonial independence in legal centralism. According to a contemporary scholar of the history of colonial law, in the early years of colonial regimes, imperial powers exerted “conscious efforts to retain elements of existing institutions and limit legal change as a way of sustaining social order.” The existence of multiple legal regimes in European colonies was a result of the complexity of their social dynamics as well as an intentional strategy of imperial powers trying to deal with the challenges of ruling unfamiliar territories with limited bureaucratic resources. “Colonial states did not in an important sense exist as states in the early centuries of colonialism. They did not claim or produce a monopoly on legal authority or on the assignment of political and legal identity.” During the long nineteenth century there was a gradual move toward a more centralized idea of law in European colonies. They remained legally pluralistic, but the imperial state became a kind of ordering power that organized the various legal regimes within each part of the empire. Increasingly, therefore, there was “a shift toward a hierarchical understanding of the plural legal order and recognition of the dominance of state law,” which represented a “movement from truly plural legal orders to state-dominated legal orders.” In Mandate Palestine this resulted in a situation in which the Mandate bureaucracy imported its own laws, particularly in the areas of commercial and criminal law, and organized and arbitrated between the legal regimes of the various religious communities.

44 Ibid., 229.
Although this system was “state-dominated,” it remained pluralist because the Mandate never claimed to be the source of all law; it recognized that the rabbinical courts, for example, had their own systems of law, with their own sources and procedures, which pre-existed the arrival of the Mandate. Although the Mandate tried to place these pre-existing plural regimes into some kind of hierarchical order, it never lay claim to be the only sovereign in the positivist sense; the single source of all law within the state.

With the decline of empire and the establishment of independent post-colonial states, there was a further shift, away from state-dominated pluralism and towards a full-fledged legal centralism. It is a commonplace of post-colonial studies that the interaction between the colonial periphery and imperial center meant that the self-understanding of colonial nationalist independence movements was often based on European myths and ideas. This was particularly true in the realm of law, given that the leaders of independence movements often received their legal education in imperial capitals and used their skills and training against the imperial powers in their fight for new post-colonial nation states. Law, as much as other aspects of nationalist culture, played a significant role in the achievements of independence movements. These movements often absorbed the Western myth of the backwardness of colonial law and considered modern law on the European model as the pinnacle of legal evolution. It was not just the hegemonic influence of imperial education that produced this effect; there was also a strategic advantage in embracing European legal modes. Legal centralism and positivism, with their emphasis on the omnipotent sovereign power of the state and the integration of all cultural

46 Likhovski, Law and Identity In Mandate Palestine, 106.

47 For the hegemonic effects of imperial education, see: Gauri Viswanathan, Masks of Conquest: Literary Study and British Rule In India (New York: Columbia University Press, 1989).
streams into a single state-based regime, was a legal philosophy that naturally supported the goals of independence movements.

This pattern – the shift from the pluralism of imperial colonies to the centralism of newly independent nations – was replicated across the globe. It was the case in Central Africa, for example:

There is a basic difference of attitude toward legal pluralism and unification between the colonial rulers on the one hand, and the leaders of independent Zaire, Rwanda, and Burundi on the other. It was consistent with colonial policy to recognize legal pluralism: this recognition was not only induced by a feeling of cultural superiority, it was also - like the choice of a policy of indirect rule – imposed by reasons of expediency and administrative convenience. Furthermore, the colonial authorities were not interested in national integration, quite the contrary. The leaders of the newly independent nations, for their part, wished to do away with legal (and for that matter, social) pluralism and strived toward national (e.g. legal) unification but were faced with a situation of legal pluralism imposed upon them by the facts of life. 48

Closer to Palestine, the same was true in the newly independent Turkey. In the 1870s, the Ottoman Empire adopted a new civil code called the Mejelle. However, religious laws remained in force, especially in the area of private law. Despite the establishment of the Mejelle, then, legal pluralism remained in force:

Two bodies of law of different origin, reflecting the rules and principles of two of the major legal families in the world, the civilian and the Islamic, were in effect operative together, with the

same force and independent of each other, applicable to the same
body of people.\textsuperscript{49}

At the end of the nineteenth and the beginning of the twentieth centuries, Turkish reformers who
were educated in Europe created the idea of the Turkish nation. After the dissolution of the
Empire, they returned to found the independent state of Turkey. At the foundation of this new
state was the reception in 1926 of the Swiss \textit{Code Civile}, which brought an abrupt end to
pluralism and established an uncompromising all-encompassing legal centralism.\textsuperscript{50}

The same pattern occurred with the establishment of the State of Israel. The British Mandate,
even as it used law as a tool to serve its imperial ends, remained pluralistic. Religious courts
retained their jurisdiction over personal law and the British did not claim to be the source of their
legal validity. For all that it disdained the supposedly less-evolved systems of religious law, it
continued to respect their jurisdictions and to recognize that their authority originated not in the
Mandate’s sovereignty but in the various communities that pre-existed British rule.\textsuperscript{51} This
pluralistic attitude is articulated well in the following description of the place of religious law in
the Mandate constitution, by a professor of law at the Hebrew University writing only a few
years after the end of the Mandate:

\begin{quote}
What is the status of the norms in our legal system, and, generally,
what is the status of those norms of Jewish law which are
recognized by our legislator? We have already said that it is the
status of a second and collateral system which is linked up with the
principal system. Can we say that the Jewish law has become
\end{quote}

\textsuperscript{49} Esin Örücü, “The Impact of European Law on the Ottoman Empire and Turkey,” in \textit{European Expansion and

\textsuperscript{50} Ibid., passim.

\textsuperscript{51} Anglicization of the law certainly took place, but it was limited by the British reluctance, on the whole, to change
the substantive law of the systems that preceded the mandate. See: Likhovski, \textit{Law and Identity In Mandate
Palestine}, 50-58.
merged into the law of the state? If by “merged” as distinguished from “linked up” we mean that the norms in question have been plucked, as it were, from the system to which they belong and fused into another system, or that their sources, their special character, the principles of interpretation peculiar to them, etc., are rejected, in short, that their autonomy is denied, the answer is in the negative.

…. When the Palestine legislator in the Palestine Order in Council, 1922, made Jewish law and the systems of the other religious communities sources of Palestine law, with regard to a certain class of legal relations, he intended to incorporate it into his system as autonomous law.52

Things changed after the state was established. Whereas the British presided over a pluralistic system in which different legal systems had their own sources of validity, the jurists of the new State of Israel insisted, following Kelsen, that sovereignty belonged to the state alone and that only the state could be the basis of legal validity. In the earliest years of the state jurists already began to conceptualize its legal regime in Kelsenian terms. One 1953 article in the legal journal ha-Praklit, for example, was entirely devoted to describing Israel’s legal system in terms of Kelsen’s Grundnorm. The author opened with a clear declaration of his intention to apply Kelsenian theory to the law of the new state:

My intention in this article is to use the foundational concept of a prominent school of contemporary jurisprudence in order to produce a legal formulation of the political event of the establishment of the State of Israel.

The concept of the Grundnorm [נורמה בסיסית] is taken from Hans Kelsen, one of the greatest jurists of our day, who created an original school of jurisprudence, known as “the pure science of law.”53

52 Guido (Gad) Tedeschi, “On the Choice Between Religious and Secular Law in the Legal System of Israel,” in Studies in Israel Law, ed. Guido (Gad) Tedeschi (Jerusalem: 1960), 274. Note that this article was first published in its Hebrew original in 1952. Although he was writing during the state period, the author is explicitly talking about the Mandate’s legal regime that had been established in 1922.

53 M. Sternberg, “Ha-norma ha-besisit shel ha-mishpat be-Yisra’el,” ha-Praklit 9, no. 2 (1953): 129.
Even Ben-Gurion himself subscribed to this legal philosophy. In response to rabbinical resistance to the Women’s Equal Rights Law of 1951 (which will be discussed in greater detail in chapter 5,) he declared that the sovereign state was the source of all legal authority, including that of the rabbinical courts:

When the rabbinical courts require, in order to give force to their rulings on every Jew, the sovereign [ממלכתי] authority that is given by the power of the state, then the state is permitted and even required to fix the conditions by which the sovereign [ממלכתי] authority of the rabbinate operates.\(^54\)

This Kelsenian jurisprudence also formed the basis for judicial decisions. A landmark case in 1951, Skornik v. Skornik, dealt with the status in Israel of a civil, non-religious, marriage between two Jews that had been contracted outside of Israel. The question arose of the jurisdiction of the religious courts in the matter. Justice Witkon answered with direct reference to Kelsen’s centralism:

If it be argued that the Jewish law is universal, the reply is that every religious law, in its application in this country, flows from an act of the secular legislator… – from the point of view of the basic norm according to the theory of Kelsen – and derives its force therefrom.\(^55\)

As summarized by Itzhak Englard, himself a leading scholar of Kelsen who later became a Supreme Court Justice of Israel, “the law of the state is a unitary and exclusive system. Thus

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\(^{54}\) Quoted in: Warhaftig, *Huqah le-Yisra’el: dat u-medinah*, 130.

religious law has no normative validity unless and to the extent that it is recognized by state law.”

The same theme arose in many cases that were decided by the Supreme Court in the early years of the state. For example, in a 1959 case dealing with a conflict between a husband and wife over spousal support, the case turned on the extent to which legislation in the Knesset could interfere with the application of rabbinical law in the rabbinical courts. Fundamentally, it was a question of the extent to which the rabbinical courts were under the centralized authority of the state’s sovereignty. Moshe Silberg, who happened to be an Orthodox Jew, argued that the rabbinical courts maintained their independent authority within the area of their own jurisdiction. “The secular legislature,” he claimed, “cannot annul a norm of the religious law because it is not the source of the religious legislation.” He was the single dissenting opinion, however. The other four judges ruled that the state may indeed interfere in the jurisdiction of her religious courts because ultimately their authority flows from the state. As Justice Olshan, who wrote the majority opinion, put it, “I find no basis for the claim that the secular legislator cannot annul a religious law. In the absence of a constitution, the legislator is all powerful.”

56 Ibid.

57 For a long list of similar cases, see: Asher Maoz, “Ha-rabanut u-yet ha-din: ben patish ha-hoq le-sadan ha-halakha,” Shenton ha-mishpat ha-ivri 16-17 (1990-1): 33 ff.


59 Quoted in: Menachem Elon, Haqiqah datit (Tel Aviv: Ha-kibuts ha-dati, 1968), 39.

60 Quoted in: ibid., 40.
A similar attitude was expressed in a Supreme Court case from 1964. The chief rabbinate challenged the right of the court to hear an appeal to a rabbinical court decision. Justice Kister responded as follows:

Religious functionaries [כהנין דת] are permitted to administer of religious worship freely. When speaking of the Jewish religion, a rabbi is permitted to teach Torah and mitsvot and to answer question in matters of religion without any impediment. But … when they are acting as rabbis with the authority bestowed upon them by the legislator, they are an arm of the government and are open for supervision like other authorities of the state.\(^{61}\)

There was, then, a distinct difference between the way that the Mandate authorities and the Israeli government understood the legal structure of the state and particularly the basis for the authority of the state’s religious courts. As with so many other post-colonial newly independent nations in which national homogeneity was a priority, legal pluralism gave way to a strict centralism. It is important to note that there was almost no change in practice between the administration of the law in the final years of the Mandate and the first years of the state. Under the new state the religious courts continued to have jurisdiction over personal status law. The difference, however, was in how the administration of the law was perceived. Whereas the Mandate considered the various courts within the state to be operating autonomously and to have their own sources of validity, the State of Israel considered all law to flow directly from its centralized sovereignty. That has remained the case to the present day. Aharon Barak, a particularly influential Supreme Court Justice in Israel, described Israel’s law thus:

> Even the application of Torah law in the areas of marriage and divorce among Jews derives from a secular law… From the standpoint of the State, the secular legislature is empowered to

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adopt a given set of religious law norms and to reject others. The application of religious law derives, then, from its absorption by the secular law. By the process of this absorption, the religious law becomes a law with a secular source.\(^{62}\)

When Herzog departed from the legal pluralism of pre-state Jewish thinkers and embraced a halakhic version of legal centralism, he was following precisely the same path as many post-colonial nationalists, Zionists among them. Indeed, he did not have to wait until his arrival in Palestine to become acquainted with the importance of legal centralism to nationalist independence movements. He learned this lesson while he was still serving in Ireland. Although the Anglo-Irish Treaty of 1922 established the Irish Free State as a political entity, it remained under the sovereignty of the British crown. Many Irish accepted this compromise but others decried the submission to ultimate British control and a bloody civil war ensued. One of the leaders of the so-called anti-Treatyites, who fought for total independence, was Éamon de Valera. De Valera had been the first President of the Free Irish State and he left the Parliament in protest when the treaty was signed in what he considered to be a betrayal of full Irish independence. He could not accept a situation in which the Irish government still owed fealty to another power so that total sovereignty did not reside in the state. After a year of civil war, he finally supported a cease-fire and dedicated himself to fighting for independence through legislative means. He became Prime Minister in 1932 and ushered Ireland to full independence with a new constitution of the Republic of Ireland which was ratified in 1937.

Herzog had a close personal friendship with de Valera. They shared a love of mathematics and, according to the memoirs of Herzog’s son Chaim (later President of the State of Israel,) de Valera would frequently visit the Herzog home to “unburden his heart to my father.”

According to one source, de Valera was hidden for a time in the Herzog home during the civil war. The friendship was likely strengthened by the mutual interest of the two men in the independence movements of their respective nations. Herzog, according to his son, was “an open partisan of the Irish cause.” He even learned a little Irish in response to a friendly challenge of de Valera. Herzog’s sympathy for the Irish cause was presumably enhanced because he compared the Zionist movement with the struggle for Irish independence. His criticism of British policy in Palestine, which he considered to be discriminatory against Jews, must have echoed the Irish antipathy for British policy in Ireland. The comparison of Jewish and Irish independence


67 See, for example, the following newspaper report of Herzog’s criticism of the British Government during a Sabbath sermon. The sermon was presumably a response to the Passfield White Paper, published a few days earlier, which was anti-Zionist in tone, restricted Jewish immigration to Palestine, and was understood by many Zionists to be an abrogation of promises made under the 1917 Balfour Declaration. This is one of the rare examples extant of Herzog’s sermonizing in English. That, and the strength of his statements about Britain, make it worth quoting the sermon at some length, as it was reported in the Irish press in “Dublin Rabbi’s Protest,” Irish Independent, 27 October 1930:

Rev. Dr. Isaac Herzog, M.A., D.Litt., Chief Rabbi of the Jewish community in the Free State, preaching at the Adelaide Rd., Dublin, Synagogue, on Saturday morning, referred to the Palestine question, and condemned the British Government’s recent statement of policy.

“We stand amazed,” he said. “How did it come about that the British Government has dared to turn into a sham, into a farce, most solemn obligations contracted towards an ancient, historic race of 17 millions; towards a race which has given to the world religion and morality; towards a race which has outlived all its tormentors and would-be destroyers, including the mightiest empires of antiquity; towards a race which is now in the forefront of every sphere of progress – humanitarian, industrial, scientific, literary and artistic?

“We refuse to believe that the British people are at one with the present Government in this singular breach of faith. When the latent conscience of the
was quite common in Ireland. Many Catholics in Ireland, for example, were strongly opposed to the Peel Commission’s partition plan because it seemed to them akin to the division of Ireland that had been forced upon them by the British and their supporters. Long after he had become already chief rabbi of Palestine, Herzog continued to make this connection explicitly. In 1947, according to a contemporary Irish newspaper,

In a recent conversation with a “high British personality,” who had demanded the Jewish community’s co-operation in suppressing disorders, he (Dr. Herzog) explained that this could only be done by the Jewish people having their own Government, police and army.

Dr. Herzog said he had reminded the British official of the history of Ireland, and emphasized that the Irish people had refused to become informers when asked to do so by the British Government.

“Britain did not enlist the co-operation of Ireland in the campaign against terrorism until agreement was reached with the Irish nation, after which the Irish people liquidated the terrorists,” Dr. Herzog added.

De Valera, for his part, seems to have sympathized with Herzog’s Zionism. In 1933 Herzog was present when de Valera, then Prime Minister, received Norman Sokolow, the president of the Jewish Agency and the World Zionist Organization. Sokolow asked de Valera “to use his

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British public has been aroused to the true facts of the case, when it realises what a travesty, what a parody, the present Government has made of the Palestine Mandate, Englishmen throughout the Empire may yet proceed to echo the great cry of sorely-disappointed Israel.

“But come what may, we shall never lose heart. Palestine is the land of Israel, not by virtue of the Balfour Declaration, but by a Divine Declaration embodied in the Book of Books. No power on earth can tear us away from our prophetic cradle-land to which we are bound by ties innumerable, indissoluble.”

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69 Reuter Agence France-Presse, A.P., ”Palestine Tensions Grow: Fortified Camps Erected by the British,” Irish Press, 7 February 1947. This comparison was not acceptable to all readers. A letter to the editor in response to the article, from a London address, claimed that in fact the Jews in Palestine were more like Ulster Unionists and that “the quarrel between British and Jewish Imperialism is simply an example of thieves falling out.” Reginald Reynolds, “Palestine and Ireland,” Irish Press, 11 February 1947.
influence with the League of Nations to secure a larger quota for Jews entering Palestine, especially in view of the situation in Germany.”  

Reportedly, de Valera “promised to do his best.” His connection with Zionism continued even after Herzog’s departure to take up office in Palestine. In 1950, de Valera visited Ben Gurion in Israel and he remained close with the Herzog family for decades.

This relationship with de Valera makes it easy to understand why the Irish Prime Minister consulted Herzog as he was writing a new constitution for Ireland, which was the culmination of de Valera’s long struggle to achieve full independence through political and legal means. In the few months before Herzog’s departure for Palestine, de Valera conferred with Herzog about the

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70 “Dr. Sokolow Received by Mr. de Valera,” Irish Press, May 19 1933.

71 Ibid.

72 Keogh, Jews in Twentieth Century Ireland: Refugees, Anti-Semitism and the Holocaust, 91. De Valera’s connection with both Isaac Herzog and with Zionism, is reflected in a more recent account of Isaac Cohen, one of Herzog’s successors as Chief Rabbi of Ireland:

During his years with the Irish Volunteers, [de Valera] developed a warm mutual friendship with a predecessor of mine, Rabbi Dr. Isaac Herzog, whom he visited in the Chief Rabbi’s residence in Dublin’s South Circular Road. He mentioned a number of times that he greatly admired the new-born state of Israel and welcomed its liberation from British control. He was particularly impressed by the successful revival of Hebrew as the daily spoken language in Israel.

President de Valera was deeply moved when I brought him a sapling of a fir tree in 1973 from Eamon de Valera Forest which the Irish Jewish community had planted in Cana near Nazareth in his honour. When the Israeli forestry department sent him three trees growing in the forest he was happy to plant them himself in the grounds of Aras an Uachtaráin [the residence of the Irish President] so as to have a part of the Holy Land near his home.

