The Time Has Not Yet Come to Repair the World in the Kingdom of God: Israeli Lawyers and the Failed Jewish Legal Revolution of 1948

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Jews and the Law

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"The Time Has Not Yet Come to Repair the World in the Kingdom of God": Israeli Lawyers and the Failed Jewish Legal Revolution of 1948

Assaf Likhovski

Introduction

When we analyze the term "Jewish lawyers," one important question to ask is whether there is something unique about Jewish lawyers and in what ways (sociological, economic, ideological) Jewish lawyers are different from lawyers who belong to other ethnic groups. But there is another question that one might ask: what happens when the two parts of the term—"Jewish" and "lawyer"—are in conflict? This is the question I would like to ask in this chapter. I will answer it by looking at Jewish lawyers in Israel. At certain moments in Israel's legal history, Jewish lawyers were forced to choose between their commitment to the professional interests of their guild and their commitment to Jewish culture and Jewish nationalism. This dilemma was especially apparent in the debates surrounding what can be called the "failed Jewish legal revolution" of 1948.

In 1948, Israelis, generally, and Israeli lawyers, in particular, had to decide whether they wanted to maintain the legal status quo by retaining the legal system that Israel inherited from the British rulers of Palestine, or whether this legal system would be replaced by one that was connected in some way to Jewish law (halakha). The demand for linking Israeli law with Jewish law was expressed by certain religious politicians and lawyers. But the desire to use the halakha, or a modernized version of it, in Israeli law also reflected the aspirations of many secular Zionists. What choice did the

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1 Professor of Law, Tel-Aviv University Faculty of Law; Director, David Berg Foundation Institute for Law and History, Tel-Aviv University. Parts of this chapter are based on my article, Assaf Likhovski, "Beyn Shnei 'Olamot: Moreshet ha-Mishpat ha-Mandatori bi-Medinat Yisra'el be-Reshita" (Between Two Worlds), in Yerushalayim bi-Tkufat ha-Mandat, ed. Yehoshua Ben Arye (Jerusalem: Yad Ben Zvi Press, 2003), 253–86; and my book, Law and Identity in Mandate Palestine (Chapel Hill: University of North Carolina Press, 2006), http://univpress.unc.edu/books/T-5910.html. This chapter was originally prepared for the "Jews and the Legal Profession conference at Cardozo Law School, October 2006. I would like to thank the Augusto Levi Fund for their financial assistance in preparing this work for publication, Adar Ortal for her research assistance, and Ari Merlestein for his comments and editorial assistance.

2 Of course, one could also analyze the conflict between professional interests and Jewish ethical values (rather than Jewish culture or Jewish nationalism). This ethical conflict will not be discussed in this chapter.
Jewish lawyers of Palestine make, and how was this choice received by lay Israelis?

This chapter tells the story of the attempts to create a legal system based on Jewish law in Mandatory Palestine and in Israel immediately after its independence in 1948. It analyzes the reasons for the failure of these attempts. First, it identifies some practical factors that inhibited legal change in 1948. It then examines the role of Jewish lawyers in maintaining the legal status quo which was based on English law. The chapter then argues that the preference of Jewish lawyers for English law on its own cannot explain the failure of the Jewish law project. Instead, the chapter claims that professional opposition to Jewish law succeeded only because it resonated with wider cultural perceptions prevalent among lay Israelis in 1948 and afterwards concerning law in general, Jewish law in particular, and their own society. By manipulating these perceptions, lawyers successfully thwarted the linking of Israeli law to Jewish law.

Specifically, this chapter focuses on the perception that many Israelis had that their society was one in a state of transition. Israeli society was perceived as not yet fully formed. In particular, the term "the desert generation," an allusion to the Israelis who fled slavery in Egypt and wandered in the Sinai desert for forty years, was often used in this context. As long as this society was viewed as incomplete, there was no point, so the argument went, in changing its laws. Some lawyers skillfully used this image to justify adherence to the legal system that Israel inherited from the British Mandate. Thus, in the conflict between being Jewish and being a lawyer, the professional part triumphed. Many lawyers in post-independence Israel were indeed committed to their narrow professional interests more than they were to Jewish cultural nationalism and its legal manifestation—the project of Jewish legal revival.

I. The Law of British Palestine and its Legacy

Before the British occupied Palestine at the end of World War I, the legal system of the country was based on Ottoman law. Prior to the nineteenth century, the Ottoman law mainly relied on norms taken from the Shi’i—Islamic law. During the nineteenth century, Ottoman rulers reformed their legal system by adopting codes taken from Europe, mainly from France. However, in some areas of the law, most notably in private law, the sultans preserved Islamic law. Here too, however, some Western influence was evident. Ottoman scholars codified the private law norms of

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lay the Shari'a in a Western style code called the Me�elle (Mecelle in Turkish). The substance of the Me�elle was, thus, Islamic, but its structure was inspired by modern European codes. Consequently, the legal system that the British encountered in Palestine was based on a patchwork of French and Islamic norms and procedures.

British colonial legal policy at the end of the nineteenth century and in the early twentieth century sought to preserve the legal status quo in British colonies, especially in those colonies that had a developed local legal system. However, English law did influence many colonial legal systems through a process known as Anglicization, which was sometimes the result of deliberate design and at other times of sheer coincidence. Some local systems proved more resistant to English influences than others. In some colonies, the British set up a single governmental legal system, but in others (especially those in Africa) they created dual legal systems in which there was an institutionalized distinction between a governmental system that implemented English norms, and a native legal system that was based on local customs (or at least on what the British believed to be local customs). All of these factors led to significant differences in the nature of legal systems throughout the British Empire.

Two legal concepts influenced the process of Anglicization. One was the distinction between substance and procedure, and the other was the distinction between the public and private spheres. The British were not eager to replace local substantive law, but were more interested in replacing procedural law. Using British procedural law served a practical need in that British judges were used to the evidentiary and procedural notions of the common law. Westerners also viewed non-Western legal systems as discretionary and corrupt, so replacement of procedural law was seen as a way to prevent corruption. The English contribution to the colonies, the argument went, was to provide the natives with a system of justice that enforced local

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norms, but, unlike local legal systems, did so efficiently. Thus, in British
texts one often finds the idea that the British “civilized” local legal systems
by imposing the notion of the “rule of law” on native judges and officials, or
by importing procedural mechanisms such as the principles of “natural
justice,” which had not been applied before the British conquest.\(^7\)

Changing substantive law was more difficult than replacing native pro-
cedure, but here too Anglicization was at work. Those areas of law defined
by the British as most “private” (or “religious”)—the law of marriage and
divorce, laws of inheritance, and, to a lesser extent, the rules governing land
tenure—were usually left unchanged. An intermediate area of law, the rules
of contracts and torts, was usually replaced by English rules, but the process
sometimes took a long time. Finally, the more “public” areas of law—
criminal law and commercial law—were almost invariably anglicized.\(^8\)

It is important to bear in mind that the introduction of English law was
not always intentional. When new legal questions appeared, English-trained
lawyers and judges naturally turned to English law to solve them, and
thereby inadvertently imported this law into the legal system of the colo-
nies.\(^9\) Importation was also the result of lack of familiarity with local law.
Sir Anton Bertram, who had been Attorney General of the Bahamas, a judge
in Cyprus and the Chief Justice of Ceylon, wrote (no doubt from personal
experience), “the most extraordinary feature of our judicial system is ... the
diversity of the law which our Courts apply. The judges of our various
Supreme Courts pass on promotion from one system of law to another and
are required immediately on their arrival in a new territory to administer a
system of law ... to which they are completely strange.”\(^10\)