…When the United Nations urged Israel to withdraw from extensive parts of the liberated areas of Palestine he said that if he had still been President of the League of Nations he would have seen to it that Israel did not give up any of the territory that it had regained after the Arab attack resulting in the Six Day War in 1967. Isaac Cohen, “De Valera's Wartime Condolences,” The Irish Times, 29 March 2005.
constitution, particularly its clause concerning minority religions in Ireland.\textsuperscript{73} Herzog’s experiences in Ireland, then, brought him into intimate contact with an independence movement that fought for years for a constitution that centralized all sovereign authority in the new state. His association of Irish and Jewish independence helps us further to understand his absolute insistence of a fully centralized legal regime for Israel and the fact that he would not tolerate the existence of different jurisdictions, with different sources of legal authority in his vision of a constitution.

Herzog’s intellectual context, then, provides crucial background to his own constitutional writings. Like many secular Zionsts and nationalists from Turkey, Africa, India and elsewhere, Herzog received his general and legal education in Europe and like them, his constitutional ideas were based squarely on the model of positivist and centralist constitutions of Europe. With this context in mind, his \textit{Constitution for Israel} can be understood in greater depth.

\textbf{Theocracy and Nomocracy: The Structure of the Jewish Constitution}

This chapter opened with Herzog’s description of his proposed constitution as “theocratic-democratic.” Indeed, the entire project of \textit{Constitution for the State} was intended “to solve the problem of the harmonization of a government of Torah which is democratic.”\textsuperscript{74} Herzog’s first challenge was to address the question of terminology. “Theocracy” was not a popular term as it

\footnotesize{\textsuperscript{73} Keogh, \textit{Jews in Twentieth Century Ireland: Refugees, Anti-Semitism and the Holocaust}, 110. Keogh notes that the official documents do not mention Herzog as a participant. On the basis of an oral interview, however, he maintains that Herzog was consulted about the constitutional clause relating to minorities in Ireland.}

\footnotesize{\textsuperscript{74} Herzog, \textit{Tehuqah le-Yisra’el al-pi ha-torah}, 1, 2.}
conjured up images of a state ruled by religious functionaries.\textsuperscript{75} Herzog made it clear that he was not recommending the rule of priests but the rule of law. For him, however, this law was halakha. According to this definition, he was unapologetic about his commitment to theocracy:

> Is it necessary for the Jewish state which recognizes the decisive rule of the Torah to be a theocracy? The answer is clear and simple: Yes and yes! ...[The] Torah includes within it the foundation of foundations. That is to say the general principles of the constitution, and the law in its general principles and to a known degree, in details.\textsuperscript{76}

If, Herzog argued, a Muslim state can be run according to Muslim law, why should a Jewish state not be run according to Jewish law?

> Say what you will! Say that this is a theocracy! Look at Saudi Arabia! You all recognize it and you all run after it because of its oil. Yet it maintains a government, police force and legal system which is absolutely theocratic.\textsuperscript{77}

This was not the only occasion on which Herzog appealed to other states in search of a precedent for his own constitution. On one occasion, grappling with what it would mean to impose halakha on all citizens in the Jewish state, including Gentiles, he wrote that “it would be appropriate to check the situation in the Far East in places under the higher government of European powers

\textsuperscript{75} Other religious Zionists were also wary of this term. Making reference to the Josephus, who coined the term in \textit{Contra Apionem} 2.16, Shimon Federbusch wrote at some length about how “theocracy” means simply a state under the law of God rather than a “hierocracy” which is a state run by the priesthood (or in the case of Israel, the rabbinate.) Federbusch, \textit{Mishpat ha-melukhah be-Yisra'el}, Chapter 1. The negative connotations of “theocracy” persisted in Israeli society. Some continued to argue that halakha is anti-political at its core and is inherently and necessarily incommensurate with democracy. See: Gershon Weiler, \textit{Jewish Theocracy} (Leiden; New York: Brill, 1988). More nuanced treatments take issue with this position. See especially: Aviezer Ravitzky, “Is a Halakhic State Possible? The Paradox of Jewish Theocracy,” \textit{Israel Affairs} 11, no. 1 (2005); Eliezer Goldman, “Hoq Ha-Medinah Veha-Halakhah - Ha-Ommam Setirah?,” in \textit{Mahshavot 'Al Demokratiah Yehudit}, ed. Aviezer Ravitzky (Jerusalem: The Israel Democracy Institute, 2010).

\textsuperscript{76} Herzog, \textit{Tehuqah le-Yisra'el al-pi ha-torah}, 1, 3.

\textsuperscript{77} Ibid., 2.
and to determine the custom in Egypt and in similar countries." It is also possible that Herzog had the Irish constitution in mind. There is no direct evidence that Herzog considered the Irish constitution as a useful precedent but given his familiarity with Irish politics and his own associations between Irish nationalism and Zionism, he may well imagined Ireland’s 1937 constitution, the work of de Valera, as a model for his own constitution.

The Irish constitution would have been a particularly useful precedent because it was a democratic constitution that made special recognition of the Catholic faith. The preamble of the Irish constitution made special mention of the Christian character of Ireland:

In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, Do hereby adopt, enact, and give to ourselves this Constitution.

Christian doctrine was not limited to the preamble; it also had an impact on its substantive law.

The constitution provided for freedom of conscience, outlawed discrimination on the basis of

78 Herzog, “Ha-tehiqah,” 206.
79 It is interesting to note that Leo Kohn, whose draft constitution formed the basis for the discussions of the constitutional committee of the Jewish Agency, headed by Zerah Warhaftig, himself received his doctorate in law from the University of Heidelberg. His dissertation was a study of the constitution of the Irish Free State. He was subsequently consulted in the drafting of the 1937 constitution of Ireland. Certainly, his study of Ireland played a role in his own constitutional thinking for Israel, although he also studied many other constitutions as part of that process. On Kohn, see: Amihai Radzyner, “A Constitution for Israel: The Design of the Leo Kohn Proposal, 1948,” Israel Studies 15, no. 1 (2010).
80 “Constitution of Ireland,” (1937), Preamble.
religion and recognized minority religious communities. However, it also recognized “the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.” It also gave a special reverence not only to Catholic identity as a national heritage but as a state-endorsed value.

The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.

Indeed, under the constitution, divorce was impossible in Ireland: “No law shall be enacted providing for the grant of a dissolution of marriage.”

Having established the precedent of contemporary constitutions in which religion played a central role, Herzog continued with an extended analysis of the Jewish precedents for the kind of constitution he imagined. Once again, his centralist and positivist re-interpretation of the Jewish tradition came to the fore. Towards the beginning of his *Constitution for the State*, he issued the following disclaimer:

I will not deal here with history. My aim is not to give any sort of picture of the Jewish state as it was in actual practice in earlier days… I am dealing here not with past reality but with theory, that is to say with the question of how the state should come into being and exist according to our authoritative sources of halakha.

With this statement, Herzog made clear that his discussion of Jewish constitutional theory was to be not historical but analytical. This approach in itself was consistent with legal positivism

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81 Ibid., Art. 44.1.
82 “Constitution of Ireland,” (1937), Art. 44.1.
83 Ibid.
84 Ibid., Art. 41.3. This remained the law in Ireland until the fifteenth amendment to the constitution in 1995 allowed divorce, with certain fairly restrictive conditions.
85 Herzog, *Tehuqah le-Yisra’el al-pi ha-torah*, 1, 3-4.
which, as we have seen, focuses on describing the law as it is, not as it has come to be or how it should be.  

Herzog continued:

> From this perspective the form of the state is a theocratic monarchy. At the head of the state stands a king. He himself is placed under the sovereignty of the Torah, just like the king of a democratic state is placed under the authority of the constitution and the law. He has, it is true, broader powers than such a king, but they themselves derive from the divine constitution, from the Torah.

This passage is deeply significant. As we saw in chapter 2, the “king’s law” was the cornerstone of religious Zionist legal pluralism from Kook onwards who imagined the political powers of the king, which ran parallel to the halakha, as a precedent for the political authority of the state. Herzog sharply diverged from this approach. Immediately after mentioning the monarchy, he undermined its significance. Certainly, he acknowledged, the traditional Jewish constitutional arrangement includes a king but the king is not the most significant component of state power. True, the king stands “at the head of the state,” but he is nevertheless subordinate to the ultimate sovereignty in the state which is the “sovereignty of the Torah.” For Herzog, then, the king and his legal regime is not parallel to halakha, as medieval scholars like the Ran, religious Zionists like Goren, Federbusch and others had maintained, but subordinate to it. There is but one centralized system of law deriving from a single sovereign constitution, the divine Torah.

Herzog also drew a parallel in this passage between the Jewish constitution as he imagined it and contemporary constitutional monarchies:

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86 “It is also thought to follow from the positivist obsession with the “is” that they distinguish between formal analysis on the one hand, and historical and functional analysis on the other.” Dias, Jurisprudence, 453.

87 Herzog, Tehuqah le-Yisra’el al-pi ha-torah, 1, 4.
He [the king] himself is placed under the sovereignty [_equalsched] of the Torah, just like the king of a democratic state is placed under the authority of the constitution and the law.\textsuperscript{88}

By making this analogy, Herzog enhanced the legitimacy of his Jewish constitution by associating it with the constitutional model of many European states, not least the United Kingdom. This move is familiar to us from his earlier writings in which he strove to legitimate Jewish law in the eyes of Gentile critics by demonstrating its similarity to systems of law that were widely accepted as the most advanced and civil in the world.

Herzog enhanced his description of the Jewish constitution as a centralized hierarchy beneath a sovereign law in a 1953 article. In Constitution for the State, Herzog had characterized the constitution he had in mind for Israel as a democratic-theocratic “hyphenation.” In his 1953 article Herzog alighted on a more felicitous term for the kind of state he had in mind: he called it a “nomocracy.”

The Israelite state, according to its traditional structure, is neither a complete theocracy nor a complete democracy, but a nomocracy.\textsuperscript{89}

\textsuperscript{88} Ibid.

\textsuperscript{89} Herzog, “ha-medina ha-Yisraelit,” 11. Herzog was not the first to use the term “nomocracy.” It seems, however, that the word was first used to describe the ancient Jewish polity. The Oxford English Dictionary cites the earliest use of the word in print as the 1829 The History of the Jews by the English priest, Henry Hart Milman. I have no evidence that Herzog had read the book, but it was still in print during his lifetime and it seems reasonable that Herzog would have encountered a popular English work about the Jews. Indeed, Milman’s description of “nomocracy” is reminiscent of Herzog’s:

If God was not the sovereign of the Jewish state, the Law was: the best, and only safe, vicegerent of Almighty Providence, to which the welfare of human communities can be entrusted. If the Hebrew commonwealth was not a theocracy, it was a nomocracy. (Henry Hart Milman, The History of the Jews: From the Earliest Period Down To Modern Times, 5 ed., 3 vols., vol. 1 (London: J. Murray, 1883), 215-6.)

Notably, the term also occurs in a 1901 work by Oscar Straus (1850-1926), who to become the first Jewish United States Cabinet Secretary, serving as the Secretary of Commerce and Labor under President Theodore Roosevelt. Straus sought to trace the origins of the republican form of government in the United States to “the direct and indirect influence of the Hebrew Commonwealth.” He wrote:
Herzog spelt out his understanding of the term:

It is really more accurate to say that the state in Israel should be a nomocracy than a theocracy, that is, a rule of law. But not the rule of any law; the rule of the divine law, the heavenly Torah.  

Under this Jewish nomocracy, there is a king, but the king, like that in a constitutional monarchy, is not the real sovereign. He is subordinate to the true sovereign, which is the law. His only authority derives from that sovereign law: “The king rules by power of the Torah.”

If the king does not represent the sovereign authority of the state, who does? Already in his Constitution for the State, before he had adopted the term “nomocracy,” Herzog hinted at an answer:

What is a theocracy? It is a word made up of two Greek works: theos, God, and kratia, government. That is to say, a state whose constitution and laws, at least in the main, declare themselves to be from a supernatural, superhuman source. This does not mean that the term applies only a state that has no place for the human factor to be expressed. … [But] what is clear is that that term is only fitting for a state in which the human factor in the context of constitution is expressed only within a known framework of a superhuman edict and according to authority it derives from that edict.

This [ancient Jewish] government, from the fact that God, the source of all power, the embodiment of the law, and not a king, was ruler of the nation, is termed by various writers a Theocracy, or Nomocracy (from nomos, meaning law), or a Commonwealth. (Oscar S. Straus, The Origin of Republican Form of Government In the United States of America (New York; London: G.P. Putnam's Sons, 1901), vi, 108.)

Like Herzog, Straus used the term “nomocracy” favorably to associate the ancient Jewish constitution with that of a modern state.

91 Ibid.
92 Herzog, Tehuqah le-Yisra’el al-pi ha-torah, 1, 3.
With this formulation, Herzog further distanced Jewish law from the irrational and ritualistic religious laws imagined by proponents of the evolutionary theory of law by emphasizing that the law, while divine in origin, is interpreted by human beings. As long as the “human factor” operates within the structure of the law and according to its procedural rules, it acquires the authority of the divine law itself. In the 1953 article, Herzog made it clear that the institutional body that wields the power to interpret and develop the law with its divine framework is the Sanhedrin. As it is the representative institution of the sovereign law, the Sanhedrin is the ultimate constitutional authority:

The principle supreme power [הכח primaryKeyowy העליון] is that of the court which is the Great Sanhedrin.\(^{93}\)

Herzog’s understanding of the Sanhedrin enhanced the association of the Jewish constitution with the law of the modern state. According to Herzog’s description, the one significant difference between the sovereignty of Israel and that of the modern European state was that the ultimate sovereign authority in the former was the divine revelation and in the latter the will of the people. Just as in the modern state the sovereign was represented by Parliament, in Israel it was represented by the Sanhedrin, the Great Rabbinical Court. That is why the Sanhedrin was, for Herzog, the “supreme power” in the state. On several occasions, Herzog explicitly compared the Sanhedrin with a parliament. In his notes to Leo Kohn’s draft constitution, he remarked that “the role of the parliament was filled by the Great Sanhedrin in no small way.”\(^{94}\) Elsewhere, referring to the Men of the Great Assembly, which in rabbinical literature is often considered the precursor to the Sanhedrin, Herzog wrote:

\(^{93}\) Herzog, “ha-medina ha-Yisraelit,” 8.

\(^{94}\) Herzog, *Tehuqah le-Yisra’el al-pi ha-torah*, 3, 28.
In the early Second Temple period there was for a certain time another higher institution at the highest level by the name of the Great Assembly. … This was a public body made up of the great men of the nation which accepted upon itself the important role of implementing the sovereignty of the Torah in Israel, and raising the morals of the people. This was a kind of legislative parliament [פרלמנט מחוקק], enacting laws according to the procedures set up by the written and transmitted Torah; a parliament, only not in the modern sense.\(^95\)

This is a description of the constitution of Israel which self-consciously and explicitly mirrored the positivist jurisprudence that in Herzog’s lifetime dominated both European and Anglo-American legal scholarship. The entire state is under the rule of law, a single centralized hierarchy in which all legal authority derives from the sovereign. The king of Israel, like the kings of constitutional democratic monarchies, or the executive powers of republican governments, was entirely dependent on and subordinate to that sovereign authority. Furthermore, the constitution appoints a body whose task is to interpret old laws and create new ones. In the modern state, this role is taken by the parliament; in the Israelite state by the Sanhedrin.

**Women and Gentiles**

Having laid the basis for the structure of his constitution, Herzog went on to address the potential conflicts between halakha and democracy. As shown above, he was eager to present solutions to these conflicts that did not depend on halakhic concepts like “preservation of life” but rather arose from a more natural application of halakha. He conceded that according to halakha, all

\(^95\) Ibid., 289.
judges would ideally be religious Jewish men who were intimately familiar with the law of the
Torah. The circumstances, however, were not ideal and so Herzog proposed, begrudgingly, that
there would be “two legal authorities” in the state, one called “rabbinical” and the other “state”
[ממשלתי]. The rabbinical courts would have jurisdiction over personal status law as they had
under the British Mandate and the state courts would judge civil matters.

According to this overview, Herzog’s proposal sounds similar to Gorontchik’s pluralist system
of rabbinical and state courts, each with its own laws and its own judges. The similarity,
however, is illusory. The continuation of Herzog’s proposal made it clear that it was not
pluralistic at all. For Herzog, the state courts, dealing with civil law, would also have to apply
halakha: “Torah law is also the legal code of these courts.” Indeed, in certain circumstances
Herzog thought that these state courts should prosecute people even for religious crimes like the
public desecration of Shabbat and sins of sexual immorality. Furthermore, the state courts
would have to be constituted according to the judicial procedures outlined in halakha. Every
court would have to have three judges, the minimum size of a religious court. The judges would
ideally all be pious Jews, or at least Jews with a basic respect for the tradition, if not Orthodox in
all respects:

96 Ibid., 1: 25.

97 More accurately, Herzog wanted the jurisdiction of the rabbinical laws to be expanded so that they would have
exclusive jurisdiction of all cases in their remit. Under the mandate, they had exclusive jurisdiction over certain
kinds of law and concurrent jurisdiction over others. Rabbinical courts under the Mandate had, in fact, a narrower
jurisdiction than the Muslim religious courts because of the heritage of the Ottoman legal system. The fact that this
difference between Muslim and Jewish courts was in fact preserved in the early years of the State of Israel, which
was a source of great disappointment to the rabbis. See, for example: ibid., 26, 239-42. On the jurisdictions of the
different religious courts in the early years of the state, see: Moshe Chigier, “The Rabbinical Courts in the State of
Israel,” Israel Law Review 2, no. 2 (1967).

98 Herzog, Tehuqah le-Yisra’el al-pi ha-torah, 1, 26.

99 Ibid.
We have to insist with all strength that only Jews who, at least, are not known to transgress the Shabbat or eat non-kosher food in public will be eligible to be appointed. [Judges in the state courts] cannot be Jews who cause pain and strife in the heart of the believing community and the Judaism of Torah and mitzvot, even if they don’t fill the requirement of being God-fearing in the context of the ritual commandments. 100

In other words, even Herzog’s “state courts” are halakhic courts in both substance and procedure. This is quite different from Gorontchik’s model in which halakha had no role in the governmental courts. In Herzog’s model, all courts would judge according to halakha but different courts would have jurisdiction over different areas of law in much the same way as European states have different courts for, say, family law and civil law. Judges in the family courts, because of the complicated nature of family law and its critical importance for religious integrity, would have to meet higher qualifications of religious commitment and halakhic knowledge than the criminal and civil courts. All courts, however, would be governed by the basic substance and procedure demanded by halakha.

Herzog realized, though, that this system could never be implemented. The exclusion of women and non-Orthodox men, not to mention Gentiles, from the judiciary would arouse “the opposition of large sectors of the public on the basis of the principle of the personal freedom of religion.” 101 Herzog considered offering Israeli Arabs their own courts where they could judge themselves by their own rules, “two jurisdictions and two laws, for Jews as appropriate for them and for Arabs as appropriate for them.” 102 This would avoid the halakhically problematic situation of a Gentile

100 Ibid., 25.
101 Ibid.
102 Ibid., 28.
judging a Jew in a court run according to the Torah. But Herzog knew well that this position
would not have been accepted:

This divisive approach in the realm of jurisdiction and law will not receive the support of the decisive majority. They will say that a distinction to such an extent cannot be maintained … and that this is not the way to arrive at peace and serious, free, political unity.

Therefore, Herzog had to devise more far-reaching solutions. He was not willing to compromise on his position that all courts in the state would have to judge by halakha. He had, though, to devise a way to allow non-religious, female and Gentile judges to sit on those courts.

“Partnership” and “Acceptance”

Herzog’s first suggestion was to avoid the question altogether. The prohibitions against appointing Gentiles to positions of power applies only to positions with formal political-legal authority. Gentiles may, however, be business partners with Jews. Herzog mooted a proposal that sidelined the entire question of the prohibition of Gentiles holding positions of authority by altering the entire perception of the state. If the state were not conceptualized as a political entity, but as a civil partnership, then anyone, including Gentiles, women and non-Orthodox Jews, would have equal status. This proposal required Herzog to give an inventive reading of the state:

Surely the foundation of the state itself is a kind of [civil] partnership. Does this state have the law of the kingdom of Israel in the same way as the kingdom of Israel in the days of David and Solomon…? That is something else. In reality, this is a partnership between the people of Israel and the Gentile people according to conditions that guarantee the first partner [i.e. the Jews] a certain degree of control. The question, then, can only be whether we are permitted to make a partnership of this kind.

103 Ibid.

104 Ibid., 20.
Herzog proceeded to examine a number of pertinent sources before concluding that it is indeed permitted for the people of Israel to forge agreements with other nations in circumstances like this one. In this case, in fact, it would be certainly acceptable, because “it is for the good of our existence.”

Herzog was not satisfied with this approach, however. He did not give a reason for this, but two possibilities suggest themselves. First, the “partnership” approach eviscerates not only the political but also the theological significance of the Jewish state. The miraculous events of 1948, to which Herzog himself ascribed the messianic description of “the first flowering of our redemption,” could surely not be reduced to an innovative kind of business partnership.

Second, the proposal was simply not very convincing. Herzog’s description of the state as civil partnership could more or less apply to any state. Taken to its logical conclusion this position could entirely eliminate the category of the political from Jewish thought. In any case, for whatever the reason, Herzog dedicated only two paragraphs to this proposal before putting it to one side and returning to his consideration of the halakhic ramifications of appointing Gentiles and women to positions of authority in the context of a state proper.

The first halakhic obstacle to address was the prohibition of serara, “lordship” or “authority.”

According to many halakhic authorities, it is not permitted for Jews to appoint Gentiles to any

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105 Ibid., 21. Herzog considered here the possible difference between forging an agreement with Muslims and Christians, whom he did not categorize as idolaters, and others like “Indians, Chinese and Japanese.” He concluded that there would be no difference with regards to this kind of “partnership” and noted that he was not even sure that those nations are really idolatrous as “I have not properly studied their religions and their modes of worship.”

106 This is the description given in the official Prayer for the State of Israel produced by the Chief Rabbinate. Notwithstanding certain claims that S. Y. Agnon contributed to the prayer, Herzog was its primary author. See: Yo'el Rafel, “Zehuto shel mehaber ha-tefilah li-shlom ha-medinah,” in Masu’ah Le-Yitzhak, ed. Shulamit Eliash, Itamar Warhaftig, and Uri Desberg (Jerusalem: Yad ha-rav Herzog; mekhon ha-entsiklopediah ha-talmudit; mekhon ha-talmud ha-yisra'eli ha-shalem, 2008).
position of authority (not only the judiciary) over Jews. The prohibition is based on an extrapolation from the biblical passage about the appointment of a king who has to be “from among your brethren” and not from among the Gentiles. According to the classical formulation of this principle by Maimonides, the teaching regarding the appointment of the king extends to all other positions of authority:

This applies not only to the monarchy but to all positions of authority [serara] among Israel… All appointments that you make must only be from among your brethren.

Herzog circumvented Maimonides’ ruling by noting that it is based on a verse about the appointment of a king. Perhaps, then, suggested Herzog, the ruling applies only to positions of authority that are akin to monarchy. Kings are appointed for life and they transmit their political authority to their heirs. Appointments in a democracy generally have a fixed term and are not inherited. Furthermore, he argued, a king rules over subjects who do not necessarily want his rule. In a democracy, by contrast, elected officials are not imposed on the population, but are appointed by the very people over whom they have authority. These differences between a king and democratically elected officials, argued Herzog, may mean that Maimonides’ restrictions to political appointments do not apply in the context of the democratic state.

This innovative hermeneutics dealt with the general problem of political appointments of Gentiles. A further step, however, was required to justify Gentiles occupying the judicial bench and judging Jews by Jewish law. The halakhic mechanism he suggested for this purpose was that

107 Deuteronomy 17:15
108 Maimonides, *Hilkhot melakhim* 1:4
of “acceptance” [קבלה]. If a judge or witness is accepted by the parties in a civil suit, or by the defendant in a criminal suit, then they are allowed to take up those roles even if they do not meet the normal qualifications for them.\(^\text{110}\) This method could, Herzog suggested, allow even Gentiles or women to take up the position of judge on the basis of the formal acceptance of all relevant parties. It would, however, be an inadequate solution, and might lead to chaos, if at the start of every case the parties needed to accept or reject the judge or witnesses. It would hardly make for a robust legal system if any party in a case could simply dispute the authority of the judge. Herzog therefore proposed that there could be a one-off “acceptance” of each judge, on behalf of all the residents of the state, by a binding act of the elected government. He suggested that because the people choose their representatives, those representatives may formally accept on their behalf all judges and witnesses in the state’s courts:

The community in its entirety elects a legislative assembly [אספה מחוקקת] and this assembly through the strength of this election will decree that it accepts in the name of the entire community witnesses and judges who are unqualified by the law of the Torah and the sages.\(^\text{111}\)

This suggestion is radical for several reasons. Most of all, there is simply no precedent for it at all. Herzog admitted much: “We have apparently not found an “acceptance” of this kind explicitly in the commentators.”\(^\text{112}\) The alternative, however, was unthinkable. Without this accommodation, halakha would be rejected wholesale as the legal system of the state. Herzog

\(^\text{110}\) The details of this method go beyond the scope of this chapter. Suffice it to say that there is much discussion about the efficacy of this method in the halakhic literature. See: Bar-Ilan and Zevin, \textit{Entsiklopedia Talmudit}. Vol. 3 pp.168-9

\(^\text{111}\) Herzog, \textit{Tehuqah le-Yisra’el al-pi ha-torah}, 1, 41.

\(^\text{112}\) Ibid.
felt that the only way for it to have a chance of acceptance was for this, albeit radical, mechanism of “acceptance” to be employed.

The upshot, then, was a proposal of a judicial system in which some courts, those concerned with family law most of all, would be reserved for religiously-trained rabbis and the other state courts would accept judges and witnesses of any kind. Both courts, however, would be part of the same hierarchy and would be considered Torah courts, ruling according to the substance and procedure of halakha:

Let the official law book for the entire population, “for the stranger as for the sojourner in the land”, be Torah law.\footnote{Ibid., 28.}

Clearly, this system is quite unlike that of Gorontchik. Herzog indicated this even in the names that he gave to the different courts. Gorontchik had called the two courts in his system “rabbinical Torah courts” [using the tradition term בתי דין רבניים on the one hand and “courts of law” [using the modern secular term בתי משפט on the other. This emphasized the fact that they each ruled according to a different source of law and legal authority. Herzog, by contrast called both courts by the traditional name [בתי דין] and distinguished them by calling the family courts “rabbinical” [בתי דין רבניים] and the others “state” [בתי דין ממשלתיים].

**Herzog in Context**

In chapter 2, I noted that the most religious Zionists who proposed constitutional arrangements for the Jewish state before 1948 suggested models that were, at their core, legally pluralistic. They relied on Jewish legal mechanisms like “king’s law” and modeled themselves on the
thinking of medieval scholars like the Ran who conceived of the Jewish polity as incorporating a number of parallel systems of law which, although they all were under the authority of God, each had their own source of authority and had distinct rules and procedures. Herzog, though, departed from this line of thinking and sharply opposed the notion that the Jewish constitution might accommodate multiple legal systems. The Jewish state, he argued, had to be a centralized, all-encompassing regime with a single legal hierarchy that incorporated all valid law in the state. Anything else, argued Herzog, was inconceivable. This raised the question: why did Herzog take such strong exception to a model for the Jewish state that drew firmly on pre-modern precedent, that provided reasonable solutions to the challenges of having a religious democratic state, and that garnered so much support from within the religious Zionist community?

I have tried to answer that question through an extended analysis of Herzog’s writings on law from his time in Ireland to his time as Chief Rabbi of Israel. I placed those writings within the wider context of European intellectual discourse, which celebrated centralism and positivism and looked down upon religious law and the pluralistic legal models of colonial societies. I have shown that Herzog was particularly sensitive to this intellectual climate. He was aware that legal positivists would be predisposed to viewing Jewish law, which was, after all, ancient, ritualistic and de-centralized, as the epitome of un-evolved law. Herzog lamented this critique of halakha, which was for him the word of God and the greatest law of all. Furthermore, Herzog he knew that halakha would only have a chance of being made into the law of a new Jewish state if it was viewed as the equal of modern European law. He therefore took great pains to describe Jewish law in positivist terms, rejecting the legal pluralism of many of his religious Zionist colleagues and taking every opportunity to demonstrate parallels between the ancient Jewish constitution, as
he portrayed it, and the constitutions of modern Europe. He did this even though it required him to make substantial accommodations in his halakhic reasoning.

Herzog’s emphasis on centralism and positivism fits perfectly into the pattern of legal development in other post-colonial independence movements. In establishing their own independent state, Zionists, like other nationalists, insisted on a European-style centralized legal regime. This placed them on a par with the European states from which they claimed independence and also supported the goal of national cohesion in the new state. Herzog’s rejection of pluralism in favor of centralism correlates well with the same shift made by secular Zionist jurists in the early years of the state.

The fact that Herzog’s constitutional thinking had so many resonances with general Zionist jurisprudence perhaps explains the speed with which it rose to dominate pluralistic thinking in the religious Zionist camp. Within a few years after the establishment of the State of Israel, legal centralism and positivism became defining features of the legislative goals of the religious Zionist leadership as well as the institutionalization and bureaucratization of the chief rabbinate and the rabbinical courts. The next chapters recount this development.
5. The Imperialism of the Chief Rabbinate

The rabbinical courts need to be as imperialistic as possible and must not give up on their authority.

- Zerah Warhaftig

Despite the prevalence of legal pluralism before the late 1940s, from the time that the state was established the legal centralism of Herzog and others came to dominate. Ultimately, religious Zionists had virtually no real input into the actual constitutional arrangement of the new state. Their legal philosophy, however, continued to have significant effects on the way that they related to it. It shaped the legislative proposals emerging from the highest levels of the Mizrahi party and often resulted in an antagonistic attitude to the state’s institutions, particularly the judiciary and the legislature. Following Herzog’s centralist doctrine, religious Zionists worked hard to get the Torah to determine the nature of Israel’s constitution. Their categorical failure in this regard did not lead them to rethink their centralist philosophy; it merely forced them into an ideological battle to acquire as much control as possible over the state’s legal machinery.

Civil Legislation

As discussed in chapter 2, one of the main motivations for the legal pluralism of both medieval thinkers like the Ran and modern thinkers like Gorontchik was the inability of halakha to establish social order. This led them to advocate a dual legal system in which the state’s civil and criminal courts would be able to fill the gaps in the halakha. Centralists of Herzog’s school,
however, demanded a single halakhic legal system that would govern all realms of the state. To have any chance of fulfilling their vision, therefore, Herzog and his followers had to formulate a halakhic code that would be competent to govern all spheres of Israeli law. Because Israeli judges would be drawn from the entire population, not only those with rabbinical training, the code also had to be understandable even to people with no experience of halakha. To this end, the early years of the state witnessed a concerted effort on the part of a group of rabbis to produce a halakhic civil and criminal code. Their work bore unmistakable traces of European positivism, especially of the German style of legal codification, which reinforces the impression of the ascendancy of centralist jurisprudence among religious Zionists as well as the close relationship between the religious Zionist attitude to law and general European legal discourse.

In 1948, one of the most important and influential religious Zionist leaders was Rabbi Meir Bar-Ilan (1880-1949). Born Meir Berlin in Volozhin to a preeminent rabbinical family, he received an extensive yeshiva education. His father was Rabbi Naftali Zvi Yehuda Berlin (widely known by his acronym, Netziv,) head of the Volozhin Yeshiva, who was revered by generations of rabbis. After receiving a religious education, Meir Berlin attended the University of Berlin. It was in Germany that he became a member of the Mizrahi party and later the secretary of the world Mizrahi movement. After his move to Jerusalem in 1926, he became the president of the Center of World Mizrahi and in that office, which he held until his death, he was one of the senior religious representatives of the Yishuv. He is today perhaps best known for spearheading the monumental *Talmudic Encyclopaedia*, a work which has reached its thirtieth volume and continues to grow, which comprises exhaustive essays on Talmudic legal principles and
categories.\(^1\) In 1948, Bar-Ilan was the grandfather of religious Zionism, a deeply authoritative voice who was connected to the roots of Zionism and also to the religious establishment of pre-war Europe.

Given his deep investment in religious Zionism, Bar-Ilan had naturally given thought to the relationship between politics and Judaism. As early as 1922, he made the claim that the Jewish tradition knows of no separation between church and state.\(^2\) Like other Zionists, however, both religious and secular, he allowed these thoughts to remain in the abstract for decades. It was not until 1948 that he outlined a detailed position on what a modern Jewish state might look like in practice. In the immediate aftermath of the Declaration of Independence, only months before his death, he published an article called “Law and Justice in our State.”\(^3\) It was originally a memorandum circulated around a number of like-minded rabbinical scholars and was later reprinted in *Yavneh*, a journal of religious Zionism that had recently been founded. At the time Herzog’s work had not yet been published or widely shared, so this was the one of the first and most detailed treatments of the role of halakha in the laws of the state in this period. Because of Bar-Ilan’s seniority, authority and scholarship, it became an important touchstone of religious Zionist thought and policy.

The article began with Bar-Ilan stating outright that he believed that the all areas of law in the

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1 See Bar-Ilan’s bibliography: Meir Bar-Ilan, *Mi-Volozhin ad Yerushalayim* (Tel-Aviv: Yalkut, 1939). For the methodology and impact of the encyclopaedia, see: Yehoshua Hutner, “Ha-rav Meir Berlin ve-’entsiklopedia talmudit’,” *Ha-Darom* 49 (5740=1980).


Jewish state, including civil law, should be governed by halakha. “Foreign” law has no place in the Jewish state:

We are obliged to … arrange statutes and laws, not just in matters of religious ritual but also in matters of civil law, by which we will live and by which we will judge in our independent and sovereign state.4

He conceded that there were serious obstacles to this goal. Like Herzog, he recognized that reform was required to allow full participation of women and Gentiles in the institutions of state. Without this, he recognized, halakha would certainly not be adopted by the majority of citizens, in which case “the whole shape of social life in our state will be neither by our spirit, nor according to our outlook.”5 He also acknowledged that Jewish law, particularly criminal law, fell short of what the modern state required. He readily admitted that for two millennia Jewish communities had not generally been responsible for administering their own criminal or civil law without the oversight of the Christian or Muslim authorities.6 This was no small admission. The span of two millennia of exile, which Bar Ilan portrayed as merely an unfortunate hiccup in the natural development of Jewish law, in fact represent the entire period of the development of rabbinical law. Bar-Ilan conceded, then, that legal reform and new legislation was necessary.

Despite this, however, Bar-Ilan continued to maintain that the Torah in principle contains all the necessary resources for governing a modern state. All that was needed was reorganization:

The fundamental question of what is the basis of the law of our state should by rights and by logic not arise, since we have the entire Torah, written and transmitted, and a legal corpus in the

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4 Bar-Ilan, “Hoq u-mishpat be-medinatenu,” 20. For the sake of clarity, it should be noted that the context indicates that Bar-Ilan is not saying here that there should be no Gentiles in the State of Israel, but simply that the law of the land should be decided by Jews, and according to the Jewish tradition as opposed to English or some other law.

5 Ibid., 23.

6 Ibid., 21.
form of halakhic explanations and practical responsa that perhaps no other nation has. We have only to put these laws in order and to make their realization in day to day life to a real possibility. [Emphasis in the original.]

Bar-Ilan excoriated the “regnant public opinion” that the state would have to adopt the laws of other nations, “to go and graze in other fields and to draw the basis of the laws of our state from the strange wells of the other nations.” This, he said, is nothing but “the evil inclination [created by] the long exile.” Bar-Ilan observed that this position even arose within the heart of the Orthodox community itself. He took issue directly with those who argued for a pluralist constitutional model:

Within our religious circles there is a kind of secret agreement that if there will be in the State of Israel a double system of law with religious or rabbinical courts on the one hand and secular ones on the other, … that will be enough for them and they will not ask for more.

For Bar-Ilan, however, as for Herzog, this pluralist solution was entirely unacceptable. The only path for every believing Jew is to request with all force and to strive with all might and with every effort that we should have one law in all realms of our state, and not just for us but for all those who live in the state, even those who are not of the covenant, just as in every land and country the political territory determines [the law] and not personal [religious] affiliation … and this one law should be based on the Torah of Israel and what derives from it, and not on another law and another Torah.

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7 Ibid.
8 Ibid., 22.
9 Ibid.
10 Ibid. Bar-Ilan is presumably here referring to the agreement, later called the “status-quo agreement,” made between Ben-Gurion and the Agudat Israel party in June 1947. Part of that agreement granted the rabbinical courts continued control over personal status law, but reserved the right of the state to control all other realms of law. The full text of the agreement is at: Itamar Rabinovich and Jehuda Reinharz, Israel In the Middle East: Documents and Readings On Society, Politics, and Foreign Relations, Pre-1948 To the Present (Waltham, Mass.; Hanover: Brandeis University Press; University Press of New England, 2008), 58-59. For a full discussion, see Friedman, “Structural Foundation.”
But this is not easy... Therefore it is our obligation, the obligation of the believers in the justice of the goal and the possibility of bringing it to fruition, to prepare immediately for war, with the right and with the left, for a state law that is based on the laws of our holy Torah in all the streets of our state and in all the fields of its life. This law and no other, none besides it.11 [Emphases in the original.]