This lack of familiarity with local law was certainly evident in Palestine.
Not only was Palestine merely one station in the long careers of some
British officials, but, more significantly, many of the British officials in

\(^7\) Zweigert and Kötz, *Introduction to Comparative Law*, 235, 239, 241; Edward W. Said,
*Orientalism* (New York: Pantheon Books, 1978), 37; Martin Chanoock, *Law, Custom and
Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Cambridge
University Press, 1985), 5; Nasser Hussain, *The Jurisprudence of Emergency: Colonial-

\(^8\) Elias, *British Colonial Law*, 5, 137, 141, 147; Zweigert and Kötz, *Introduction to Com-
parative Law*, 235, 241–42; Herbert J. Liebenz, *The Law of the Near and Middle East:
Readings, Cases and Materials* (Albany: SUNY Press, 1975), 56; Lawrence M. Friedman,
“Law and Social Change: Culture, Nationality and Identity,” in Collected Courses of the
Strawson, “Revisiting Islamic Law: Marginal Notes from Colonial History,” *Griffith Law

\(^9\) Jörg Fisch, “Law as a Means and as an End: Some Remarks on the Function of Eu-
ropean and non-European Law in the Process of European Expansion,” in European
Expansion and Law: The Encounter of European and Indigenous Law in 19th and 20th
Century Africa and Asia, eds. W. J. Mommsen and J. A. de Moor (Oxford: Berg, 1992),
15–38.

\(^10\) Anton Bertram, *The Colonial Service* (Cambridge: Cambridge University Press, 1930),
152.
Palestine, especially in the first years of British rule, were amateurs. In addition, Ottoman law, as well as the decisions of the Palestine courts, were objectively difficult to ascertain and even obtain. An unofficial French translation of Ottoman legislation had been made in 1905, but there was no authoritative English version. Moreover, even those copies of the French translation were rare and not all British officials had access to them. Official publication of the reports of the courts of Palestine began only in the mid-1930s. Finally, the physical conditions of work in many courts in Palestine were not conducive to conducting extensive legal research. The courts were described by one observer as “stables” and by another as “dirty and unkempt rooms” with broken chairs and benches, with court clerks who were “shabby and down at heel” and records which were kept on “scraps of paper.”

The distinctions between process and substance and between the public and the private that the British employed in many of their colonies also emerged in Palestine. During the three decades of British rule in Palestine, British legislation replaced a large number of Ottoman laws with ordinances and regulations based on English or British-colonial codes. The process of replacement took place in a way that reflected the substance/process and public/private dichotomies. The British began with procedural and public law and gradually moved on to more private/substantive areas of the law. In the 1920s, the British replaced Ottoman commercial laws, the Ottoman code of criminal procedure, and some Ottoman rules of evidence. They also reorganized the land registration system, began a cadastral survey of the land, and promulgated town-planning legislation. In the 1930s, the British replaced the French-based Ottoman Penal Code and the code of Civil Procedure with codes based on English law. Finally, in the late 1940s, when


British rule in Palestine was nearing its end, they began to anglicize areas such as tort and labor law.\textsuperscript{14}

When the British left Palestine in 1948, the process of Anglicization was only partially completed. Consequently, the legal system that was left behind was a hybrid one, based in part on English law and in part on old Ottoman law. Since 1948, Israeli law has gradually shed parts of its Mandatory heritage. Israelis reformed the private law they inherited from the Ottomans and British, ultimately creating continental-like civil codification.\textsuperscript{15} Constitutional, administrative, and commercial laws have also been greatly modified.

However, the Mandatory legal heritage is very much alive in the law of twenty-first century Israel and can clearly be seen in the legal system's general characteristics. Israeli law inherited from its Mandatory predecessor the deference to precedents, the notion that judges should play an important and active role in creating legal norms, an adversarial conception of the role of lawyers, a unitary conception of the structure of the court system and many other general structural features.\textsuperscript{16} The relationship between Israeli law and Mandatory law also extends to the details of the legal system, as entire areas of Israeli law are still based on Mandatory legislation. For example, Israel's income tax system is still based on a British Income Tax Ordinance enacted in 1941.\textsuperscript{17} Its civil and criminal procedure norms, the rules of evidence used by the legal system, and the Israeli penal code originate in Mandatory laws and regulations.

Finally, the very identity of the system is still firmly English (or Anglo-American). Despite two explicit attempts, in 1948 and in 1980, to sever the ties of Israeli law with the common-law world and replace these ties with a link to Jewish law, Israeli legal identity is still tied to English legal culture. Why is this so? Why was there no "legal revolution" that changed the identity of the Israeli legal system following Israel's independence?

The next two parts of the chapter deal with this question. The second part shows that the potential for a "Jewish legal revolution" did indeed exist in 1948. The third part analyzes some of the reasons why, despite the existence of the potential for a change in the identity of the legal system, this change did not ultimately occur.


\textsuperscript{15} See for example the symposium issue on the new civil code in Mishpat ve-'Asakim 4 (2006).


II. The Failed Jewish Legal Revolution of 1948

The “first Israelis” who lived through the months before and immediately after Israeli independence in 1948 felt they were living in a revolutionary period. This is also true of the first Israeli lawyers. The pages of the journal of the Jewish Bar Association of Palestine, *ha-Praklit*, contained many articles that discussed the desired character of Israel’s legal system and declared that the legal system of the new Israeli state should be entirely different than the system of the British Mandate and linked in some way to Jewish law. This desired linkage was not a utopian dream that briefly appeared in 1948. It had a long history that went back to the early decades of Zionism.

A. The First Phase of the Jewish Legal Revival Movement

Like many nationalist movements, Zionism sought to revive the Jewish cultural past. The best-known aspect of Zionist cultural activity is the revival of the Hebrew language. But linguistic revival was not the only item on the Zionist agenda. Some Zionists also sought to revive what they called *Mishpat Ivri* (literally, “Hebrew law”) and make it the legal system of the Jewish community in Palestine. The revival of law, like the revival of a large part of Jewish culture by the Zionist movement, was not so much a continuation of the Jewish past as a break with it; not the restoration of an old tradition, but the invention of a new one. Secular Zionists sought to create a new “Hebrew” person who would be the antithesis of the old exilic Jew. Zionists saw the Jews of the Diaspora as passive, weak, and uprooted. These Jews were the “other” of Zionist culture, a negative template of the new, active, masculine Hebrew person that many Zionists sought to be.

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ly, when the revivers envisioned the creation of a new legal system it was one based on Jewish law but not identical to it. They used the term Mishpat Ivri in order to distinguish their modernized notion of Jewish law from the traditional law of Jewish communities in the Diaspora—the halakha.

The project of legal revival had its roots in early nineteenth century German nationalism. German thinkers claimed that each nation had its own unique “national spirit” (volksgeist) and that every aspect of national culture should reflect this spirit. These ideas were translated into the legal realm in the jurisprudential thought of the Historical School, which held that law was not created “from above” by the rational mind of an enlightened ruler. Instead, law (identified with custom) was produced by “the people” in an organic, silent, and unconscious process. Because law was a creation of the people, it could not be universal. Each nation has its own laws, just as each nation has its own language, and both law and language reflect the unique spirit of the nation, its volksgeist.