In this striking passage, Bar-Ilan articulated his positivist and centralist belief that halakha must be the only legal system endorsed by the state. He explicitly stated that he would not seek to impose the ritual aspects of halakha on every citizen, but regarding civil and criminal law, he issued a call to arms in the struggle to establish halakha as the only law for every resident in the state, Jewish and Gentile. The originality of this call cannot be overstated. It was a radical innovation to seek to impose the civil and criminal aspects of Jewish law not just on Jews but on all those within the territory of the state, irrespective of their religious identity. Nonetheless, Bar-Ilan clearly insisted that the Jewish law in Israel should be all-encompassing and unified and should reside in the power of the state. His picture of the law represented the epitome of legal centralism and he was willing to tolerate serious divergences from the traditional norm to establish and defend it.

The strength of Bar-Ilan’s rhetoric belied the fact that his position was deeply paradoxical. He maintained throughout that Jewish law is capable of governing a modern state and that the adoption of a pluralistic legal system, incorporating the laws of other nations, would be folly. However, a close reading of his argumentation reveals that he fought for a centralist model of halakha precisely on the grounds that this was the legal model of other modern states. He argued that the halakha should cover everyone “just as in every land and country [where] the political

territory determines [the law] and not personal [religious] affiliation." So even as he called for a pure Jewish law unsullied by foreign influence, he pushed radical innovations to make Jewish law more like the law of other nations, especially the European countries where legal centralism and positivism reigned supreme.

The adoption of a systematic law code to cover all residents of the state was the hallmark of modern European law. Prior to the long nineteenth century, Europe was split into innumerable localities, governed by their own heteronomous laws. The rise of the modern nation state was accompanied by the consolidation of state power through the imposition of a single law within state boundaries. This was achieved by the creation of new national legal codes which were intended to bring the rigors of Enlightenment positivism to the field of law and clarity and uniformity to the legal system of unified states. The earliest example was the Napoleonic French Civil Code of 1804. A decade later, after the beginning of German unification with the Congress of Vienna, the argument was made for a uniform German legal code. During the course of the 19th century, jurists like Paul Laband continued to argue that law was nothing more than the will of the state and that therefore, all laws and all institutions of state had, by definition,

12 Bar-Ilan’s commitment to centralism is also manifested in his rejection of qabalah – case by case acceptance of invalid judges by parties to a case – as a solution to the problem of the involvement of women and Gentiles in the judiciary. Like Herzog Bar-Ilan rejected this approach because it was not “statist” enough. Qabalah would have to be based on private arrangements between individuals whereas for Bar-Ilan, as a legal centralist, the law had to be organized and enforced by the state and not a matter for personal preference.


14 The argument for a uniform German legal code was famously made by A. F. Thibaut who believed that a unified legal system was an essential tool of unification. Initially, Thibaut was opposed by Von Savigny and the Historical School, who believed that laws should emerge from the societies that they govern and not be indiscriminately imposed by a small elite. Tellingly, though, Thibaut’s position won out. The Historical School itself was instrumental in the gradual adoption of Roman law as the model for the German code. See: Susan Gaylord Gale, “Very German Legal Science: Savigny and the Historical School,” Stanford Journal of International Law 18 (1982).
to be unified coordinated with each other. Legal unification culminated with the *Bürgerliches Gesetzbuch* (BGB), Germany's civil code, which was begun in the aftermath of the final unification of Germany in 1871 and finally adopted in 1900. The BGB became the archetypal civil code and was the basis of much subsequent European legislation and codification.

Bar-Ilan’s vision of a modern halakhic code was based squarely on modern European codes, the BGB in particular. This is true for both the method of its compilation and the structure of the final product. Bar-Ilan called for the code to be compiled in a highly bureaucratic fashion. He wanted the traditional sources of halakha to be combed for useful precedents, refined by committee after committee, and eventually compiled into a modern legal code. This code should then be placed “in the hands of every judge” so that even judges without a prior knowledge of halakha would be able to apply it:

> We will need to form different committees of Torah scholars wherein each person or group will occupy himself with a specific area... and will conduct a great search in the responsa from the early to late... A special committee, or several committees, will analyze all the material of the first committees and when it is ready for publication it will be necessary to edit everything into a concise and pithy literary form. One can suppose that lawyers who know the Torah and perhaps other proof readers will take part in this work.

Bar-Ilan also wanted the form of his code to resemble the form of other modern codes. He took pains to describe to his readers, his potential collaborators on this codification project, that the finished product should not contain the extended and often convoluted legal analyses customarily

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found in Jewish legal texts. Rather, it was to be concise and consistent. It was to contain the law and nothing more.

Every generation has its own literary form. The form of the Halakhot Gedolot and She’iltot is not the same as Maimonides or the Shulhan Arukh. In this generation and for the needs of our time a book of laws has to be edited in the accepted form of law books, with sources below, and comments in exceptional cases as either footnotes or endnotes. But the people working on this should not include in the law books the many new theories and lengthy explanations that will certainly occur to them [because the law books] will be in the hands of every judge, including those who are not real Torah scholars.  

It is difficult to overlook Bar-Ilan's apologetic tone and the fact that he felt the need to defend the literary form of his proposed code. He was quite aware that the form he was describing – a book of precise legal phrases with sources relegated to footnotes and commentary banished to rare endnotes – had little in common with traditional Jewish compilations. It was, though, a precise description of the BGB, the most important European law code of his era.

The influence of the BGB on Bar-Ilan’s proposed code went even further. The terms Bar-Ilan used to describe his vision of Jewish law were direct Hebrew translations of terms from German jurisprudence. Thus, he called his legal code a “law book” [ספר חוקים], a direct translation of the German Gesetzbuch. He referred to “civil law” [חוק אזרחי], a translation of bürgerliches Recht; “penal (i.e. criminal) law” [חוק פלילי], a translation of Strafrecht; and “public law” [חוק ציבורי], a translation of öffentliches Recht. This terminology was common in legal circles in Palestine and then Israel, which, as we have seen, were heavily dependent on German legal theory. It is, however, entirely foreign to the Jewish legal tradition. I have been unable to find even one instance of any of these terms in classical Jewish literature, even in the modern period, before the

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rise of religious Zionist jurisprudence. Furthermore, it cannot be claimed that this was simply a
matter of convenient translation; these are not just foreign terms, but foreign categories. Jewish
law knows no distinction between, for example, civil and criminal damages; they are both
categorized under “damages” [נזיקין]. Nor does the Jewish tradition know of a “law book” in the
sense of a civil code. Whatever the intentions of their authors, traditional Jewish legal collections
are used in collaboration with case law and are not treated in the same way as a civil code is
treated in a modern state. Despite all of this, Bar-Ilan chose to adopt this terminology for his
legal code. It was common among the secular Zionist juristic elite, many of whom had
themselves been educated in German universities. It was also no doubt familiar to Bar-Ilan from
his own education in Berlin.

Bar-Ilan insisted on using an unadulterated Jewish law for the Jewish state. But his entire vision
of that law, its dependence on a centralized state, its monistic structure, its all-encompassing
scope, its dependence on codification, its terminology and its central categories were foreign to
halakha and were heavily dependent on the modern European model of legal centralism. The
adaptation of halakha to squeeze it into this foreign model required quite radical innovations
which Bar-Ilan, for the sake of his vision, was ready to accept. Bar-Ilan, like Herzog, understood
that legal positivism and centralism represented the only kind of law that was valued in the
modern state. For Jewish law to be taken seriously and to make its mark in a newly independent
state, it had to be re-modeled according to the laws of modern Europe.

Codification in Practice
Unlike the various religious advocates of legal pluralism, Bar Ilan and Herzog had the seniority and institutional clout to take practical steps to bring their ideas to fruition. In Sivan 5708, (June or July 1948,) only weeks after the declaration of independence, Bar-Ilan convened a “legislative committee” of the World Mizrahi movement, of which he was president, which he was to supervise jointly with Herzog. The goal of the committee, as its secretary Zvi Kaplan later described, was exactly in accordance with Bar-Ilan's memorandum discussed above:

Our movement must concern itself with the preparation of a book of laws for the State of Israel according to our Torah ... It is forbidden for two kinds of law to rule in our state, a “civil” law and a Torah law. All the state and all the courts [ Beit ha-Mishpat ] within it must be run according to the law of the Torah... To that end... there is the need first of all for internal work in order to create a book of laws in the modern form so that it will be comprehensible to every judge and lawyer, even those who are not religious. [Emphasis in the original.]

On 17 August of that same year, Bar-Ilan personally wrote to a number of rabbis to enlist their participation in the project. He explained the urgency “to go as fast as possible to prepare samples of a book of laws in topical matters in both civil and criminal matters.” He outlined specific areas of law that required their attention including contract, extortion, insurance, tort, treason, espionage, draft evasion, forging currency, theft, robbery and murder. He also mentioned some of the procedural problems that needed to be overcome such as the appointment of judges and the inclusion of testimony from women or Gentiles. The work, he said, would require them to find appropriate material and work it into the form of the finished code. He

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18 This term refers specifically to state courts, as opposed to rabbinical courts, which are called Beit ha-Yad.

19 Zvi Kaplan, “Avodat va’adat ha-haqiqah”. Emphases in the original.

20 Bar-Ilan, Correspondence of 12 Av 5708, RZA, 330/38/4/1948.
encouraged the rabbis to let him know what they wanted to work on and how much they would like to be paid. Ultimately, a fixed committee was established comprising nine rabbis. They were paid from the budget of World Mizrahi. Most of them worked 4 hours per day for a wage of 30 Israeli pounds per month.  

The work of this committee, and the intellectual problems that it encountered, reflect the paradoxical nature of Bar-Ilan's entire project which was caught between the repudiation of any external sources of law and the reliance on European legal models and structures. There were first of all problems over the literary form of the work. It was mentioned above that Bar-Ilan had in mind the form of a European civil code, a form that was quite different from the discursive nature of most rabbinical legal texts, full of tangents and asides. Bar-Ilan reiterated this requirement in a meeting of the legislative committee on 11 April 1949:

> Whatever is published must be acceptable to the public and must be intended for this particular purpose. There is no place for length but for summary. The give and take of halakha must be curtailed. The work must be edited by one, directed hand... Attention must be paid to the form, which must be comprehensible not just to Torah scholars, for our work is not just intended for them.  

Despite his clear instructions, though, not all members of the committee understood what was required. Earlier, Kaplan had written a letter to one of the rabbis on the committee, in which he

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21 They were: Avraham Shapira, Aharon Bialistotski, Yaakov Ginzburg, A. Z. Gerber [?], Sh. A. Yedelewitz, Dr Y. Z. Kahana, Binyamin Rabinowitz-Te’omim, Avraham Shadmi, Mordechai Elon. A further three rabbis also worked for a short time on the committee: D. Kreuzer, G. Arieli, Y. Salmon. (The list is taken from Zvi Kaplan, “Avodat va’adat ha-haqiqah”.) Bar-Ilan, in a meeting of the same month said there were 16 workers on the project rather than 12. It seems there were also other members of the committee not included on Kaplan's list, for example Bezalel Zolti and M. D. Bakesht, who were both present at the 12 Nisan meeting.

felt the need to address this point, apparently in response to the rabbi’s failure to keep to the required format:

> You must understand that this work with which we are occupied is not intended for the sake of study alone;\(^{23}\) it has a practical goal: the ordering of a law book for the State of Israel. And in the context of this work, we must attend only to matters pertaining directly to the laws of the contemporary state and not to other matters. [Emphasis in the original.]\(^ {24}\)

The rabbi’s confusion over what was expected of him is entirely understandable given that the form of the work was entirely new in the history of Jewish law.

This paradox surfaced most of all in the search for legal materials on which to base the code. The paucity of materials in the Jewish legal corpus, especially pertaining to criminal matters, was not lost on the committee members. One of them called their work was “a creation ex nihilo.”\(^ {25}\)

Another member of the committee wrote to Bar-Ilan in such a way that manifested perfectly the tension implicit in undertaking such a radically new project while claiming, and believing, that it arose naturally from traditional sources. He began by emphasizing that the goal of the project was to achieve a Torah-based legal system for the state by showing the secular parties that “any legal problem in any area can find a fitting solution according to the foundations and roots of traditional halakha.”\(^ {26}\)

However, he went on to undermine his confidence in the applicability of traditional Jewish law to the modern state:

> It appears to me that we have to concentrate first of all on the material pertaining to civil law because it is plentiful and diverse,

\(^ {23}\) Lit. “to greater and ennoble the Torah” i.e. to study the Torah as a religious exercise rather than for practical purposes.


such that there is the possibility of full and complete legislation for our purposes... But regarding criminal law, even if we actually find all the Torah material etc., we will only have partial and decisively insufficient legislation. For apart from the paucity of material in our possession, there is the additional factor that criminal law, apart from establishing guilt or innocence, needs to effect punishments that fit the crime. This is an indispensable part of the law and in this area there are no sources at all in the halakha. Even if it would be possible fully to reconstruct criminal law from the sources, as it was practiced at one time or another, this would have little practical advantage in fixing the penal law in our time.²⁷

This rabbi, like Bar-Ilan, was simultaneously confident in the applicability of Jewish law to the modern state, and also concerned about the lack of resources in the Jewish tradition to write a modern legal code in practice.

Despite these problems, the project forged ahead and by April 1949, less than a year after it had begun, the committee had produced pamphlets on the jurisdiction of rabbinical courts, murder, theft, robbery, extortion, incarceration, contract, business law, laws of partnerships, tort, labor law, inheritance law and laws pertaining to the national mint. Not all of it had been edited, but some had been approved by Bar-Ilan and Herzog.²⁸

In this same month, however, Bar-Ilan died. The project found itself without a leader and, consequently, without a budget. The Mizrahi archives contain letters from participants in the project who had apparently been informed that it would have to be closed due to lack of funds. All was not lost, however. Yehuda Leib Maimon-Fishman, Israel's first Minister for Religious Affairs, apportioned funds to the project. Maimon-Fishman had himself been an eager advocate of the revival of the ancient rabbinical body, the Great Sanhedrin. He believed that such a body

²⁸ Zvi Kaplan, “Avodat va'adat ha-haqiqah”.
would allow for the modernization of halakha and the centralization of halakhic authority in a rabbinical body in the new state. He was, therefore, himself an avid supporter of halakhic centralization. Although the Sanhedrin project was aborted, Maimon-Fishman was in a position to direct government funds to Bar-Ilan’s initiative, which aimed toward a similar goal. At the same time, the Harry Fischel Institute, named for its patron, a New York Orthodox Jew, which had already been funding Torah scholarship in Jerusalem for some years, also set aside funds for the project and eventually absorbed all efforts of a halakhic codification under its auspices.

While remaining under the ultimate supervision of Herzog, the project apparently passed to the management of Binyamin Rabinowitz-Te’omim. Rabinowitz-Te’omim, a nephew of Rabbi Kook’s second wife, had been educated in the Slobodka Yeshiva in Kovno and immigrated to Palestine in 1930. He had been a member of the original committee and published a programmatic pamphlet about its future in March 1950. As the pamphlet made clear, although the funding and management had changed, the intellectual problems and inherent paradox of the project remained. Rabinowitz-Te’omim, like his predecessors, stressed the importance of the uniquely Jewish approach to law but at the same time conceded the need to consult with experts in other legal systems, “especially Swiss law which is accepted in many countries.”

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29 The Sanhedrin project failed despite the efforts of Maimon-Fishman, Shlomo-Zalman Shragai and others. Herzog, though supportive in theory, never lent the project his full support. As a pragmatist he knew that it would never garner the strength of rabbinical support it would require to be successful. He may also have feared for the potentially radical changes such a body might introduce. For a collection of Maimon-Fishman’s writings on the Sanhedrin, see: Yehudah Leib Maimon, *Hidush ha-sanhedrin bi-medinatenu ha-mehudeshet* (Jerusalem: Mosad ha-rav Kook, 1967). For more on the episode, see: Herzog, *Tehuqah le-Yisra’el al-pi ha-torah*, 3, 260-67; Cohen, *Ha-talit veha-degel*, chapter 3.


31 In 1907 Switzerland had enacted its own civil code, similar to the German BGB. The Swiss code had been adopted by Turkey in the 1920s.
mentioned that one such jurist, Dr. Zvi Arman, a graduate of law from the University of Bern and an expert on Swiss law had been advising the project. Rabinowitz-Te'omim also explicitly conceded that there was a need to use new terminology, of the kind Bar-Ilan had already introduced without fanfare. He insisted that this new terminology would not be secular, although it is hard to imagine what he might have meant by this. He also repeated the requests, already made by Bar-Ilan and other leaders of the project, that the law had to be understood by anyone, even those who were not scholars of the Torah.

Ultimately, Bar-Ilan’s dream was realized only in part. The Harry Fischel Institute published two books of Jewish law, one dealing with the law of sales, the other with the authority of the courts and government, and the laws of murder. On each page of these works there is a clear outline of the law in numbered paragraphs. Beneath the main text there are footnotes which direct the reader to the sources of the law and a commentary which delves into the law in greater detail and occasionally makes comparative comments with other legal systems. The section on criminal liability, for example, first surveyed German, Ottoman and British Mandate law before discussing halakha.

These books were the first state legal codes ever produced in the rabbinical tradition. To a large degree they fit the literary form that Bar-Ilan had envisioned, although they contain more commentary and digression than he would probably have liked. The traditional rabbinic idiom

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was apparently too difficult to break away from entirely. The Harry Fischel Institute continued to produce volumes of Jewish law in the form of modern codes in the 1960s and recently revived the project after a lull of several years, with new volumes about the laws of witnesses and judges. The project failed, however, in its broader goals. By the early 1950s it was already clear that the state would never adopt halakha as its national code. The codes produced by the Institute after that point were never expected to be practical codes for the state’s courts; they were considered to be helpful for rabbinical courts dealing with civil matters, or understood as exercises of abstract Torah study and perhaps a blueprint for a law in some kind of messianic future. Their continued production, however, indicates that even though the plan failed in practice, central institutions of religious Zionism continued to hold onto the claim that at least in principle the state could and should be run according to halakha. Meanwhile, even the followers of Bar-Ilan's vision abandoned the dream of running the state with an all-encompassing halakhic code.

The Setback

The constitutional plans of religious Zionists, centralists and pluralists alike, all came to naught. Their chances of success had always been very slim. They had no doubt drawn encouragement from the general interest in Jewish law among many secular Zionist jurists, especially around 1948 when interest in Mishpat Ivri, which had slumped for several years, was piqued by the immanent declaration of independence. In 1946, for example, even Hayyim Cohn, who would

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34 Hilkhot edut: halakha pesukah im birur halakha. (Jerusalem: Mechon Harry Fischel, 2007).
later become sharply opposed to the incorporation of Jewish law into the state’s legislation, spoke in favor of constructing a civil law “that would continue our ancient traditions” and which would reflect “the character and the destiny” of the Jewish people.\(^{35}\) This interest, however, was never likely to translate into the formal adoption of halakha as the law of the state. Even had the interest in *Mishpat Ivri* continued, the state would still have been a secular state whose laws, even as they were based on traditional sources, would have been given authority by the Knesset, not by God.

Ultimately, the question of the nature of the state’s constitution and its legislation became a moot point. Although at the moment of the establishment of the state, all protagonists expected a constitution and the adoption of a new legal code, neither of these things came to pass.\(^{36}\) Since the 1950s, it was commonly held that the failure to adopt a constitution was the fault of the religious parties, who considered the adoption of a written constitution to be a negation of the Torah.\(^{37}\) This was only part of the story. True, Agudat Israel did object to a constitution on these grounds, but the other religious parties, (Mizrahi and ha-Po’el ha-Mizrahi,) did not, at least not at first.\(^{38}\) The real failure to adopt a constitution was a result of the extreme conditions of the early years of the state. The war of 1948 absorbed most of the government’s energies. Crucially, Ben-

\(^{35}\) Quoted in: Likhovski, “Between Mandate and State: On the Periodization of Israeli Legal History,” 62. For more on the temporary interest in *Mishpat Ivri*, see ibid., 60-64 and especially fn. 101. For more on Kohn and the changes in his thinking about Jewish law, see: Amihai Radzyner and Shuki Friedman, “Ha-mehoqeq ha-yisraeli veha-mishpat ha-ivri: Hayim Kohn ben mahar le-etmol,” *Iyun* *Ivrit* 29, no. 6 (2005).

\(^{36}\) Technically, some have argued that Israel does indeed have a constitution, albeit unwritten or incomplete. See, for example: Aharon Barak, “The Values of the State of Israel as a Jewish and Democratic State,” in *Israel as a Jewish and Democratic State*, ed. Asher Maoz, *Jewish Law Association Studies XXI* (Atlanta: Scholars Press, 1991).

\(^{37}\) An early study of the constitution-making process observed: “notwithstanding popular opinion to the contrary there was opposition to a written constitution from political parties other than the religious ones.” Rackman, *Israel’s Emerging Constitution, 1948-51*, x.

Gurion himself impeded the adoption of a constitution for fear that it would place limits on his (in his view necessarily) strong executive powers. In the face of all this, even Herzog himself began to doubt his chance of success as early as July 1948 and other religious Zionists were even more skeptical.

In the end, there was hardly any change in the legal system with the establishment of the state. The first law passed by the Provisional State Council (the forerunner of the Knesset) was the Law and Administration Ordinance which established that the law in force on the last day of the British Mandate would continue to be in force in the new state, subject to legislation by the new government. The commitment in the Declaration of Independence to enact a constitution by October 1948 went unheeded. (To this day, Israel still does not have a full written constitution.)

The law of Israel and its constitutional structure remained an amalgam of Ottoman law and the modifications of the three decades of British rule. As under the British, personal status laws in

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Ben Gurion stood like a wall against those who wanted a constitution. In discussions with supporters and opponents, in the Knesset and outside it, he found countless reasons to belittle the importance that the supporters of the constitution adduced to the document. Moreover, by pushing off the need for a constitution here and now, he sought to set himself up as the supreme defender of the democracy.

40 In a letter of 6 Tammuz 5708 = 13 July 1948 to Simha Assaf, a professor of Jewish law, Herzog voiced his doubts as to whether his proposed constitutional clause that the laws of the state should be based on the laws of the Torah would ever be accepted. The letter is at: Herzog, *Tehuqah le-Yisra'el al-pi ha-torah*, 1, 229. For skepticism among other religious Zionists, see: Warhaftig, *Huqah le-Yisra'el: dat u-medinah*, 351. Moshe Una voiced similar skepticism in a piece from 1969: “It is unclear to me on what they based the hope that it would be possible to come to an agreement with the people who were then dealing with [legislation and the constitution].” Republished at: Moshe Una, “Mashmautah shel ha-hashpa’ah ha-hilkhatit ‘al ha-haqqah,” in *Ha-mishpat ha-ivri u-medinat Yisra’el*, ed. Ya’akov Bazak (Jerusalem: Mosad ha-rav Kook, 1969), 104.

41 Law and Administration Ordinance No.1, 1948, Section 11.
Israel (marriage, divorce, etc.) remained under the jurisdiction of the religious courts, but the religious courts enjoyed no jurisdiction over civil or criminal law.\textsuperscript{42}

Herzog, for one, was distraught by this development. His commitment to a halakhic state had been absolute. In his own words: “We will not give up on the law of the Torah. I am ready to sacrifice my life for it. Only on the Torah of Israel may the state of Israel be built.”\textsuperscript{43} His palpable disappointment was articulated in speech to the 18\textsuperscript{th} Council of World Mizrahi on 16 August 1949. The hope of the religious Zionists, he said, had been for the political elite to come to the rabbis to ask for advice on the law of the state so that the democracy of the Jewish state would not just be a “pastiche, an aping of, and subordination to, the spirit of the democracy of other nations,” but rather a democracy which drew from the Torah, “the spring of our life, the source of Israel.”\textsuperscript{44} This was not to be. Instead, “a mix of Turkish Ottoman and British law took the place of the law of the Torah of Israel in the State of Israel.”\textsuperscript{45} This was a particular insult given what he felt to be the superiority of Jewish law and civilization over both the Ottomans and the British. According to Herzog:

These peoples did not reach the level of civilized peoples until thousands of years after we stood at Mount Sinai. The wisdom of their laws … is like a monkey before a human being when compared to the wisdom of our [Jewish] laws…and I am talking to

\textsuperscript{42} Religious courts would probably have maintained their jurisdiction over personal law even had a constitution been adopted. There was a clause along these lines in the Leo Kohn’s draft constitution, which was most likely to be the basis for the constitution of the state. See: Radzyner, “A Constitution for Israel: The Design of the Leo Kohn Proposal, 1948.”

\textsuperscript{43} The comment was made in a speech in the Great Synagogue in Jerusalem at the end of July 1948. The power of this rhetoric is startling given that two weeks earlier Herzog had himself raised doubts about whether his plan would be accepted. The speech was originally published in \textit{ha-Tsofe}, 25 Tammuz 5708 and is quoted in: Warhaftig, “Mavo,” 28 fn. 11.

\textsuperscript{44} Herzog, “Be-Kesher Le-Ma'amav,” 222.

\textsuperscript{45} Ibid.
you as someone who is well versed in the laws of Rome and England.46

The fact that personal law remained under the jurisdiction of the rabbinical courts was little consolation. As we saw chapter 4, the institutions of the state, in particular the Supreme Court of Israel, had themselves adopted a centralist approach. That meant that from the point of view of the state and in particular its non-Orthodox leaders, the rabbinical courts now derived all of their legal authority from the sovereignty of the secular state. This was not purely a theoretical matter; the state did interfere in the workings of the religious courts. The most significant early intervention of the state in the practice of the rabbinical courts came in 1951 with the Women’s Equal Rights Law. The law enacted that “a man and a woman shall have equal status with regard to any legal proceedings.”47 It was explicitly imposed upon all courts in the state, including the rabbinical courts.48 The impact on the rabbinical courts was mitigated to a degree because marriage and divorce law were exempted from the law. Given that differences between men and women attend many fundamental details of Jewish marriage law, the exemption was necessary if the application of Jewish law in the rabbinical courts was to continue to have any meaning at all. Under the exception, rabbinical courts could continue to administer marriage and divorce exactly as they had done before. In other areas, however, the rabbinical courts were bound to observe total equality of the sexes. The law effected in particular the administration of marital assets, for which halakha distinguishes between husband and wife.49 Even when the law was still in its draft

46 Ibid., 222, 26.

47 Women’s Equal Rights Law 1951, para. 1.

48 Ibid., para. 7.

49 For more on the administration and precise jurisdiction of the rabbinical courts, see: Chigier, “The Rabbinical Courts in the State of Israel.”; Moshe Chigier, Husband and Wife in Israeli Law (Jerusalem: The Harry Fischel Institute for Research in Talmud and Jurisprudence, 1985). For a helpful collection of Knesset regulations pertaining
stages, Herzog signaled the threat that it posed to the operation of the rabbinical courts and the future of religious law in the state.

The draft law of full equality between man and woman in all areas of the law is threatening us. [It is] a law that will not only uproot with the arm of the sovereign the laws of Torah in the field of civil law but will also badly harm family law in Israel – marriage itself – something that is likely to split, God forbid, the people of Israel in its land, to divide them in matters of marriage. Religious Zionists, then, felt besieged. Under the leadership of Herzog and Bar-Ilan, they had fought for a centralized legal regime. This had come about, but not in the way they had wanted.

In the eyes of the state, the all-encompassing law was not halakha. Even the rabbinical courts themselves were under the authority of a secular sovereign.

Principled Centralism, Pragmatic Pluralism

Under these circumstances there were strategic advantages for religious Zionists to abandon their commitment to legal centralism in favor of pluralism. By adopting the rhetoric of a pluralist approach to law, which allows for different legal systems with different sources of authority to co-exist within the same political territory, they were able to argue that rabbinical courts should be granted greater autonomy from the secular state and thereby attempted to salvage some residue of legal autonomy. The adoption of this rhetoric, though, was only a strategic move, which belied their true commitments. In order to fight for their independence from secular authority, they argued to the government that there was room within the same polity for different


50 Herzog, “Be-Kesher Le-Ma'amorav,” 223.
legal structures to co-exist. Among themselves, however, religious Zionists continued to adhere
to the doctrine of legal centralism that had guided them up to that point. This continuing
commitment to legal centralism, despite the intellectual acrobatics that it necessitated, underlines
the depth to which this legal doctrine had been internalized by religious Zionist society.
Whatever arguments they made externally, they remained committed in principle to the ideal that
the entire state and its law should be governed by halakha.

An important text that displays this jurisprudential double-think, the distinction between what I
would like to call pragmatic pluralism and principled centralism, is a speech that Herzog
delivered to the Mizrahi council on 6 August 1949. To understand the significance of the speech,
it is worth remembering the fervor with which Herzog had fought to have halakha established as
the law of the state. This goal characterized, for example, the open letter that Herzog and the
Sephardic Chief Rabbi Uziel had written to the Jewish Agency on 11 March 1948:

We were troubled to hear of your preparations to establish a secular court for all civil matters. This, the establishment of a permanent secular court on foundations foreign to the laws of Israel means the uprooting of one of the basic and sacred principles of generations of Judaism. We Jewish leaders must protest against it with all our might and oppose it with every means at our disposal. We request with every kind of plea and warning that you remove this plan from your agenda and allow the law of the Torah to have its way.51

In his 1949 speech to the Mizrahi council, Herzog’s tone was different. He was by that stage
resigned to the failure of the plan to have halakha considered for the law of the state. He did not,

however, abandon his militancy altogether. In the speech, Herzog outlined several points of a “programmatic proposal”:52

1) …To solemnly declare that we are not in principle ([though] in practice we have no power over this) in any way at peace with the current situation, which is the abolition of the vast majority of the law of the Torah, and that our most fervent desire is to return the law of the Torah to its place according to everything that the sages of the Torah will teach under the leadership of the Chief Rabbinate of the Land of Israel...

2) Regarding financial matters, outside the framework of personal status, there should be a law that every Jew who is taken to a state court has the choice to declare: “I am going to the Torah court.” In such a case the Torah courts should have the full authority of law and their rulings appealed only before the Great Rabbinical Court of the Chief Rabbinate of the Land of Israel in Jerusalem...

4) Whatever happens, we must insist with all force and power on the request for exclusive authority in the field of personal status. And ultimately I caution and warn from the bottom of my heart and soul that we must be ready to fight with absolutely all our power, even to the departure of our ministers from the coalition or our representatives from the Knesset, against any law that is likely to impinge on the prohibitions of the personal laws of our holy Torah.55

In this speech, Herzog began by noting the dissatisfaction of the religious Zionists with the failure of the state to implement traditional Jewish law in its entirety. Conceding that this had become a lost cause, he outlined a less desirable alternative constitutional structure wherein Torah courts would constitute a parallel and entirely independent legal system to which any citizen of the state could have recourse. In this vision, cases heard in rabbinical courts would only be brought on appeal to the Great Rabbinical Court; the Supreme Court of Israel would have no jurisdiction whatsoever in the rabbinical system. This would mean that the rabbinical courts would not be subsumed under the hierarchy of a centralized legal system of the entire

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52 The speech was delivered on 21 Av 5709 at the Mizrahi Council. It is published in: Herzog, *Tehuqah le-Yisra’el al-pi ha-torah*, 1, 221-28.

53 Ibid., 226-27.
state. Herzog continued to say that if even this plan could not be realized then at the very least the rabbinical courts must have independent and exclusive authority over the personal status laws that were traditionally within its jurisdiction. This was something over which no compromise could be tolerated.

Herzog’s ultimate concession was a picture of classic legal pluralism, exactly the kind of legal system that Gorontchik had suggested and Herzog had vigorously opposed only two years earlier. Intervening developments had forced him to compromise. Now that a centralized system of law would mean the subordination of the rabbinical courts to a secular state, Herzog was reluctantly forced to argue for legal pluralism.

However, crucially, this pluralist rhetoric was only a pragmatic position that Herzog presented to the world outside religious Zionist circles. When talking to those inside his own camp, he made it clear that he still held fast to centralist principles. He explicitly distinguished between the pragmatic rhetoric reserved for outsiders and the principled centralism expressed within religious Zionist circles. The Mizrahi council speech continued:

These are our requests facing outward, i.e. to the governmental authority in the State of Israel. And now something about our internal requests: We have to appoint a public committee made up of our own people with the approval of the Minister for Religions, whose purpose will be to introduce efficient procedures into our courts … Now that our rabbinical courts are part of the legal structure of the state, we have to enact legislation with the help of God, meaning the introduction of improvements and reform of the rabbinical courts upon whose perfection, honor and glory the honor of our holy Torah and its influence to no small degree depend.\textsuperscript{54}

\textsuperscript{54} Ibid., 227.
So whereas to the outside, Herzog represented a pluralistic legal theory, his internal message to the religious Zionist camp was quite different. There, his emphasis was not on the independence of different courts, but on the necessity of the imposition of uniform rules of procedure and the bolstering of the status of the rabbinical court of appeals. This contrast emphasizes the difference between Herzog’s external pluralism and internal centralism. To the state he argued that the rabbinical courts should to function autonomously of the central legal hierarchy but to the religious population he demanded that the regional rabbinical courts all be brought under the centralized legal authority of the Chief Rabbinate.

The aspiration for centralization reached its apogee at the end of Herzog’s speech. After talking about the need for a modern halakhic code, (as discussed at the beginning of this chapter,) Herzog continued:

> There is a special importance in realizing the idea of a world union of rabbis of Israel, whose pièce de resistance will be like the Council of the Four Lands and, based on its precedent and structure, will be composed of Torah authorities from the Diaspora and Israel. It will be convened regularly by the Chief Rabbinate of the land of Israel in Jerusalem our holy city for the purpose of clarifying contemporary and future halakhic problems. It will be accepted as a supreme halakhic authority.\(^55\)

Herzog dreamed of an authoritative legal body, convened under the auspices of his own office, whose findings would be binding on Jews all over the world. He cited as precedent the Council of the Four Lands, which in the Early Modern period had authority over the Jewish communities in Eastern Europe. This dream represents legal centralism par excellence.

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\(^{55}\) Ibid., 228.
An important figure in the execution of this strategy of adopting an externally-oriented pragmatic pluralism and an internally-oriented principled centralism was Zerah Warhaftig. Warhaftig was one of the people most connected with both the Zionist rabbinical establishment and the government itself. A lawyer by training, he was a member of Knesset on the religious Zionist slate, (first for ha-Po’el ha-Mizrahi and then for the National Religious Party,) and a signatory to Israel’s Declaration of Independence. He was a valuable asset for the religious Zionist camp because as a trained lawyer he was involved in the drafting of legislation and the inner workings of government. He used his training and position to be a resource for the halakhic centralist camp by making whatever headway he could in the legislature and at the same time briefing the religious Zionist leaders and advising them on the best strategy to adopt in order to achieve their goals.

Even earlier than Herzog, Warhaftig recognized that the implementation of halakha in the state courts was a utopian dream. As a concession, Warhaftig pursued another strategy, which was to try to urge the Knesset to adopt a law that said that in the event of a lacuna in Israeli law, the judge was required to seek for a response in traditional Jewish law. After the failure of this attempt, Warhaftig followed Herzog’s retreat into pragmatic pluralism.

Warhaftig frequently indicated in his Knesset debates that he believed that the legal regime of the state did not constitute a single hierarchy, but a plurality of legal authorities. When he spoke in the Knesset about laws dealing with the rabbinical courts, he often supported his arguments

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56 Warhaftig, *Huqah le-Yisra’el: dat u-medinah*, 45-6. This law was modeled on Article 46 of the King’s Order in Council (a kind of constitution for the British Mandate of Palestine) which said that lacunae must be filled by recourse to the English Common Law.
with quotations from halakha. For most Knesset members, halakhic argumentation was quite irrelevant, as Warhaftig well understood. His quotations from the halakhic literature, then, make no sense when understood as an attempt to convince others of his argument. They do make sense, though, when understood as jurisprudential theater, a public insistence that the rules governing the rabbinical courts are not in principle derived from the body of the Knesset but from halakha itself.

An excellent example of this was the debate in the Knesset over the Capacity and Guardianship Bill in 1961. A proposal had been made to add to the bill the law that all people must “honor thy father and thy mother.” One might assume that the religious parties would be in favor of such an incorporation of religious law into an official statute. But Warhaftig, then Minister for Religious Affairs, opposed the move:

There are things for which no law is needed.... Why repeat the Ten Commandments and thus, if I may say so, reduce the level of this eternal precept to a matter of transient law.\(^57\)

Warhaftig balked at the inclusion of a religious precept into civil statute because he argued that religious law has its own independent standing, (and a superior source of authority,) and thus has no need for the added endorsement of a foreign system of law.\(^58\)

Perhaps the best articulation of pragmatic pluralism was a speech that Warhaftig gave in the Knesset in 1954:

We have in Israel two court systems. Most matters are under the legal authority of the general courts which judge not necessarily by


\(^58\) This episode fits well with the thesis of Asher Cohen, who argues that while the initial goal of the religious Zionist movement as a whole was to establish the halakha as the law of the state, they abandoned their desire for ‘halakhic legislation’ by the mid-1950s. See: Cohen, Ha-talit veha-degel.
original Hebrew law but according to the laws of the Knesset…
And there is a second system, of rabbinical courts...
The rabbinical courts rule according to the laws of the Torah. They are religious courts and the law that governs them is the halakha… The secular law does not get involved and it cannot get involved in the internal affairs of these rabbinical courts, nor in the cases in progress in them. Secular law only defines their authority, marks the borders of their authority, and says “within the framework of this jurisdiction will you judge.” But it does not involve itself in their judicial activity because they are founded on the law of the Torah and not on human law.  