Such ideas influenced legal movements in many countries and Zionist legal thinkers were no exception. These thinkers, who came mainly from Russia, called for the creation of a national Jewish legal system that would be based on Jewish law. In the beginning of the twentieth century, a number of Russian-Jewish students, educated in central European and Russian universities, decided that the time had come to begin the work of legal revival. Two prominent leaders were Paltiel Dikshtein, a Russian Jewish who had studied law at the University of Odessa, and Samuel Eisenstadt, a young Swiss-educated Russian scholar. In 1916, Eisenstadt called for the establishment of a “scientific society for the study of Hebrew law.” Such an organization, the Hebrew Law Society (Hevrat ha-Mishpat ha-Ivri), was ultimately established in Moscow in the late 1910s, and immediately began publishing a scholarly journal that advocated legal revival. The turmoil of

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the Russian Revolution and its aftermath hindered the activities of the society and by the early 1920s, as conditions in the Soviet Union worsened, the society was disbanded and some of its members immigrated to Palestine.26

Meanwhile in Ottoman Palestine, Zionist immigrants created a system of secular courts for the Zionist Jewish community of Palestine. These courts, called the Hebrew Courts of Arbitration (Mishpat ha-Shalom ha-'Ivri), were established in 1909. The main reason for their creation was the practical desire of Zionist Jews not to be subjected to the jurisdiction of Ottoman or rabbinical courts. A secondary reason was the lack of jurisdiction of European consular courts in cases in which the litigants were citizens of different European countries. However, the notion of nationalist legal revival, to which even some left-wing socialist Jews were committed at this stage, may also have played a part in their formation.27

After World War I the amount of litigation in the Hebrew Courts of Arbitration increased dramatically.28 It was also at this time that their activity became fused with the activity of the Hebrew Law Society, newly reestablished in Palestine. Prominent Jewish lawyers like Norman Bentwich, the Anglo-Jewish Attorney General of Palestine, Judge Gad Frumkin, and Mordechai Eliash, a leading member of the local bar association, joined the ranks of the Hebrew Law Society.29

During the 1920s and early 1930s, the revivers published two scholarly journals, Ha-Mishpat and Ha-Mishpat ha-'Ivri, and founded two legal presses. Using them, the revivers began to consolidate their movement and create a unified agenda for it.30 They compiled a massive bibliography of

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28 The British enacted an Arbitration Ordinance, which indirectly recognized the courts as arbitration tribunals and, thus, enabled litigants to use the state apparatus to enforce their judgments. For a discussion of British attitudes to the Hebrew Courts, see generally Shamir, The Colonies of Law, 61–63. Even some Arabs used these courts. See, for example, Decision P/687/36 ‘Arif al-Mutawall, Grocer, Jerusalem v. Solei Boneh Ltd., reported in Ha-Mishpat 1 (1927): 252–56, 340; and Ha-Mishpat 2 (1927): 168. However, the courts, as well as the revival project, more generally, were an internal Jewish affair in which neither the Arabs nor the British intervened in any significant way.

29 See “Takanot ha-Hevrah ‘ha-Mishpat ha-‘Ivri’ be-Erets Yisra’el” (Regulations).

30 As with any intellectual movement, one can find different notions and contradictory
works on Jewish law, which was published in 1931.\textsuperscript{31} They created a calendar of historical events connected with Jewish law.\textsuperscript{32} They proposed collaborative research plans which would progress in stages to legal revival.\textsuperscript{33} They even suggested measures that would broaden their circle of supporters, such as teaching law in Jewish high schools in Palestine, presumably as a preparatory step to creating a cadre of people committed to the idea of legal revival.\textsuperscript{34}

All of these projects, therefore, suggest that in the 1920s, the creation of an autonomous nationalist legal system for the Jews of Palestine seemed feasible. By the early 1930s, however, the movement lost much of its momentum.\textsuperscript{35} The journals published by the revivers gradually stopped appearing.\textsuperscript{36} Even more damaging to the cause of legal revival was the rapid decline in the use of the Hebrew Courts of Arbitration in the late 1920s and early 1930s. Individual litigants and official Jewish bodies, like the Tel Aviv municipality and the Zionist Executive, refused to litigate in the Hebrew Courts or demanded that these courts rule according to Ottoman and English law instead of the fuzzy notion of Hebrew law.\textsuperscript{37}

When the old institutions of the revival project (the courts, the journals, and the society) gradually stopped functioning, the focus of revival activity shifted to legal education. In 1934, the revivers established a law school, the

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32 For example, in 1930 they marked "nineteen hundred years since the Exile of the Great Sanhedrin," Samuel Eisenstadt, "Yovel ha-Mishpat ha-‘Ivrit" (A Hebrew Law Jubilee), Ha-Mishpat 4 (1930): 41.


35 Eisenstadt, 'Ein Mishpat, xxvi.

36 Ha-Mishpat stopped regular publication in 1929, although irregular issues appeared in 1931 and 1934/5. Ha-Mishpat ha-‘Ivrit was published between 1925/6 and 1927/8, in 1932/3, and, for the last time, in 1936/7.

Tel Aviv School of Law and Economics. One of the major goals of the School of Law and Economics, declared its founders, was to “to train jurists, lawyers and judges who could fulfill the ideals of the nation in the field of legal revival.” During the 1940s, the School slowly expanded, eventually laying the groundwork for the establishment of Tel Aviv University in the 1950s. But in one respect the school was unsuccessful. It did not fulfill its declared goal of serving as “an academic tool for the revival of Hebrew law.” In 1937, the School established a committee for the “codification of Hebrew law,” but this committee achieved nothing. Some professors at the School attempted to use Jewish legal sources in their courses (in addition to teaching Ottoman and British-colonial law), but the use of such sources was not universal and in any event did not contribute to the project of revival.

B. The Second Phase: Resurrection and Failure in 1948

While the 1930s saw the revival movement gradually losing momentum, this trend was reversed in the years 1945–1948 as prospects of the establishment of an independent Jewish state in Palestine grew. In 1945, Avraham Haim Freiman, one of the leading scholars of Jewish law in Mandatory Palestine argued that Jewish law (after its reform and modernization) should become the law of the future Jewish state. In a 1946 article entitled “Concern for Tomorrow,” Haim Cohn, a leading Jewish lawyer who later became an Israeli Supreme Court justice, also said that preparations should be made for the establishment of a Jewish state, and that Jewish law should be revived by composing “a proposal that demonstrates that it is possible to construct a uniform civil law that would continue our ancient traditions, and which will be unique to the Jewish people, reflecting its character and destiny, and yet will match the advancements and developments of all enlightened nations.”

Interest in Jewish law increased as the British hold on Palestine weakened. At the beginning of 1947, the autonomous Jewish court system reappeared in Tel Aviv. Naturally, there was a debate about the law, but such

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38 Eisenstadt, “Ha-Universitah,” 11, 16; CZA, A 212/2 (Tel Aviv University: School of Law and Economics, July 1936); CZA, A212/2, B. Ziv, “Ma Anu Rotsin” (What do We Want?), in Bet ha-Sefer ha-Gavo’ah le-Mishpat ve-Kalkalah (The School of Law and Economics) (1935).