These quotations exemplify the new approach of religious Zionists vis-à-vis the state. They challenge the centralist claims of the secular state by recourse to a pluralist argument. They acknowledge that the secular law of the state does exist but they resist the implication that as a result the rabbinical authority has to be subsumed within it. They claim that the relationship between religious and state law is not the relationship between a higher and lower tier of a single hierarchy but rather the relationship between two independent legal systems, each with its own source of authority and substantive rules.

Despite these public professions of legal pluralism, however, Warhaftig, like Herzog, remained deeply committed to legal centralism in principle. In 1953 Warhaftig delivered a speech to Israel’s rabbinical judges. He summarized for them the various legal matters on which he was working and noted the practical benefits of having the executive branch of the state supporting the judgments of the rabbinical courts, and thereby enforcing their rulings in matters of personal status law.  

Fundamentally, however, the speech was a call to arms, a cry to shore up the forces

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59 Quoted at: Warhaftig, Huqah le-Yisra’el: dat u-medinah, 429.

60 Despite the reluctance to recognize the state’s authority over them, the rabbinical courts did make use of the state’s coercive powers, not to mention its funding. Some rabbis wrote about how their authorization by the state actually gave them greater authority in the eyes of halakha itself. See: Maoz, “Ha-rabanut u-vet ha-din: ben patish ha-hoq le-sadan ha-halakha.”
of religious law and the rabbinical courts and to prepare for an extended war with the government. “We are,” he said, “in a hard struggle with the Knesset and with the government over authority.” The appropriate strategy in this struggle was that “the rabbinical courts need to be as imperialistic [אמפריאלייסטים] as possible and not to give up on their authority.”

Warhaftig then emphasized this bellicose exhortation with a quotation from one of the rulings of the rabbinical court itself: “The Great Rabbinical Court ruled in one of its rulings, ‘In principle everything belongs to us, just that the law removes certain things from us.’”

Warhaftig’s rhetoric points clearly to a stance of legal centralism. The exhortation to the rabbinical courts to be “imperialistic” and the notion that “everything belongs to us” are both expressions of a philosophy according to which rival legal regimes are battling for the control of the same territory: the legal authority of the state. The battle for legal control, Warhaftig warned the rabbinical judges, was a zero-sum game in which either the government or the rabbinical courts, but not both, could win. Indeed, Warhaftig held on to his dream of the application of halakha to the state until late in his life. As late as 1988, he wrote:

[Torah] law is the language of the state and the spirit of the people. When we returned to the Land of Israel, we accepted the Hebrew language. We redeemed it from pages of books and brought it out to the city street. We did not go to seek other languages, despite the many difficulties in reviving an ancient language.63 Similarly, the

61 Zerah Warhaftig, Al ha-shiput ha-rabani be-Yisra’el: neumim (Tel Aviv: Moreshet, 1955), 17.
62 Ibid.
63 Needless to say, this romantic view of the revival of Hebrew and the abandonment of other languages was not entirely true to reality. In the same way as, I am arguing, halakha in the Zionist context absorbed many characteristics of “foreign” laws and competed with them in a busy philosophical marketplace, so was the Hebrew language not used as universally in the Yishuv as Warhaftig would have liked to remember. See: Liora Halperin, “Other Tongues: The Place of Lo’azit in Hebrew Culture,” in Reflections on Knowledge and Language in Middle Eastern Societies, ed. Bruno De Nicola, Yonatan Mendel, and Husain Qutbuddin (Cambridge, UK: Cambridge Scholars Press, 2010); Liora Russman Halperin, “Babel in Zion: The Politics of Language Diversity in Jewish Palestine, 1920-1948” (Ph.D. Dissertation, UCLA, History Department, 2011).
State of Israel needed to announce in its first constitution its acceptance of Hebrew Law.\footnote{Warhaftig, \textit{Hucah le-Yisra'el: dat u-medinah}, 45.}

I have argued that despite the disappointments of 1948, when halakha did not become the law of the state as Herzog, Bar-Ilan and others had hoped it would, legal centralism remained important to the religious Zionist movement. Notwithstanding their strategic adoption of an external discourse of pragmatic pluralism, they remained committed in principle to a jurisprudence which championed the idea of a single centralized legal hierarchy. This expression of principled centralism was not restricted to the world of theory; it was accompanied by a rigorous program of practical legal reform internal to the system of rabbinical courts. This reform and its consequences are the subject of chapter 6.
6. Centralization of the Rabbinical Courts

The Great Rabbinical Court finds that it indeed does have the authority to judge this appeal, since the matter of appeals was accepted by rabbinical enactment, which is a law [as binding] as a law of our holy Torah.

- Ruling of the Rabbinical Court of Appeals

Chapter 5 dealt with the strategic response of the religious Zionist leadership to the failure of their grand ambition, to make halakha into the law of the State of Israel. It showed that there was a distinction between the outward rhetoric of the religious Zionists and their internal policy. Towards the state, they strategically projected a rhetoric of pragmatic pluralism in order to accrue for themselves as much independence as they could. Among themselves, they remained committed to a principled centralism. That position was most apparent in the ways in which the inner workings of the rabbinical courts were transformed in the early years of the state. An extensive reform of the institution of the Chief Rabbinate was carried out according to a policy of centralization and bureaucratization. An analysis of that reform indicates that legal centralism continued to dominate the legal philosophy of religious Zionism, even after the failure of their more expansive constitutional goals.

Rules of Procedure for the Rabbinical Courts

A hallmark of a centralized hierarchical legal system is that the different courts within it are subject to the procedural rules imposed upon them by the central authority. Before 1942 there
was no uniform procedure for the rabbinical courts in Palestine. At the time, there were four regional rabbinical courts, (Haifa, Tel Aviv-Yafo, Petah Tikvah and Jerusalem,) which each followed its own procedures. These procedures were generally ad hoc and often even internally inconsistent. There were frequent complaints from lawyers about the unpredictability of the rabbinical court system.\footnote{Radzyner, “‘Takkanot Ha-Diyun’, 1943,” 117.} The matter was brought into stark relief in a landmark case of 1939, in which the High Court of the British Mandate reversed a ruling of the Great Rabbinical Court for the first time. The grounds for the reversal were the failure of the rabbinical court to adhere to appropriate procedural rules. The British authorities recognized the independent authority of Palestine’s religious courts and generally avoided direct intervention in the substance of their rulings. However, they were quite strict about legal procedure and insisted that all courts within the Mandate follow the expected standards of an organized and centralized legal system.

The appeal was fiercely contested by both chief rabbis, who objected to what they considered to be an unjustified interference in their jurisdiction. Rabbinical courts, they claimed, had jurisdiction over personal law and that meant they should have autonomy not just of law but also of legal procedure:

> If the rabbinical courts are given the authority to judge [cases of] personal status for members of their community, they have to be given the full possibility to judge not only according to the material law of the Jewish community but also according to laws and principles of judgment that are customary in the Jewish religious courts and which constitute an inseparable part of the general Jewish law.\footnote{Quoted at: ibid.}

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1 Radzyner, “‘Takkanot Ha-Diyun’, 1943,” 117.

2 Quoted at: ibid.
This moment marked a turning point in the administration of the rabbinical courts. To avoid future appeals to the Mandate courts, the Va’ad Le’umi proposed new procedural regulations for the rabbinical courts. Within a year, lawyers for the Va’ad Le’umi had composed the regulations. They were presented to the chief rabbis, who made few changes, and they were published in November 1942. They included rules about the time and place of cases, the composition of the courts, the division of court costs and, especially, rules requiring the recording of judicial reasoning and the process of appeals.

One scholar has suggested that this episode represents the capitulation of the Chief Rabbinate in the face of external pressure from the Mandate authorities and the Va’ad Le’umi. However, another interpretation is possible. The Chief Rabbinate did not accept the regulations begrudgingly. They were eagerly embraced and enforced by the Chief Rabbinate which relished the centralization of legal authority within a legal hierarchy with the Chief Rabbinate at its apex. The extent of the positive attitude of the Chief Rabbinate to the 1942 reforms is highlighted when contrasted with its very different response to similar reforms only twenty years earlier. In 1921, like in 1942, the British Mandate demanded that the rabbinical courts establish procedural regulations and an appeals system. On both occasions, the Va’ad Le’umi composed the requested regulations and formally enacted them. The practical impact of the regulations of 1942, however, was entirely different from that of the regulations of 1921. In 1921, the regulations were all but entirely ignored. Indeed, the very fact that regulations had to be re-issued in 1942 demonstrates how little impact the 1921 regulations actually made on the Chief Rabbinate. In 1942, however, the regulations were positively embraced by the Chief Rabbinate and became deeply engrained.

\[3\] This Radzyner’s opinion in: ibid.
in the legal culture of the rabbinical judiciary. The difference between the reception of these two sets of very similar regulations only twenty years apart can best be explained by the new commitment of the Chief Rabbinate to legal centralism. To understand this, a brief overview of the background to the 1921 regulations and their reception is necessary.

When the British took over Palestine they preserved most of the structure of the religious court system but also introduced some key changes. In particular, the very institution of the Chief Rabbinate of Palestine was only established upon the insistence of the British authorities. As indicated above, for all the autonomy the Mandate authorities granted to the religious courts, they insisted on certain procedural rules and intuitional structures. They demanded, most of all, consistent procedures and the possibility of appeal.

The Ottomans, who preceded the British as governors of Palestine, recognized the position of Hakham Bashi, or Head Rabbi. This position, however, lacked the formal authority or institutional structure that the British required. On the urging of the British, the Chief Rabbinate of Palestine was founded in 1921. Rabbi Abraham Isaac Kook, Herzog’s predecessor, became the first Ashkenazic chief rabbi and Yitshak Nisim, Uziel’s predecessor, its first Sephardic chief rabbi. The establishment of the Chief Rabbinate brought with it two substantive developments. First, the rabbinical court of Jerusalem took on a new importance. Previously it had been just another rabbinical court serving its own locality. From 1921, while continuing to serve as a regional rabbinical court, it was given an additional function and a new name. It became the bet

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din ha-gadol, the Great Rabbinical Court, and was given the power to act as a court of appeal for

cases heard in any of the other rabbinical courts. In other words, the previously independent

regional rabbinical courts became the first tier courts in a new juridical framework for which the

Jerusalem court served as an appeals court. Second, a new series of procedural rules were

published that were intended to govern all the rabbinic courts in the country. The new rules

covered everything from the place of trial, the composition of the courts and the procedure for

appeal.⁵

The procedural rules of 1921 were not drafted by rabbis at all, but, on the insistence of the

Mandate authorities, by three lawyers, (one of whom, Mordekhai Levanon, was also a co-author

of the 1942 regulations,) against the objection of many rabbis including Kook himself.⁶ Once

introduced, the rules were resisted by the rabbinical authorities. Though he realized the benefits

of his appointment as chief rabbi, Kook protested in particular against the institution of a

rabbinical court of appeal.⁷ He did not only resist these innovations because they represented an

imposition from external sources. He also opposed them because they were a departure from

precedent in Jewish law, which provides no right to appeal.⁸ The transformation of the Jerusalem

⁵ They were published, some years after their initial promulgation, at: “Sidrei ha-mishpatim be-vatei ha-din be-erets

Yisra’el: Ha-rabanut ha-rashit be-erets Yisra’el,” ha-Mishpat 2(1928): 241-250; 290-298.


22-31.

⁷ Morgenstern, Ha-rabanut ha-rashit, 76; Friedman, Hevrah va-dat.

⁸ The principle is established in the Talmud that a rabbi may not overturn the ruling of a colleague: “What a sage has
declared impure his colleague may not declare pure. What he has forbidden his colleague may not permit.” (Bavli
Hulin 44b, Bavli Nidah 20b.) Also: “A court does not scrutinize the decision of another court.” (Bavli Baba Batra
138b.) Many pre-modern commentators allow for a rabbi to overrule a colleague’s earlier ruling in the case of a

clear mistake in the law or, according to some, in the case of a mistake in judgment. Some allow for a rabbi to

overrule any ruling of a less eminent colleague. (See, for example, Rama on Yoreh De’ah 242:31 and Shach on

Yoreh De’ah 242:53.) Historically, there were examples of rabbinical courts that functioned as appeal courts. The

Council of the Four Lands, mentioned by Herzog as a possible precedent of the chief rabbinate, sometimes

performed this function, but it was not its main role. Simha Assaf, a law professor in Mandate Palestine, tried to
rabbinical court into a court of appeal was an innovation in Jewish law. Some of the new procedural rules were also departures from halakha. The new rules stated, for example, that the rabbinical judge must formally record the reasoning for his ruling. This rule was required for the proper administration of a court of appeals which needs a record of the decision of the court of first instance in order to consider the appeal properly. The requirement for the judge to record his reasoning, however, is not required by the classic Jewish codes, which explicitly state that the rabbinical judge need make no such record.  

It was not just Kook who objected to these innovations. Although the court in Jerusalem did hear many appeals, the regional rabbinical courts frequently objected to its jurisdiction. As a result, the procedural rules were roundly ignored. Records of rabbinical court rulings from before the 1940s almost never include the judge’s reasoning. They are instead terse statements, usually only a few lines long, that list the actions demanded by the court. In fact, the procedural rules made so little impact on the landscape of the rabbinical infrastructure of Palestine that when the new regulations were published in 1942, most people thought that they were the first that had ever been written. One scholar, who wrote an entire book about rabbinical procedure, asserted that “for the first time in the history of the literature of the halakha a collection of the laws of legal procedure was edited in its own framework, not as part of substantive law, in the year 5703 [i.e.

demonstrate the ample precedent for rabbinical courts of appeal. Herzog appreciated Assaf’s work and quoted it in his book on the constitution. Simha Assaf, Bate ha-din ve-sidrehem ahare hatimat ha-Talmud (Jerusalem 1924-5). The idea of a rabbinical appeals court, however, remained largely foreign to the Jewish tradition and, as we will see, many rabbis in Palestine-Israel were unconvinced that the chief rabbinate had the authority to overturn their decisions. For more on the role of appeals and precedent in Jewish law, see: J. David Bleich, “The Appeal Process in the Jewish Legal System,” in Contemporary Halakhic Problems (1995).

9 Shulhan Arukh Hoshen Mishpat 14:4.

10 See the contemporary report in: Paltiel Dickstein, “Sidrei ha-din be-vatei dinenu ha-leumi'im,” Ha-mishpat ha-ivri 3 (1928). See also: Radzyner, “‘Takkanot Ha-Diyun’, 1943,” 153 fn. 70.
This was the view shared by most people at the time, who were unaware that similar rules had been composed only twenty years earlier. They made so little impact on the religious Zionist community, or the rabbinical community as a whole, that almost nobody knew they even existed.

In 1942, however, the reactions were entirely different. The Chief Rabbinate itself embraced the 1942 regulations and defended them against any criticism. What explains this difference in response? It cannot be attributed to the response of the regional rabbis, whose resistance was equally determined, and perhaps more so, than it was in 1921. The Tel Aviv-Yafo rabbinate objected particularly strenuously to the centralizing thrust of the 1942 regulations. In a private meeting with the Chief Rabbinate, they claimed that the Great Rabbinical Court was authorized to write regulations only for itself, not for the regional courts. If regulations were required, they insisted to be allowed to write their own. Besides, they claimed, the regulations contained rules that were contrary to halakha. In particular, they argued, the endorsement of the rabbinical court appeal system invalidated the entire enterprise. This opposition in Tel Aviv-Yafo to the regulations was unanimous among the members of its rabbinical court: one rabbinical judge said the imposition of a rabbinical court of appeal would result in total opposition to the regulations; another said he would organize all the rabbis in the country against them; a third labeled the regulations “Reform.” Yet despite all of this opposition, the regulations were approved by the chief rabbis.

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11 Shochetman, Seder ha-din, 11.

If the embrace of the regulations cannot be explained by the acceptance of the regional rabbinate, it can still less be explained by external pressure from the British or the Va’ad Le’umi. For one thing, the same kind of pressure in 1921 resulted not in capitulation but in resistance. Furthermore, it cannot be said that the chief rabbis in 1942, Herzog and Uziel, tended any more readily toward capitulation with the British than their predecessors in 1921. We have many examples of their resistance to governmental pressure, including those examples outlined in chapter 5 where the chief rabbis or other religious Zionists like Zerah Warhaftig resisted governmental encroachment into rabbinical matters. There was no such resistance, however, to the procedural regulations of 1942. To be sure, there was no overnight change to rabbinical procedure. Shortly after the regulations were published, a commission of the Va’ad Le’umi found that the Tel Aviv rabbinate was still ignoring the regulations, and even, in contravention of approved procedure, levying a tax on parties seeking appeal in order to dissuade them from challenging their rulings in the Great Rabbinical Court. Indeed, even the Great Rabbinical Court itself did not always insist on the strictest adherence to the regulations, at least in their early years. Before long, however, the Chief Rabbinate began effectively to enforce the new rules. The evidence indicates that the Chief Rabbinate was not simply capitulating to external pressure. Rather, it was fully in support of a regulatory apparatus that transformed a disparate body of loosely connected rabbinical courts with regionally dispersed power and ad hoc procedure into a single hierarchical structure with centralized authority and uniform legal procedure.

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Even before the regulations had been written, the chief rabbis had insisted on the authority of the Great Rabbinical Court to request case materials from lower courts in order to properly conduct appeals. In 1937, the Chief Rabbinate wrote to the notoriously independent Tel Aviv rabbinate:

We have not been honored with a response to our correspondence of 28 Iyar 5697 [=9 May 1937] and we have still not received the legal material in your possession regarding Shlomo and Sophia Skorokhod. As this is impeding the appeal hearing, we would be grateful if you would request your agents quickly to send to us the full material of this case.\(^{14}\)

This letter was sent on 28 Sivan [=7 June], a full month after the earlier request for the material. Behind the stylized honorifics, we sense the impatience of the Chief Rabbinate at the fact that the Tel Aviv court had not only failed to fulfill proper procedure, but had ignored the request of the Chief Rabbinate altogether.