39 CZA, A212/2, Bet ha-Sefer ha-Gavo’ah le-Mishpat ve-Kalkalah: Sidrey Limudim, 1944 (School of Law and Economics: Catalogue 1944), 3; Eisenstadt, “Ha-Universitah,” 86; CZA, A212/2, Prospekt li-Shnat ha-Limudim Tartsah (Catalogue 1937/8), 5–6, 8, 11, 12; CZA, A212/2, Sefer ha-Shanah, 1948 (1948 Yearbook), 21; Menahem Elon, interview by author, New York City, New York, November 1995.


courts should apply. Some said that these courts should apply Jewish law, in order to "return Jewish law to the path of the natural life of the people and the State." Moshe Silberg, another future justice of the Israeli Supreme Court, had already called for the codification of Jewish law in the 1930s. In September 1947 he reiterated this call, writing that the Jewish state would have to adopt Jewish law, after its appropriate codification, as its national law. Another advocate of Jewish legal revival, Paltiel Dinshstein, also demanded that English law be replaced by Jewish law, as the former was not suited to local conditions because "not everything that cold minds on the banks of the Thames envisioned can be utilized on the banks of the Jordan and Yarkon Rivers, under the blazing subtropical sun." It is important to note that the advocates of the Jewish legal revolution realized it could not take place overnight. They did not demand replacing Mandatory law with Jewish law in one fell swoop. More modest (and realistic) proposals were suggested. One such proposal recommended integrating norms taken from Jewish law into new Israeli legislation, declaring that there was a link between Israeli law and Jewish law in the constitution of the new state, or enacting a law that would require Israeli judges to turn to Jewish law in cases of lacunas or conflicts in existing laws.

In the first months of 1948, immediately before Israeli independence, calls by both secular and religious Israelis to use Jewish law as the law of the new state intensified. The demand for the use of Jewish law also had

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43 M. Silberg, "Ha-Mishpat ba-Medinah ha-'Ivrit" (Law in the Jewish State), Haaretz (February 17, 1938–March 14, 1938), reprinted in Z. Teli and M. Hovav, eds., Ba'in ke-Ehad: Asfat Duorim shebe-Hagat iva-Nahalit (Jerusalem: Magnes Press, 1982), 180, 199–203; M. Silberg, "Hidushe shel ha-Mishpat ha-'Ivri" (Renewing Jewish Law), Ha-Boker (September 14, 1947), reprinted in Teli and Hovav, Ba'in ke-Ehad, 202, 204.

44 P. Dikshtein, "Hakhrazah 'al ha-Mishpat ha- 'Ivri" (Declaration on Jewish Law), Ha-Praklit 5 (1948): 3–4.
45 Ron Harris, "Hizdamnuhot Historiyot ve-Habmasot shebe-Hesah ha-Da'at: 'Al Shihuvo shel ha-Mishpat ha-'Ivri be-'Et Hakamat ha-Medinah" (Absent Minded Misses and Historical Opportunities: Jewish Law, Israeli Law and the Establishment of the State of Israel) in Shnei 'Ereuy ha-Gesher: Dat v-Medinah be-Reshit Darkah shel Yisroel, eds. Mordechai Bar-On and Tsvi Tsameret (Jerusalem: Yad Izhak Ben-Zvi Press, 2002), 35. See also P. Dikshtein, "Lo Titkhen Medina 'Ivrit Lelo Mishpat 'Ivri" (A Jewish State is not Possible without Jewish Law), Ha-Praklit 4 (1947): 328, 329–30; Dikshtein, "Hakhrazah 'al ha-Mishpat ha-'Ivri" (In which Dikshtein suggested enacting the following provision: "wherever existing legislation does not address a given issue at all, or wherever there are two possible interpretations or where two laws conflict, the courts and other official bodies must use the norms of Jewish law, adjusted to modern times"). For other expressions of the same idea, see Y. Karp, "Ha-Ma'atsah ha-Mishpatit: Reshit 'Aliot Hakikah" (The Legal Council), in Sefer Uri Yadin: Ma'amarrim le-Zikhou shel Uri Yadin, vol. 2, eds. Aharon Barak and Tania Shpanitz (Tel Aviv: Bursi, 1990), 238, which mentions a proposal by politician Zerah Warhaftig according to which "the decisions of the civil courts would be governed by the laws that were in force on the last day before the end of the British Mandate and in accordance with the principles of the law of the Torah and the rules of justice and equity.

46 A. Karlin, "Le-Hieker ha-Mishpat ha- 'Ivri" (On the Study of Jewish Law), Ha-Praklit 5 (1948): 80; S. M., "Mishpat ha-Shalom ha- 'Ivri: Ma Yihiyv Tafkidav ha-Medinah ha-

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practical consequences. In December 1947 a Legal Council, whose task was to prepare the legal transition from British to Jewish rule, was established. A subcommittee of this Council was created to study the possible uses of Jewish law in the law of the future state.

However, the subcommittee on Jewish law was unable to suggest ways of incorporating Jewish law into Israeli law, partly because its chairman, Avraham Haim Freimann, was killed on his way to the campus of the Hebrew University of Jerusalem. It soon became clear that there would be no "national revolution" in the field of the law, not even the simple declaration that Jewish law should be used to fill in lacunas in existing Mandatory legislation. The first act of legislation after the establishment of the state, the Law and Administration Ordinance of 1948, refrained from explicitly linking the new Israeli legal system with Jewish law. The fading enthusiasm for the use of Jewish law was also reflected in the decisions of the Jewish Bar Association conference in the summer of 1949, which called for "the creation of an advanced legal system" and for "laws ... that would be consistent with the spirit of the revolution that brought about the establishment of the state." Jewish law was not mentioned at all. In September 1949, Paltiel Dikshein complained about a general trend in the new Israeli legislation to ignore Jewish law. As time passed, interest in legal revolution waned and was only interrupted now and then with vague promises to make use of Jewish law. Thus, within approximately a decade after independence it became clear that Israel's legal system would not be based on Jewish law. In an article written in the late 1950s, Haim Cohn, who in pre-state years had been one of the main proponents of the revival of Jewish

"Ivrit?" (What Will Be the Role of Jewish Law in the Jewish State?), Ha-Praklit 5 (1948): 92; M. Silberg, "Ha-Mishpat ha-Medinah ha-Ivrit" (Law in the Jewish State), Ha-Praklit 5 (1948): 102; P. Dikshein, "Atsma'ut Medinit ve-'Atsma'ut Mishpatit" (National and Legal Independence), Ha-Praklit 5 (1948): 107; S. Eisenstadt, "Mishpat ha-Mishpat" (State and Law), Ha-Praklit 5 (1948): 113; M. Bar Ilan, "Hok u-Mishpat bi-Medinatenu" (Legislation and Law in our State), Yavneh 3 (1949), reprinted in Y. Bazaq, ed., Ha-Mishpat ha-Ivrit u-Medinit Yisra'el: Leket Ma'amaram (Jerusalem: Mosad ha-Rav Kuk, 1969), 20.

47 P. Dikshein, "Le-Zekher Dr. Avraham Haim Freimann" (In Memoriam: Dr. Avraham Haim Freimann), Ha-Praklit 5 (1948): 67; Harris, "Hizdannuyot"; Karp, "Ha-Mo'atsah," 238.

48 M. Silberg, "Ha-Mishpat Ba-Medinah ha-Ivrit," Ha-Praklit 5 (1948): 102, 103 (codification of Jewish law would require "half a generation and perhaps even an entire generation").

49 "Hablatot ha-Ve'idah ha-13 shel Hisadrut 'Orchey ha-Din be-Yisra'el" (Decisions of the Thirteenth Convention of the Bar Association in Israel), Ha-Praklit 6 (1949): 125; [Speech of S. Assaf], ibid., 247, 249 ("There are no revolutions in the world of the law," and the process of reviving Jewish law would take "a generation or even generations").

50 P. D., "Le-Darkhey ha-Hakikah bi-Medinatenu" (On Legislation in our State), Ha-Praklit 6 (1949): 144.

51 For example, Uri Yadin, "Ha-Tikkun ha-Mishpati be-Sh'ahah Zo" (Legal Planning Now), Ha-Praklit 7 (1950): 283 (promising that the Justice Ministry plans to draw on foreign and Jewish sources alike in the process of legislation).
law, said that the conservatism of the rabbinical establishment was to be blamed for the fact that "the revival of Jewish law as the law of the state of Israel is no longer on the agenda: This was yesterday's concern." Similarly, an article by Eliezer Malchi, an Israeli lawyer and later judge, written in the early 1960s, reflected the new approach of many Israeli lawyers. Malchi said that "in the previous [i.e., nineteenth] century, there was a tendency to link nationalism and law. Each nation had to have its own legal system. Each legal system tried to differentiate itself as much as possible, so that it would reflect the spirit of the nation. This approach is outdated and is now perceived as artificial. Nowadays, the tendency is to learn from the law of other states."

A final, and much later, attempt to associate Jewish law with Israel's legal system was made in the early 1980s, when the Foundation of Law Act was passed. This act officially severed the connection between Israeli and English law, and instructed judges that in cases in which no answer could be found in Israeli legislation or case law, they should decide the case in accordance with the "principles of freedom, justice, equity, and peace of Israel's Heritage." While some observers had high expectations for the impact of this act, a number of Supreme Court decisions from the 1980s and 1990s made certain that it would have no real influence on the shape of Israeli law.

III. The Reasons for the Failure

A. Practical Explanations

One set of explanations for the failure of the "Jewish legal revolution" in 1948 is practical in nature. First, it is obvious that legal reform was simply not a major issue on the agenda of the first Israelis given the importance of security and economic concerns. With the threats facing Israel in its first years, even those lawyers and statesmen who supported legal reform were...

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52 H. Cohn, "De'agah shel Yom Etmol" (A Concern of Yesterday), in Haim Cohn: Mivhar Ktavim, eds. A. Barak and R. Gavison (Tel Aviv: Bursi, 1992), 25, 31–32, 40; A. Radzyner and S. Friedman, "Ha-Mehokek." From time to time, isolated calls for the revival of Jewish law were reiterated. See S. Eisenstadt, "Kodiffkatsyah Hadashah shel Mishpatenu ha-Le'umi" (A New Codification of our National Law), Mishpat ve-Kaikal 5 (1958/9): 162.


54 34 Law of the State of Israel 181 (1980).

55 See, e.g., H.C. 1635/90, Jerzewska v. Rosh ha-Memshalah, PD 45(1), 749. See also Menachem Mautner, Law and the Culture of Israel (Oxford: Oxford University Press, 2011), 41–44.

56 For a list of reasons why "the first Israelis" were uninterested in the law in general and in replacing the Mandatory legal heritage in particular, see, for example, Alfred Witkon, "Ha-Mishpat be-Krets Mitpatah" (Law in a Developing Country), in Mishpat ve-Shiput: Kovets Ma'amirim ve-Reshimot, eds. Aharon Barak et al. (Jerusalem: Schocken, 1988), 39, 43–48.

57 Hart
58 Likh
59 Gala
60 Ken
hard pressed to dedicate much attention to it. Second, Jewish law itself is problematic. It is an ancient and religious legal system whose norms are not easily amenable to incorporation in the law of a modern state. Its use in post-1948 Israel would have required the investment of substantial time and effort.

Third, there were institutional barriers to legal reform. In a study of the legal transition from the Mandatory era to Israeli independence, historian Ron Harris has argued that the fact that Jewish law was not incorporated into the legal system of Israel after its establishment was not the result of any ideological resistance to Jewish law but mainly the result of chance and poor institutional design; namely, the Legal Council charged with preparing the legal system of the state-in-the-making and (among other things) deciding the role of Jewish law in the future Jewish state included too many members and had too many subcommittees. Some of the subcommittees could not convene because of the Arab blockade of Jewish Jerusalem in the early months of the 1948 war. In addition, legal reform was given low priority by major politicians such as David Ben Gurion. These factors, rather than any ideological conflicts between secular and religious Jews, led to the preservation of Mandatory law and prevented any linkage between Jewish law, or a modernized version of it, and the Israeli legal system that came into being in May 1948.57

Finally, the absence of a Jewish legal revolution in Israel in 1948 was not necessarily only the result of Israel’s specific conditions. It may also have been due to the very nature of law. Even if the practical considerations listed above had not been factors, it would not be realistic to expect Israel to transform its legal system overnight. Legal revolutions are not common and many new countries, even those born of war with foreign occupiers, tend to preserve the occupier’s legal system after gaining independence. Law is inherently conservative. Changes made too rapidly undermine the political and economic certainty that the legal system seeks to guarantee. The conservatism of law is especially evident in the common-law world, where law, by definition, is based on reverence for precedents. America is a case in point. For many years after gaining independence, the United States maintained close links to English law. Another common-law legal system, whose history is even closer in some senses to that of Israel, is India.58 After Indian independence in 1947, there were nationalist calls for abolishing the legal system of British India and replacing it with a uniquely “Indian” legal system. But in India, too, nationalist legal aspirations were not fulfilled.59

While one cannot ignore these explanations, it would be inaccurate to say that legal revolutions never occur. There are examples of such revolutions. One such example is late nineteenth century Japan.60 A legal revolu-
tion also took place in Turkey in the early 1920s, after the collapse of the Ottoman Empire, and in Egypt in the early twentieth century. In addition, one must note that while it would have been unrealistic to expect Israel to change its legal system overnight, it would have been quite easy and costless to enact a less revolutionary provision requiring judges to use Jewish law in cases of lacunas or conflicts in existing Mandatory legislation. However, even this did not occur. Practical concerns, thus, provide only partial explanations for the failure of Israel in 1948 to link its new legal system to Jewish law.

B. Jewish Law as a Threat to the Professional Monopoly of Lawyers

In a book on the autonomous Jewish court system of Mandatory Palestine, sociologist Ronen Shamir argues that one reason for the failure of these courts in the early 1930s was the opposition of the Jewish legal profession. Jewish lawyers in Palestine made their living by mediating between Jewish litigants and the Mandatory legal system. Their monopoly as mediators was based on their knowledge of the English language and their familiarity with English law. These lawyers, therefore, had an interest in preserving the Mandatory legal system and not the autonomous Jewish system that flourished in the 1920s. The autonomous system had used the Hebrew language and was both less formal and less professional than the Mandatory system. For this reason, it threatened the livelihood of Jewish lawyers, and these lawyers did their best to weaken the Jewish courts and to channel their clients toward the Mandatory system. Shamir does not discuss the debates about Jewish law in the 1940s and 1950s, but an analogous argument can be made in discussing the preservation of the Mandatory system in the years following the establishment of Israel. Many Israeli lawyers in the 1940s and 1950s had an interest in preserving the Mandatory system because they were intimately familiar with it and because it was inherently less accessible to laymen than a system in which Jewish law had a major role.