Herzog was particularly strict in his insistence on the keeping of proper legal records, in particular a written record of the legal reasoning of the judges, which were not required by the halakha, but were required by the 1942 regulations. In a responsum from 1948, Herzog acknowledged the novelty of the regulations, but nonetheless insisted on their enforcement:

The fact is that according to the strict halakha there is no right to request written arguments from us. This is explicit in \textit{Hoshen Mishpat} 14:4 in the Rama … It seems that the rabbinical courts that do not write reasoning and proof rely on this [ruling]…. However, they are not acting properly. They are contravening our enactment which was made with their agreement, even as we recognize that this is a great innovation.\(^{15}\)

As he chastised the regional rabbinical courts for ignoring the new regulations, Herzog, notably, made no mention of the fact that the regulations had originated with the insistence of the British

\(^{14}\) Israel State Archive LAW/23517/83

authorities. He took full ownership of them and threw the weight of his authority behind them. Despite the fact that the regulations were written by lawyers and not by rabbis, Herzog attributed halakhic authority to the regulations on the basis that this was “our enactment made with their agreement.” In other words, they had the status of a rabbinical enactment with the binding force of the halakha, not merely of the Mandate authorities. He even implied that the enactment had received the approval of the regional courts, which was not in fact the case.

Similar efforts were made by the chief rabbis to enforce the appellate system. In 1950, a case was heard in the Tel Aviv rabbinical court in a civil matter. This was a legal field over which the rabbinical courts had no state-endorsed jurisdiction. From the perspective of the state, therefore, the court was functioning in the capacity of an arbitration board and not as a formal court. Herzog claimed that even in this instance, the parties had the right to appeal, “for our authority as a rabbinical court of appeals flows from a communal enactment.” In other words, the centralization of the rabbinical court system was not a result of enforcement by the secular state alone; it had real halakhic validity. This approach was repeatedly affirmed in discussions in Great Rabbinical Court cases about the jurisdiction of the rabbinical court of appeals. In one example of many, the court ruled in 1945:

The Great Rabbinical Court finds that it indeed does have the authority to judge this appeal, since the matter of appeals was accepted by rabbinical enactment, which is a law [as binding] as a

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16 Since the Mandate period or earlier, the rabbinical courts had functioned as arbitration tribunals in areas outside of their legal jurisdiction. This role of the rabbinical courts was recognized in law under the Mandate. In 2006, however, in HCJ 8638/03 Amir v The Great Rabbinical Court in Jerusalem, the state ruled that Israel’s state-funded rabbinical courts were prohibited from acting as arbitration tribunals, even where the private parties submitted themselves to their binding authority, and were only allowed to adjudicate cases that the state explicitly placed under their jurisdiction. See: Mautner, *Law and the Culture of Israel*, 189-90; Adam S. Hofri-Winogradow, “Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State,” *Journal of Law and Religion* 26, no. 1 (2010): 76-78 and passim.

law of our holy Torah. Therefore, anyone who comes to court comes with this in mind.\textsuperscript{18}

As if to underline the importance of both the system of appeals and the requirement for recording judicial reasoning, the religious establishment published in 1950 the very first collection of rabbinical court rulings, called \textit{Collection of Rulings of the Chief Rabbinate of the Land of Israel – the Great Rabbinical Court for Appeals}.\textsuperscript{19} Edited by Zerah Warhaftig, this book was the first of its kind. For centuries rabbis had published collections of responsa, which often included their rulings from their roles as rabbinical judges. The formal records of Jewish communities also frequently included the final rulings of rabbinical cases. Warhaftig’s collection, however, a product of the newly institutionalized and centralized bureaucracy of the Chief Rabbinate, was quite different. The format of the book evinces the bureaucratization and modernization of the rabbinical system. Each case in the collection begins with the reference number for the case and the name of the court. It then lists the names of all of the judges, the president of the court for the hearing, the plaintiff, the respondent and their legal counsel.\textsuperscript{20} There follows a short summary of the subject of the case; a statement of the facts; the terms of the decision (often presented as a numbered list); the reasoning of the judges; and a numbered list of the “conclusions”, meaning points of law decided in the case which could conceivably be applied as binding precedent in future cases.

\textsuperscript{18} \textit{Osef piskei din}, 1, 71. The halakhic significance of the enhanced status of the state-endorsed Great Rabbinical Court in Jerusalem was discussed in various forums. For more about the way the official position of the chief rabbinate affected the perception of its courts in the halakhic mind, see: Maoz, “Ha-rabanut u-vet ha-din: ben patish ha-hoq le-sadan ha-halakha.”

\textsuperscript{19} \textit{Osef piskei din}, 1.

\textsuperscript{20} Names are often concealed to preserve anonymity, for example: “The plaintiff A (the wife); The respondent B (the husband).”
Similar records of rabbinical court cases were published regularly for about twenty years. The format of these published decisions was quite different from those previously issued by the very same courts but it was almost identical to the format of the records of the Supreme Court of Israel, which began to be published at around the same time. Figures 1 and 2 (page 234) depict how similar were the records of secular courts to those of the rabbinical courts in both content and form, even down to the typeface. By contrast, figure 3 (page 235) is a copy of a decision of the Jerusalem rabbinical court from 1938. The differences are demonstrable. Whereas the later judgments were published, the 1938 decision never was. The later decisions, both rabbinical and secular, take up several pages; the 1938 decision takes up less than a page. It is quite likely that the judges in this case conferred and perhaps even exchanged their own considerations in writing. These notes, however, if they existed, were not preserved. Therefore, instead of sections outlining the points of law considered in the case, the findings of fact and the orders of the court, the entire decision consists of two sentences:

There have appeared before us in law Mr Pinhas Ehrlichman, plaintiff, and his representative Mr. Goldberg Esq., and Mrs. Rivkah Shapira-Ehrlichman, respondent, and her representative Rabbi Yitshak Levi. After hearing the claims and responses of the two sides, we have decided:
According to the enquiry she is held to be a married women. The plaintiff may not force her to accept a divorce until he pays her damages in the sum of 15 Palestinian pounds. Then he will be exempt from marital support.  

It is clear that from the late 1940s, the Chief Rabbinate, assisted by religious Zionist lawyers like Warhaftig, chose to present the rulings of the rabbinical court in a way that was quite different from any previous such record, but identical to the presentations of the secular courts of Israel.

No law or political pressure pushed the Chief Rabbinate to do this. It was the outcome of a desire

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21 Israel State Archive LAW/23527/15
to present the rabbinical courts as professional, regulated and uniform, to draw the Jewish population of Israel to patronize the rabbinical courts over the secular courts and above all to centralize authority of the rabbinical courts into a hierarchy with the Chief Rabbinate at its peak.

The initiative to publish the decisions of the rabbinical court came from Warhaftig himself. He was assisted by a number of lawyers, including Mordekhai Levanon, who was one of the authors of the procedural regulations of both 1921 and 1942. Some rabbis were initially resistant and pointed out that the decisions were not written according to a consistent format. They had to be reassured that the editors would abstract the necessary information from the available material and put it into a format fit for publication. The forward of the first collection of edited decisions included the following note from Warhaftig:

> The selection of the rulings herein published was guided by the desire to accurately portray the workings of the Court. … The opinions of the judges, with a few exceptions, are not published as written, but have been abstracted by the editors from the contents of the pamphlets appended to the case files. This volume thus does not constitute a formal record and the editors assume full responsibility for the adaption and wording of the judicial opinion.

The goal of publishing the decisions therefore, was initially articulated not by the rabbinical judges themselves, but by religious Zionist jurists, was to modernize the workings of the rabbinical court. The format of the edited decisions was designed with that in mind:

> The principal facts are presented succinctly, the conclusions unambiguously. It this provides jurists and scholars with access to the world of the rabbinical courts and the methods by which they reach their decisions.

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23 Quoted at: ibid., 14.

24 Ibid.
Despite the fact that the rabbinical judges did not initiate this process, however, they were soon conditioned by it. Warhaftig “found that publication encouraged rabbinical court judges to communicate their opinions in a clear and orderly manner comprehensible to those unschooled in Jewish law, whether jurists or members of the public.” The bureaucratization of the rabbinate, therefore, began to affect the thinking of even those rabbis who were initially skeptical of it.

Since his time in Ireland, Herzog had attempted to portray rabbinical law to be as efficient, structured and systematic as any European law. He hoped that by demonstrating that halakha could compete with modern state law on its own terms, it would be taken more seriously and its genius would be acknowledged. From the 1940s, the Chief Rabbinate of Palestine and Israel followed a similar strategy, but now the consequences were practical and not just theoretical. The creation of a centralized hierarchical halakhic system on the model of Israel’s secular courts was intended to demonstrate the competence of rabbinical courts to operate under modern conditions and to compete with the institutions of state.

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25 Ibid.
Fig. 1: First page of a ruling from Israel’s [civil] Court of Appeals, 1959. [C. A. 291/56 Piskei Din 13:39.]

Fig. 2: First page of a ruling from the Rabbinical Court of Appeals, 1957. [Osef piskei din, 2, 353.]
Fig. 3: Ruling from the Jerusalem Rabbinical Court, 1938.
[Israel State Archive LAW/23527/15.]
Statutory Legislation

The commitment of the Chief Rabbinate to legal centralism and bureaucratization is equally evinced by a flurry of rabbinic legislation. Before 1944, there had been no rabbinic statutory law in Palestine other than the procedural regulations discussed above. In 1944 and 1950, a whole series of statutory regulations were enacted by the chief rabbinate. This fact in itself is an indication of the centralist approach of the Chief Rabbinate. Statutes by their nature diminish the interpretive authority of individual judges and presume the universally acknowledged authority of the legislating body. The substance of the statutes reinforces the impression that they emerged from the particular centralist attitude of the chief rabbinate.

The statutes can be summarized as follows:

1) All Jewish marriages require a ketubah, a document guaranteeing a payment to the wife from the husband’s estate in the in case of divorce or the husband’s death. The sum guaranteed in the ketubah was traditionally set at a certain number of silver shekels, an ancient denomination whose precise value is disputed by modern rabbis. Under this

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26 On the occasion of the establishment of the Chief Rabbinate in 1921, R Kook in his inaugural speech talked about the potential for the Chief Rabbinate to be a legislative body: ‘In our national life in the Land of Israel, there will surely at times be a dire necessity to issue some significant legislation [תוקנות], which, if agreed upon by a majority of the rabbinate, the generally recognized sages of Israel, and accepted by society, will then gain the status and power of Torah law.’ Quoted in: Warhaftig and Katz, Ha-rabanut ha-rashi le-Yisra’el, 1:23. But Kook never himself embarked on this vision of rabbinical legislation.


statute, the minimum value of the ketubah was fixed at a sum in a contemporary currency: 50 Palestinian pounds for a first marriage and 25 Palestinian pounds for a widower or divorsee.

2) A man whose married brother dies childless is called *yavam* and is required by halakha to either marry his brother’s widow or to perform a ceremony called *halitzah*, freeing him from this requirement and allowing her to re-marry at will. Until the *halitzah* ceremony, the widow is unable to re-marry. According to this statute, the *yavam* is required to pay the widow maintenance until he agrees to carry out *halitzah*.

3) A father has to support his children up to the age of fifteen years.

1950 Statutes:

4) According to halakha, a Jewish marriage is carried out between the bride and groom in the presence of two witnesses; a rabbi’s involvement is not technically required. This statute was designed to formalize marriage ceremonies and to bring them under the auspices of the administration of the rabbinical courts. It laid down that betrothal can only be performed as part of a full marriage ceremony in the presence of a quorum and that marriages may only be carried out by rabbis who have been authorized by the Chief Rabbis.

5) The minimum marriage age for a woman is 16 years and one day.

6) Halakha forbids a woman to marry more than one husband but various communities followed different practices with regards of a man marrying more than one wife. This statute prohibited polygamy for all communities, whatever their traditional practices.

7) The 1944 statutes had provided a financial incentive for *halitzah*; this statute mandated it.
It also stipulated that a *yavam* must perform *halitzah*, and is prohibited from marrying his brother’s widow.

8) Upon divorce, a man must pay his wife “compensation” in addition to the value of the *ketubah*.

9) According to halakha a divorce must be given at the initiative of the husband and may not be issued against his will. After a separation, therefore, it remains in the power of the husband to prevent his wife from re-marrying by refusing to grant a divorce, either in pursuit of financial gain or out of a desire to make her suffer. This statute allowed the rabbinical court to request the state to incarcerate a so-called recalcitrant husband pending his agreement to finalize the divorce.

These statutes served to further the centralization of legal authority in the Chief Rabbinate and to impose uniform practice on everyone under its jurisdiction. One function of the statutes was to bring the workings of the rabbinical courts in line with the norms of modern society. This does not, however, imply that they were a concession to the state or its legislative authorities. To be sure, the statute banning polygamy almost coincided with the Israeli legislature’s outlawing of polygamy as part of the Women’s Equal Rights Law of 1951. This cannot, however, have been the reason for the rabbinical legislation. As discussed in chapter 5, certain aspects of the Women’s Equal Rights Law, such as the equality of spousal property relations, were vigorously

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and vocally resisted by the Chief Rabbinate. In this case, the legislation was being introduced on its own initiative.

Similarly, the rabbinic legislation concerning the minimum age of marriage came at around the same time as the Knesset’s Age of Marriage Law of 1950. There, too, however, the rabbinical statute self-consciously differed from the law of the secular legislature. The rabbinical statute set the minimum age of marriage for women at 16. In the Knesset, the age was set at 17. Religious authorities in Palestine (both Jewish and Muslim) had long resisted attempts to legislate a minimum age for female marriage.\(^{30}\) Here too, however, the decision of the Chief Rabbinate to finally compose legislation of its own in this area should not be understood as a capitulation to the demands of the state. In his discussion during the drafting of the rabbinical statutes, it was clear that Herzog did not feel himself to be bound by the state legislature. On the contrary, he hoped that if he preempted the decision in the Knesset, the Knesset would in fact capitulate to his own decision: “We should [set the age] similar to the government so that it will only set the age that we set.”\(^{31}\) Indeed, aware that the discussions in the legislature were likely to set the minimum age at 18, Herzog, chose a different age, even though he had no halakhic objection in principle to the age that the Knesset was about to choose:

> I do not think that the age of 18 is entirely impossible according to halakha, [but] we also have to take into account the terrible fact of the destruction of the six million ... and therefore my opinion is that the age should not be older than 17 years and one day for a male and 16 years and one day for a female.\(^{32}\)


\(^{32}\) Ibid.
For public policy reasons of his own – the desire to increase the child-bearing years of Jewish women in the aftermath of the Holocaust – he explicitly chose to put his rabbinic legislation at variance with that of the state.

Clearly, then, the origins of these rabbinical statutes must be sought elsewhere than in the desire to accommodate the wishes of the state. They can best be interpreted as a natural continuation of the centralizing tendencies of the Chief Rabbinate during this period. The attempts of Herzog, Bar-Ilan and others to bring the entire state under the control of Jewish law had failed. But they remained committed in principle to legal centralism and valorized a legal system that was centralized, hierarchical, uniform, and which operated according to the standards of order and efficiency of modern state bureaucracies.

It makes sense, then, that a key concern of these statutes was bureaucratization and the imposition of uniformity of practice. One example of the bureaucratizing tendency of the statutes was the requirement that weddings only be carried out by authorized rabbis. Before this point state law mandated that all marriages of Jews in the state had to be carried out under halakha. It did not, however, have any provisions for the official registration of authorized rabbis. Any marriage conducted according to rabbinical law in Palestine/Israel was a valid marriage, irrespective of who had carried it out. These statutes restricted the administration of Jewish marriages to rabbis who had been officially registered by the Chief Rabbinate. This gave the Chief Rabbinate, rather than regional rabbis or rabbinical courts, full control over all Jewish marriages conducted in the state.

33 From the perspective of the state, the qualifications and registration of rabbis was not legislated until the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law (1953).
One aspect of halakha in particular claimed the attention of the Chief Rabbinate in its imposition of its centralized authority. Jewish law is infused with local variations, including sometimes quite large divergences of law between different communities. Jewish immigration to Palestine, especially after WWII, brought together communities of very different origins. This was particularly the case after the immigration of tens of thousands of Sefardic Jews from Yemen and other Arabian countries in the early years of the state.

Sefardic and Ashkenazic practices surrounding marriage differed in a number of important ways: Although Ashkenazic communities had given up the practice of polygamy early in the middle ages, in many Sefardic communities, men continued to marry more than one woman; certain Sefardic communities, in particular those from Yemen, had the custom of betrothing minors; Sefardic and Ashkenazic communities value the silver shekels in a traditional ketubah differently such that the same number of traditional shekels of silver in a ketubah would be valued lower by a Sefardic judge than an Ashkenazic judge; in the case of yibum, Sefardic custom encourages the yavam to marry his sister-in-law widow whereas Ashkenazic custom encourages him to perform halitzah.\footnote{Aharon Gaimani, “Marriage and Divorce Customs in Yemen and Eretz Israel,” 

Prior to the enactment of these statutes each community acted according to its received traditions. Soon after Herzog became chief rabbi, he was asked to provide his expert opinion in a case in the Mandate courts where a Jewish man was being prosecuted for polygamy. His defense
was that his own religious law, which governed personal law, allowed polygamy. Even though he was Ashkenazic, Herzog agreed that the ban on polygamy was not universally authoritative in the Jewish world and that even for Ashkenazim a second marriage was not void.\textsuperscript{35} If this were true for Ashkenazim, it was certainly true for Sefardic communities which continued to follow their own customs after arriving in Palestine or Israel. Herzog’s representations to the British courts in this matter no doubt flowed from his general antipathy to the involvement of those courts in matters, like marriage, that he felt should fall under the exclusive jurisdiction of the rabbinical courts. However, although he acknowledged the diversity of Jewish practice for the purposes of exonerating a Jewish man under criminal investigation for polygamy, his own jurisprudential leanings made him highly antipathetic to this kind of pluralism in practice. The adherence of different Jewish communities to their own customs and law was entirely unremarkable in the context of Jewish history but it could not be countenanced by a centralized rabbinical authority which was trying to create a modern system of law.

The Chief Rabbinate recognized that one of the most fundamental features of modern legal systems is that the same law governs everyone. The desire to implement this principle in the context of Jewish law lay behind Bar-Ilan’s attempts to formulate a halakhic code that would pertain to all citizens, even Gentiles. Although his plan failed, as we have seen, that centralizing and unifying impulse did not dissipate. It was applied to all those areas over which the Chief Rabbinate did have control. The rabbinical statutes under discussion are a function of this. Thus, the statutes banned polygamy even for those whose communal practice permitted it and set a minimum age for marriage even on those communities whose female children were married.

young. They also mandated the *halitzah* ceremony even for those communities whose traditional practice had been *yibum*, the marriage of a childless widow to her late husband’s brother, and stipulated a value of the *ketubah* document higher than the figure customary in Sefardic marriages.

It did not escape the attention of Sefardic rabbis that the statutes not only imposed uniformity; they imposed it according to the Ashkenazic rite. The reasons for this are not difficult to discern. Ashkenazic rabbinical authorities in the majority in Israel. More importantly, for people like Herzog, whose entire legal philosophy was motivated by the desire to create a halakha that would be seen to compete with any modern state’s legal system, practices like child marriage and polygamy would have seemed backward, even barbaric. Indeed, one might argue that the Chief Rabbinate here was implementing Warhaftig’s exhortation to “imperialism” in more ways than one. Not only did these statutes represent the imposition of a centralized rabbinical authority and the continuation of a struggle with the state over social and legal control, but it also constituted a kind of civilizing mission with regard to the newer immigrants from Eastern countries.\(^{36}\)

It was resisted by those such as Ovadiah Yosef who was and remained a champion of Sefardic independence. In 1951, just one year after the statute mandating *halitzah*, a case came before Yosef in the rabbinical court of Petah Tikvah. In a typically long ruling, he concluded:

> It seems clear that for us [Sefardim] who hold onto the coattails of our teacher\(^{37}\)… the commandment of *yibum* takes

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\(^{37}\) I.e. Rabbi Yosef Karo, author of the *Shulhan Arukh*, a key rabbinical code. Typically, Sefardic rule follows Karo whereas Ashkenazic rule follows the opinion of Rabbi Moses Isserles in the case of a disagreement.
precedence over *halitzah* even today. The agreement of the leaders
or members of the Chief Rabbinate of Israel who legislated the
annulment of the commandment of *yibum* altogether, even for the
Sefardim and Eastern communities, has no authority. They have no
authority in this matter.\(^{38}\)

Yosef, then, correctly perceived this legislation as an attempt both to centralize authority in the
Chief Rabbinate and to impose a uniform law on all Jews in the state. He disapproved of both
tendencies.\(^{39}\)

Legal centralism had begun as a fairly marginal ideology among religious Zionists. It was
championed, however, by powerful figures like Herzog and Bar-Ilan just as the state was
established, and rose to dominance. After it became clear that the state’s laws would not be based
on the Torah, legal pluralism might in theory have regained its earlier popularity in religious
circles. If the legal authority of the state was both secular and centralist, strict adherence to a
centralist position would result in the subordination of the rabbinical authorities to a legal
hierarchy which derived its authority not from the will of God but from the will of the people.
This, in the opinion of leading politicians and jurists, was indeed the case. However, rather than
abandoning their centralist position for a more accommodating pluralism, mainstream religious
Zionist leaders instead adopted an ingenious strategic maneuver in order to preserve their
centralism while also asserting their independence from the state’s sovereignty. While
representing themselves to the state, they argued for the independence of the rabbinical system
on the basis of classic pluralist arguments. Within their own camp, however, they retained and

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\(^{38}\) *Yabi’ a Omer*, volume 6, Even Ha-Ezer 14 (9).

\(^{39}\) The imposition of Ashkenazic custom, and Yosef’s resistance to it, can also be seen in the politics of the
32, no. 2 (2008).
strengthened their centralist position and did all they could to impose uniformity, order, a statutory framework and a hierarchical system on the entire rabbinical system.
Conclusion

This dissertation is an attempt to recover abandoned pathways in religious Zionist thought and to explain why those paths were abandoned in the first place. It maps a shift in the approach to law and the state that took place in religious Zionists thought around the time of the establishment of the State of Israel. Before this shift, a variety of legal philosophies were available to religious Zionist thinkers. At the extreme, as shown in chapter 1, the religious kibbutz movement and its affiliated thinkers advocated a revolutionary, almost anarchic, approach to law. They wanted their society to be built only on rules that emerged spontaneously from the spirit of their religious and national life. Although they embraced the existence of the state as the fulfillment of a nationalist ideal, they retained a Marxian skepticism for state as the seat of all law and authority. They drew on Weimar legal theory to formulate a jurisprudence that could express their repudiation of legal positivism while also being able to defend the role of law in sustaining a society and its values. Established patterns of halakhic interpretation prevented them from implementing this philosophy to the extent that some kibbutz thinkers desired but the kibbutzim remained a symbol of the potential to construct a political and legal order that was not, in theory, at least, entirely focused on the state.

Chapter 2 surveyed a number of religious Zionist constitutional positions that existed alongside the radical legal philosophy of the kibbutzim. They covered a spectrum from, at one extreme, the call for a complete separation between religion and state to, on the other, the call a rabbinic oversight of all legislation. They all, however, shared in common a pluralistic attitude to law. They agreed upon the fact that a single polity may have within it a plurality of legal regimes and
a plurality of legitimate sources of legal authority. This position had the advantage that it was able to preserve a distinction between halakha and the state, thereby avoiding the imposition of halakha on people who did not recognize its authority and preventing the imposition of radical modifications on halakha in order to engineer its accommodation with the requirements of modern law.

In the late 1940s, however, a shift took place that limited the legal philosophies that were available to religious Zionists. Legal centralism, a new approach to law, rose to dominance. The legal anarchism of the kibbutz and the legal pluralism of the mainstream religious Zionist leaders each lost their viability as they were overshadowed by legal centralism, which became the overarching philosophy that guided the religious Zionist community in theory and in practice. As chapters 3 and 4 showed, this shift was associated strongly with Isaac Herzog, whose scholarly life had been dedicated in large part to portraying the sources of Jewish law according to the image of state-centered jurisprudence that was valorized by modern legal scholars in Britain and in Palestine. Chapters 5 and 6 made clear that Herzog was not the only figure to adopt this position. It became so influential among religious Zionist leaders that it molded their constitutional fantasies, determined their strategic self-representation to the state and guided the construction of the entire system of the new rabbinical courts.

To be sure, this dissertation does not cover every aspect of religious Zionist legal philosophy during the period. It leaves a lot of room for further research, particularly in three areas, which I hope to explore in future works. First, the picture would be enhanced by a more thorough consideration of the legal philosophy of the Sephardic leaders of religious Zionism. Although to
some degree susceptible to the same dynamics of nationalism and independence as Ashkenazic thinkers, it stands to reason that Sephardic thinkers were less entrenched in the jurisprudence of Western Europe. Indeed, models of legal pluralism seem to have had greater prominence in the thinking of Bentsion Uziel, Hayim David Halevi and others.¹ Second, this dissertation is concerned primarily with the ways in which religious Zionist thinkers engaged with the theory of the state while it was still in the process of formation. In subsequent years, especially the 1950s and 1960s there was a wealth of journal and responsa literature that dealt with the halakhic status of the state and its legislation.² This literature sheds important light on the way they revisited those questions after the institutions of state were already established and the patterns of interaction between the government and the religious parties had become more familiar. Third, better access to the records of the rabbinical courts would sharpen this project. Israeli law imposes an embargo of seventy years on all the case files because they tend to deal with the

¹ In addition to his responsa, other non-halakhic writings of Uziel have recently been published. See: Bentsion Me'ir Hai Uzi'el, Mishpetei Uzi'el, 10 vols. (Jerusalem: Ha-va'ad le-hotsa'at qitvei ha-rav, 1998-2004); Bentsion Me'ir Hai Uzi'el, Mikhmanei Uzi'el, ed. Ezra Barnea et al, 6 vols. (Jerusalem: Ha-va'ad le-hotsa'at qitvei maran zts'l, 1995-2009). Halevi wrote a book of particular interest to the topic of legal philosophy: Hayim David Halevi, Dat u-medinah (Tel Aviv: Defus Arzi, 1969). See also: Marc Angel, Loving Truth and Peace: The Grand Religious Worldview of Rabbi Ben Zion Uziel (Northvale, N.J.: Jason Aronson, 1999); Marc Angel and Hayyim J. Angel, Rabbi Haim David Halevy: Gentle Scholar and Courageous Thinker (Jerusalem; New York: Urim Publications, 2006); Moshe Hellinger and Ruth Bar-Ilan, “Religious Ideology That Attempts To Ease the Conflict Between Religion and State: An Analysis of the Teachings of two Leading Religious-Zionist Rabbis In the State of Israel,” Journal of Church and State 51, no. 1 (2009); Radzyner, “Ha-rav Uziel, rabanut Tel-Aviv-Yafo u-bet ha-din ha-gadol le-erurim: mahazeh be-arba ma'arakhot.”

² See, in particular: Sha'ul Yisra'eli, ed. Ha-torah veha-medinah (Tel Aviv: Ha-merqaz le-tarbut shel hpohm"z, 1949-). Some important articles from the journal were republished in: Yehdah Shaviv, ed. Be-tsomet ha-torah veha-medinah: mivhar ma'amirim mi-tokh kovtsei “ha-torah veha-medinah” be-arihkah mehudeshet, 3 vols. (Alon Shevut, Gush Etzion: Mekhon tsomet, 1991). One of the most interesting religious Zionist thinkers of the 1950s and 1960s was Rabbi Shaul Yisraeli, who published an entire collection of responsa laying out innovative halakhic positions on various aspects of the state. Sha'ul Yisra'eli, Amud ha-yemini, 2 ed. (Jerusalem: Hotza'at ha-torah veha-medinah al shem maran ha-rav Sha'ul Yisra'eli zt'z, 2010). It would also be valuable to trace some more radical thinkers over this period. Scholars, for example, have already investigated the shift in the early 1950s in the thinking of Yeshayahu Leibowitz. See: Moshe Hellinger, “A Clearly Democratic Religious-Zionist Philosophy: The Early Thought of Yeshayahu Leibowitz,” Journal of Jewish Thought and Philosophy 16, no. 2 (2008); Yeshayahu Leibowitz, Torah u-mitzvot ha-zeman ha-zeh: hartzot u-ma'amirim 5703-5714 (Tel Aviv: Masada, 1954); Yeshayahu Leibowitz, Judaism, Human Values, and the Jewish State (Cambridge, Mass.: Harvard University Press, 1992); Haim O. Rechnitzer, “Redemptive Theology in the Thought of Yeshayahu Leibowitz,” Israel Studies 13, no. 3 (2008).
personal lives of individuals. Some court decisions have been published, although it is impossible to tell how they were selected and at least some of them were edited or censored. This makes it hard to perform a serious historical study of the material. Despite the need for further research, however, the evidence available does seem to support the general narrative of the dissertation: there was a shift from legal pluralism to legal centralism which came about not primarily as a result of an immanent unfolding of the rabbinic tradition but by the interaction of religious Zionist thought with modern legal and political theory.

This shift is a significant contribution to the way that we think about the relationship between religion and modernity, particularly within the context of the modern state. There has been a great deal of concern recently about a perceived kulturkampf between religious and secular sectors of society. When the state was founded, these two populations each prophesied that the other would soon die out of its own accord and was therefore prepared to make temporary compromises. In recent decades, however, that mutual accommodation has broken down. Neither side achieved the unambiguous social dominance that they expected and the erstwhile

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3 Amihai Radzyner has begun an analysis of the rabbinical court records from before 1942, which have been opened to the public.

4 The published decisions are: Dov Katz and Yitshak Glazner, eds., Pisqei din shel batei ha-din ha-rabani'im ha-ezori'im be-Yisra'el (Jerusalem: Defus Veis, 1954-). Shmu’el Daikhovsky, himself a judge in the rabbinical court system, describes the selectivity of the publishers and the censorship of published decisions:

The practice of the editors of the rabbinical court decisions until recently was not to publish decisions that mention or relate to the secular law. In certain circumstances they even took out sections of published decisions when they contained quotations from secular law.

accommodations between secular and religious Jews in Israel lost their power to hold together
groups with fundamentally different approaches to law, politics and social values.⁵

Religious Zionism was not exempt from these developments. Its early protagonists believed that
its synthesizing ideology could heal the rifts between the anti-Zionist ultra-Orthodox on the one
hand and the ant-Orthodox secular Zionists on the other. Recently, however, in a period of
growing mutual antipathy between sectors of Israeli society, religious Zionism has itself become
increasingly antagonistic to the secular state. Most historians look for the roots of this
antagonism in the transformation of religious Zionist ideology after 1967. In the aftermath of the
Six-Day war, the religious Zionist camp, under the influence of Rabbi Tsvi Yehuda Kook and
others, cultivated an ever more utopian and messianic understanding of the state, affirming “the
truth that the state of Israel is a divine state.”⁶ This understanding of the state, however, was
dependent on its fulfilling a particular messianic vision laid out for it, which included an
expansion of Israeli territory. The state, however, considered, and in some cases implemented, a
withdrawal from parts of that territory. The religious Zionists’ valorization of the state as a
messianic tool turned into a deep sense of betrayal once the state, in their mind, had abandoned
its divine mandate.⁷ One terrible outcome of an extreme expression of this ideology was the
assassination of Prime Minister Yitzhak Rabin in 1996. Although that event was followed by a

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⁷ Clearly, this brief sketch does not do justice to the variety and nuance that continued to characterize religious Zionists, many of whom endorsed the peace process and the idea of “land for peace.”
brief period of soul-searching in many sectors of religious Zionism, the messianic ideology did not disappear and the sense of betrayal was intensified, particularly after the disengagement from Gaza in 2005 and ongoing clashes with the state over the building of new Jewish settlements in the West Bank.

My research indicates, however, that an important component of the religious-secular kulturkampf may be found in jurisprudential shifts at the beginning of the state period. Although the political and ideological developments after 1967 are, indeed, critical factors in the development of recent social tensions, the transition described in this dissertation established a framework in which they could unfold. The conflict between religious and secular Zionism is made possible not only by their fundamental differences but also by their fundamental similarities. Reading the legal philosophy of religious Zionists in the context of the legal philosophy of modern Europe shows that religious Zionist rabbis and thinkers constructed their own constitutional ideas against the backdrop of theories of sovereignty and legal interpretation that emanated from European universities as much as from the world of the yeshiva. Just as secular Zionism – along with nationalist independence movements all over the world – embraced legal centralism, so did the religious Zionists.

Ironically, it was the fact that both secular and religious Zionists adopted the same centralist understanding of the state that made for a more intense conflict between them in the long-run. Although polities characterized by legal pluralism are not devoid of conflict, the doctrine is nonetheless predisposed to allow the devotees of different legal and political systems to in some way recognize the validity of the other. This was a function of the medieval Jewish legal
mechanisms of “king’s law” and the “law of the land.” It was also a function of the indirect rule of the British Empire. Once the secular and religious Zionist elite both adopted a position of legal centralism, there was no longer any room for the other. In a centralist mentality, there is only one unified legitimate locus of legal and political authority: the state. Once each party adopted the doctrine of legal centralism, it meant that everyone was interested in having as much control as possible over the instructions of state. Everyone was fighting over the same territory.

A similar pattern can be discerned on a global scale. In recent decades there has arisen in many countries what has been described as a conflict between religious fundamentalism and secularist constitutionalism. Here too, the conflict arises from both difference and similarity. For all that religious fundamentalists and secular liberals differ over their visions of the state, they share the belief that the state is the center of legal and political legitimacy and power. Thus, for example, despite the fact that the nation state is a relatively modern political phenomenon and, therefore, by definition, does not have a direct precedent in Muslim law, political Islam in most of its varieties has not tried to overturn the state, but to coopt it and to create a “constitutional theocracy.”

8 In Pakistan, for example, Jamaat-i-Islami, an Islamic political party, believed that politics was the only legitimate expression of Islamic spirituality. The Muslim Brotherhood in Egypt originally considered the ideal Islamic society to be a kind of a-political utopia but it has since become extremely active in politics; Egypt’s President Mohamed Morsi is, of course, drawn from its ranks.


In all these cases, then, it seems that clashes between religious and secular, or traditional and modern factions in Israel and worldwide are intensified by the fact that both sides have adopted a position of legal centralism and regard the state as the ultimate prize. The corollary of this is, some have argued, that if the ideological importance of the state is diminished, the grounds for conflict or domination are likely to diminish too. In fact, a great deal of early scholarship on legal pluralism was motivated by the desire to recover the dignity and legitimacy of non-European legal cultures that were subsumed under the centralist European regime.¹⁰

For this reason, perhaps, some recent scholars have occupied themselves with uncovering the pluralistic roots of Jewish legal and political theory.¹¹ Legal pluralism provides the theoretical framework to hold a strong and committed outlook, whilst allowing for the presence of other

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¹⁰ The scholarship of early scholarship of legal pluralism was characterized by “the romantic assumption that nonstate law was more egalitarian and less coercive than state law.” Mitra Sharafi, “Justice in Many Rooms Since Galanter: De-Romanticizing Legal Pluralism Through the Cultural Defense,” Law and Contemporary Problems 71 (2008). As Sharafi points, out, however, there was, subsequently, criticism of this romantic view. One scholar, for example, warned that “indigenous law…is not always the expression of harmonious egalitarianism. [It] often reflects narrow and parochial concerns; it is often based on the relations of domination.” Marc Galanter, “Justice in Many Rooms: Courts, Private Ordering and Indigenous Law,” Journal of Legal Pluralism 19 (1981): 25. It would be naïve, therefore, to see legal pluralism as some kind of panacea that will miraculously increase the component of toleration in society. It is, though, worth considering how a sophisticated use of the insights of legal pluralism might be brought to bear on the problems under discussion. The Archbishop of Canterbury, for example, touched on this in thoughts about what might entail a “just and constructive relationship between Islamic law and the statutory law of the United Kingdom.” He called for both the state and religious communities to consider internal change and for an avoidance of “the sterility of mutually exclusive monopolies.” Rowan Williams, “Civil and Religious Law in England: A Religious Perspective,” Ecclesiastical Law Journal 10, no. 3 (2008): 264, 74. See also the discussion in: Bernard Jackson, “‘Transformative Accommodation’ and Religious Law,” Ecclesiastical Law Journal 11, no. 2 (2009).

¹¹ Michael Walzer’s latest book addresses the plurality of political regimes in the Bible. Suzanne Last Stone and Menachem Lorberbaum have identified thinkers and legal mechanisms that divide between realms of law in the medieval period. Yedidia Stern has examined the pluralistic elements of the Jewish tradition with the explicit goal of applying those resources to the problems of contemporary Israel. Stone, “Religion and State: Models of Separation from within Jewish Law.”; Lorberbaum, Politics and the Limits of Law; Yedidia Stern, State, Law and Halakhah, 4 vols. (Jerusalem: The Israel Democracy Institute, 2001-6); Michael Walzer, In God's Shadow: Politics In the Hebrew Bible (New Haven: Yale University Press, 2012). Other scholars have pursued similar projects with regard Islamic thought. Noah Feldman, for example, has argued that Islamic law has the resources within necessary to produce democratic constitutional states under sharia. Noah Feldman, The Fall and Rise of the Islamic State (Princeton: Princeton University Press, 2008).
equally strong outlooks within the same political unit. I have shown not only that the Jewish tradition as a whole possesses deep resources of principled legal pluralism, but that this was the position of many significant religious Zionist thinkers all the way up to the foundation of the state. It is striking how quickly the transition to legal centralism obscured the memories of those early religious Zionist constitutional models.
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