The legal literature published during the first years after statehood contains very few statements in defense of the legal status quo and of English law, perhaps because memories of the bitter conflict between the Jews and the British in late 1940s Palestine were still very much alive, and few lawyers dared to identify themselves with the law of “perfidious Albion.” However, we do find a few explicit statements in which lawyers openly support


the retention of Mandatory law and reject the use of Jewish law in the legal system of Israel.63 One such example is in a 1950 article by Eliezer Malchi in which he described the demands for the replacement of the Mandatory penal code with a code based on Jewish law as “a most dangerous thing, [which] must be left to later generations.”64 Another lawyer, Aharon Ben Shemesh, wrote an article in which he advocated the preservation of Ottoman law, which Israelis inherited from the Mandatory era. Ben Shemesh argued that the basic principles of this law were close to those of Jewish law, and this made the need for the use of Jewish law redundant.65

One can also find some observers who expressly linked the preservation of the legal status quo to the interests of the professional guild. Gad Tedeschi, a law professor who taught at the Hebrew University, explained that abandoning Mandatory law would not inconvenience the general population, which in any case was not well versed in that law. It would only hurt the lawyers’ guild.66 In this respect, Israel’s legal history is not unique. When India gained its independence, the vested interest of local lawyers in preserving the existing, anglicized, legal system was also one of the main reasons for maintaining the system.67

While the interests of lawyers were certainly an important factor in preventing a “Jewish legal revolution” in 1948, this alone cannot explain the preservation of the legal status quo. First, the legal profession during the Mandate and in the first decade of statehood was hardly monolithic. Not all

63 See Binyamin Cohen, “Be-She’ah ha-Formalism” (In Praise of Formalism), Ha-Praklit 7 (1950): 324, in which Cohen criticizes the anti-formalistic legal approach, which is the result of “the waves of the national revolution that gave birth to the State of Israel.” And compare: K. Vardi, “Ruhot Hadashot be-Veyt ha-Mishpat” (A New Approach in the Courts), Ha-Praklit 7 (1950): 324. See also Yehuda Frankel, “Al Mishpat ve-Sidrey Mishpat ba-Medinah” (On Law and Procedure in the State), Ha-Praklit 8 (1951/52): 212, in which he decryes “the artificial imposition of this or that [foreign] legal system” on Mandatory law, and the “reversion to ancient Jewish law, only out of the desire to create an independent national law.”

64 E. Malchi, “Al Kodeks Pilihi Hadash (Li-Ve’ayat Tikun ha-Mishpat ha-Pili ha-Arets)” (On a New Criminal Code), Ha-Praklit 7 (1950): 352, 354.

65 A. Ben-Shemesh, “Ekronot Mishpatiyim Domim ba-Mishpat ha-Ivri u-Vehok ha-Karka’ot ha-Otoman” (5858) (Similar Legal Principles in Jewish Law and in the Ottoman Land Law), Ha-Praklit 6 (1950): 141, 144.

66 Gad Tedeschi, “Al Be’ayot Klitah ve-Al Mediniyutenu ha-Mishpatit” (On Problems of Reception and on our Legal Policy), Ha-Praklit 16 (1960): 348, 379. Some observers also argued that the desire of the legal profession to preserve the status quo matched that of the new Israeli administration. “Our government,” said one observer in 1949, “feels much more comfortable with the existing colonial system of laws [which has no constitution and] hardly any provisions that define basic human and civil rights,” because this way, “the authorities know that they are powerful and they use this power to advance their goals.” Shimon Gratsch, “Be’ayot Konstitutsioniyot” (Constitutional Problems), Ha-Praklit 6 (1949): 130, 140. See also Frankel, “Al Mishpat ve-Sidrey,” 216, in which he argues that the Ministry of Justice should focus on passing administrative legislation that would enable increased regulation of the “young administration” of the state, instead of busy itself with the drafting of new civil laws that would replace the existing ones but which are not urgently needed at this time.

67 Galanter, Law and Society in Modern India, 46.
lawyers were well versed in English law. Many Israeli lawyers were immigrants from Central and Eastern Europe with little knowledge of the English language or of English law. Indeed, most of the key players in Israel’s legal system were of German descent, and many of these key players had better knowledge of German than of English law. In addition, many of the leaders of the Jewish bar were deeply committed to the Jewish legal revival project. In particular, Faltiel Dikshstein, editor of the journal of the Jewish Bar Association, was one of the major advocates of the Jewish legal revival project since its inception.

Furthermore, the lawyers were not alone in deciding the outcome of legal reform. In this respect, a comparison between post-independence Israel and India is illuminating. One reason for the failure to revive Hindu law in post-1947 India was that the strong guild of Indian lawyers, whose interest was to preserve Anglo-Indian law, did not face any serious opposition. There was no organized group that stood to gain from the revival of Hindu law nor was there any educational institution that could have produced lawyers with an interest in such a revival. The situation in Israel was different. Both the Hebrew University of Jerusalem and the Tel Aviv School of Law and Economics, the two Jewish higher-education institutes in Palestine where law was taught, were rhetorically (and to some extent practically) committed to the revival of Jewish law. There were also political parties that expressed an interest in such a revival. This is reflected, for example, in the comments made by David Zvi Pinkas, a National-Religious party member of Israel’s parliament (Knesset), during the drafting sessions of the abortive Israeli constitution in 1950, who declared:

_We miss Jewish law. We are living—substantially and procedurally—according to a collection of laws that have one thing in common: they are not Jewish, they did not emanate from the soul of this people... We, with our ancient heritage of the loftiest concepts of law and justice, must not drink from foreign streams, from poorly dug wells... and it is inconceivable that we, in our own state, should imitate other nations and their laws._

68 For a similar (albeit not identical) argument, see P. Dikshtein, “Atma‘ut Mishpatit” (Legal Independence), _Ha-Praklit_ 5 (1948): 107. He depicts English law as “lovingly” embraced by only “a thin layer of the population... almost all of the Diaspora Jews now in Palestine were raised in other legal systems... Jews from Eastern and Central Europe and from Asia alike, all feel that the English law contains peculiar and unusual attributes with which they cannot agree.” On the influence of German-Jewish lawyers, see Fania Oz-Salzberger and Eli Salzberger, “The Secret German Sources of the Israeli Supreme Court,” _Israel Studies_ 3 (1998): 159–92.

69 Galanter, _Law and Society in Modern India_, 46.


71 _Diureg Ha-Knesset_ 5 (May 2, 1950): 1262. On the ambivalent attitude of observant Jews to the idea of legal revival, see also Radzyner, “Ha-Mishpat ha-‘Ivri beyn ‘Le‘umi‘ le-‘Dati‘.”
In conclusion, the fact that many lawyers opposed linking Israeli law to Jewish law was an important factor in preventing such a linkage. However, in order to understand why these lawyers succeeded, an additional, cultural set of explanations must be added. The next section shows that this success was partly due to the fact that the lawyers’ arguments against legal change resonated with wider cultural perceptions of law and society prevalent among lay Israelis at the time.

C. Why Did the Professional Opposition Succeed? The Role of Culture

Cultural images of Jewish law, of law generally and, most importantly, of Israeli society, were major factors that inhibited the linkage between Jewish and Israeli law. Unlike the Hebrew language, which could easily be separated from religion and, thus, could be adopted willingly by secular Zionists, Jewish law was too strongly tied to religion, and was, therefore, perceived by Zionists as antithetical to their ideology. Despite attempts to secularize Jewish law in the early twentieth century, most Israelis identified (and still identify) Jewish law with religion and with Jewish life in the Diaspora. Zionism was, in essence, a secular movement that attempted to extricate the Jews from the ghetto of religion. Lawyers opposed to the revival of Jewish law manipulated this relationship between Jewish law and the Jewish Diaspora when they described Jewish law as an outdated, petrified religious system, ill suited to life in a modern sovereign secular state.  

Another cultural image that may have played a role in the reluctance to effect any transformation of the Mandatory legal system was an image of the nature of law. Israeli culture at the time was dominated by the socialist ideology of the ruling MAPAI party, and this ideology was mainly concerned with traditional Zionist goals such as creating Jewish settlements on Israel’s frontiers. Law was considered by many Israelis as a bourgeois pursuit that suited Diaspora Jews. As one contemporary observer put it, law was a matter that simply could not “engender enthusiasm in the hearts of idealists.” Therefore, the Mandatory heritage was maintained, in part, because the idea of devoting energy to legal matters simply did not appeal to the first generation of Israelis.

In addition to their perception of law, another important factor inhibiting legal change was the cultural image that Israelis had of their own society. In the 1950s, massive immigration from Europe and the Middle East dramatically changed the demographics of Israel. Many observers described the new immigrants as a “desert generation” and believed that a new Israeli culture and identity would crystallize only once this generation was absorbed by Israeli society. The notion of a “desert generation” carried

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74 For a general discussion, see, for example, Segev, 1949: The First Israelis.
both positive and negative connotations. Sometimes it simply meant that no long-term legal change could take place until all the members of the new Israeli society had arrived in Israel. Sometimes the image was more negative—no long-term legal change could take place because the first generation of Israelis was not fit to be governed by new laws.

One well-known use of the “desert generation” argument appeared in the 1948–1950 debate regarding the adoption of an Israeli constitution. The Israeli Declaration of Independence contemplated the election of a constitutive assembly, which would adopt a constitution, but once this assembly—the first Knesset—was elected, it took the position that “the time [for adopting a constitution] has not yet arrived, because we are still busy laying down the material and human foundations of the state.”75 Thus, for example, Knesset Member David Bar-Rav-Hai of the ruling MAPAI party, argued:

A constitution is created ... not at the beginning of a revolution, but at its end ... whereas we ... are not at the end of our revolution, but at its beginning, because our revolution is not the establishment of the state ... [but] the gathering of the exiles. We are talking about this generation, the generation sitting with us here and in the transit camps of immigrants who have not yet put down roots in this country ... [and] about those who will be coming here in the very near future.76

Since not all the immigrants had arrived, there would be no point in enacting a constitution that did not take into account their views. This position eventually led to the famous “Harari Resolution” of June 1950, according to which Israel was to adopt its constitution one chapter at a time; each chapter would constitute a “basic law,” and at the end of the process, all these basic laws would be consolidated into a single constitution (which even today, more than sixty years later, has failed to materialize).77

The “desert generation” argument was not used only in constitutional debates. It also appeared in general discussions about the retention of Mandatory legal system. Here the argument was used by both opponents and proponents of the legal status-quo. Opponents of Mandatory law argued that its replacement would facilitate the creation of a new Israeli society and a new Israeli identity. Proponents of Mandatory law, on the other hand, explained that while a new Israeli identity was not fully formed,

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75 Diurey Ha-Knesset 3 (November 21, 1949): 128 (David Ben Gurion).
there was no point in replacing the Ottoman-English legal heritage of the Mandate with a new legal system linked in some way to Jewish law.

The "Desert Generation" Argument as a Reason for Replacing the Mandatory Legal Heritage

Some observers, most notably Israeli Supreme Court Justice Alfred Witkon, called for replacing Mandatory norms, especially those that originated in Ottoman law, with new Israeli norms that would facilitate the absorption of immigrants and speed up the creation of a homogeneous Israeli culture and society. Witkon thus viewed the law as an important tool in achieving a "melting pot" Israeli society. In 1962, he wrote an article in which he said that in a society that was "not homogeneous in terms of its cultural level" the law should serve as "an active educational tool" used to "modernize" the population. Witkon conceded that the values of those groups that opposed "modern" law in Israel (he was apparently referring to Orthodox Jews and to Middle Eastern immigrants) were "not all negative," and, furthermore, were deeply rooted in their "customs, traditions and ways of life." However, he continued:

We aim for progress. We have seen firsthand, throughout the years of the Mandate, an administration that failed to rejuvenate the face of society and its legal system. It preserved the image of a backward society, the barrenness of the land and the ignorance of the people, the rule of tribal culture and the corruption of the clergy, as though these were sacred values that must not be touched. Must we follow in these footsteps?

Witkon answered this rhetorical question by saying that it was obvious that "law should be on the side of progress." Witkon later expressed his chagrin at the fact that "fourteen years have passed since statehood, and we have not yet had a fundamental reform of the laws of inheritance and personal status; Ottoman laws such as the Mejelle and the land law still prevail, imposing difficulties on the daily lives of Israel's citizens." The political discourse and case law of the late 1950s contained additional statements expressing the same desire to use law as a tool for the homogenization of Israeli society.

79 Ibid., 51–54. See also D. Ben Gurion, "Dvarim ba-vehidah ha-13 shel Histadrut 'Orkhey ha-Din be-Yisrael', Tel Aviv June 5–6 1949," Ha-Praklit 9 (1949): 96–97. For a critique similar to Witkon's regarding the legal conservatism of the Mandatory government, see M. Silberg, "Ha-Mishpat ba-Medinah ba-Ivrit" (Law in the Jewish State) Ha-Praklit 5 (1948): 102, 103, in which Silberg criticized the "constant fear of the [Mandatory] legislator that he would trespass the traditional boundaries of the sacred desert."
80 See, for example, Diurey ha-Knesset 4 (February 7, 1950): 734, in which Yisrael Bar Yehuda states: "We are living in a country of unique circumstances, of a gathering of the exiles, of people from many ethnic origins from all parts of the world, with different
The “Desert Generation” Argument as a Reason for Preserving the Mandatory Legal Heritage

The opposing school of thought, which supported preservation of the Mandatory legal heritage, also made use of the “desert generation” argument. As long as Israeli society was heterogeneous, declared lawyers who opposed legal change, the Ottoman-English law that Israel had inherited from the British must not be replaced.81 A 1950 article by Eliezer Malchi serves as a good example of the use of the argument in this way.82 Malchi rejected demands for the replacement of

traditions and ... with various unwritten constitutions ... and we want to create a single nation from this admixture. To do this, we must take all possible actions ... to live together ... and this tendency must also be reflected in the law—by education through a single legal system for everyone.” It is important to note that, perhaps contrary to popular belief, the case law of the 1950s does not include many statements reflecting the “melting pot” ideology. For a rare (and now famous) example of the melting pot ideology in the case law of the 1960s, see Criminal Appeal 172/62 Garome v. Attorney General, PD 17, 925 and the discussion of this case in Yoram Shachar, “Ha-Adam ha-Savir ha-Mishpat ha-Pilli” (The Reasonable Person in Criminal Law), Ha-Praklit 39 (1989): 78-107; Menachen Mautner, “Sechel Yashar, Legitimatsyah, Kiyah: ’Al Shoflim ke-Mesaprey Sipurim” (Common Sense, Legitimacy and Coercion: On Judges as Story Tellers), Phim 7 (1997): 61.

Another use of the “desert generation” argument in demands for legal change was the call to revise Mandatory law so it would better fit the heterogeneity of Israeli society in this “desert generation” phase of its existence. The argument was that Mandatory law (or rather, the English part of it) was designed for a much more homogeneous society than Israel in the 1950s. For example, in a 1954 court decision, Justice Silberg called upon the Court not to embrace the standard interpretation of the concept of public mischief in English law because “we are living in an era of gathering of the exiles.... One day, the exiles will become one, and in the melting pot of the state, there shall arise a single nation with a single national culture that will contain a comprehensive set of moral and cultural values shared as much as possible by all the individuals comprising this nation.” However, Silberg added, at present, “we have ... a situation in which there is no uniformity among the various ethnic layers of the population, which differ from one another in their opinions, traditions, lifestyles, world views and moral and cultural values.” Therefore, Silberg believed the section dealing with “public harm” in the criminal code should be abolished or at least given a narrow interpretation, because as long as the culture was not homogeneous, there would be no uniform interpretation as to what constitutes such harm. See Criminal Appeal 53/54, Eshed v. Attorney General, PD 8, pp. 785, 820-21. Interestingly, the first Chief Justice of the Supreme Court, Moshe Smaira, also supported the notion of a heterogeneous body of Israeli law (although not as a temporary measure). In the summer of 1949 he spoke of a juridical “gathering of the exiles” in which “we will draw, as much as possible, on our sources,” but also make use of “a collection of the excellent systems we have found in exile,” in order to create a mixed system comprised of the best of all these systems. See Moshe Smaira, “Dvarim ba-Ve’ida ha-13 shel Histadrut ‘Orkhey ha-Din be-Yisra’el,” Ha-Praklit 6 (1949): 102, 103.

81 Ironically, this argument echoed similar rhetoric used by some of the British judges toward the end of the Mandate to explain why English norms should not be imported into Palestine. These judges held that “an undeveloped land needs an undeveloped law.” See Witkon, “Ha-Mishpat be-Erets Mitpatahat,” 40. See also Lishkovski, Law and Identity, 65.

82 It was during this time that the Knesset was contemplating the adoption of a constitution and decided that “the time was not ripe” for a comprehensive constitution. It is therefore possible that Malchi’s arguments were inspired by the Knesset debates.
the Mandatory penal code (which was based on English law) with an "original" penal code that would draw on the principles of Jewish law to the greatest extent possible. Malchi argued that the Mandatory penal code should be preserved, explaining that, "the character of Israeli society has still not crystallized, and it is undergoing a process that could take an entire generation, until a new generation will replace the hybrid desert generation." Instead of a legal revolution, Malchi proposed a "conservative" approach of preserving the status quo, because "the time has not yet come to repair the world in the kingdom of God." 

The conservative "desert generation" argument, supporting the legal status quo, was used with respect to the Ottoman (as well as the English) part of Mandatory law. For example, in a lecture at the annual conference of the Israeli Bar Association in 1954, one of the speakers, using somewhat bizarre imagery, said that the civil (Ottoman) law that Israel had inherited from the Mandatory era—the Mejelle—was not "an attractive bride that we will want to embrace in the long run," but "we cannot, of course, push her over the cliff all at once, as if she were a scapegoat." Instead, he said, we can only "dismember her one piece at a time ... the time has not yet come to create the perfect civil code for Israel, since as a nation we are a gathering of exiles ... the moral structure of this people and the face of its culture are still being molded ... the common national identity that can serve as substantive background for a comprehensive code has not yet been forged." 

Echoes of the "desert generation" rationale also appeared in the 1950s debate about abolishing the Ottoman rules that allowed the imprisonment of debtors for civil debt. As historian Ron Harris has noted, one major argument heard during the Knesset debate concerning these rules was that Ottoman norms that allowed the imprisonment of debtors could not be repealed because Israeli society was not yet sufficiently law-abiding. For example, in a Knesset session in 1958, MK Yochanan Bader said that "even now many Israelis still follow oriental traditions, and many of their assets are gold or other objects that can be hidden in their socks." He warned that "incarceration of debtors must therefore not be abolished, because given the nature of Israel and its inhabitants, other means of collecting civil debt

84 Malchi, "Al Kodeks," 358. Malchi, ibid., 354, 358, further argued that Jewish [penal] law had been "frozen for two thousand years," and that the problems of modernizing Jewish law "were too weighty for our young and inexperienced shoulders." It is, of course, possible that the real reason for his opposition to any legal change was that he was an English-educated lawyer. See also E. Malchi, "Atid ha-Mishpat ha-Angli bi-Medinat Yisra‘el" (The Future of English Law in the State of Israel), Mishpat ve-Kalkalah 5 (1958/59): 47, 49, where Malchi speaks about the State of Israel as being "in an age of transition."

85 Assaf Goldberg, "Mishpat, Am ve-Lashon" (Law, Nation, and Language), Ha-Praklit 10 (1953/54): 139, 146-47. See also Tamar Hoffman, ""Tsinor Yevu ha-Din ha-Angli la-Arets—Sinnan 46 li-Dvar ha-Melekh" (A Conduit for Importing English Law to Israel—Article 46 of the King’s Order in Council), Ha-Praklit 12 (1955/56): 50.
are impracticable." Bader's words implied that Mandatory law (specifically the Ottoman norms that dealt with debt) should not be replaced, not only because the homogeneous Israeli culture that would justify legal change had not yet formed, but also because the Ottoman heritage was more suited to the current circumstances of Israeli society, many members of which had not yet been fully westernized.

Another variant of the conservative approach, which favored the preservation of the legal status quo in this transitory, "desert generation," era, was the argument that the primary requirement of the legal system during this time of the "ingathering of exiles" was to educate the immigrants to uphold the law. By inference, replacing the legal system was not a top priority. For example, in a 1951 speech, Justice Minister Dov Yosef stated:

[W]e are truly a gathering of the exiles. Hundreds of thousands of Jews have come here from countries in which the law was not rooted deeply enough. In Israel, we want the same attitude toward law and order as seen in developed, enlightened countries. We have the difficult role of absorbing the immigrants spiritually and assimilating them into our midst, so the entire people will reach our level rather than the level of Yemen, Iraq, or North Africa.

His emphasis on the need to teach the new immigrants to comply with the law had the effect of weakening the motivation to work toward comprehensive legal reform, since such reform would have increased legal uncertainty and, thus, indirectly would have led to increased non-compliance with the law. As we saw, the argument could cut both ways, as an argument for legal change as well as an argument for maintaining the status quo. However, more people used it to justify legal conservatism, perhaps because the

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87 "Min ha-Na'aseh be-Histadrut 'Orkhey ha-Din: ha-Ve'ida ha-Artsit ha-14" (Events of the Bar Association: The Fourteenth National Convention), Ha-Praklit 8.3 (1951/52): 5-8.

88 This was especially evident in discussions of tax compliance. Officials often explained that tax evasion was prevalent in Israel because of the heterogeneity of the population. See Assaf Likhovski, "Training in Citizenship: Tax Compliance and Modernity," Law and Social Inquiry 32 (2007): 686. There are many other examples of the great interest expressed in the concept of the rule of law in the legal and political discourse of the time. See, for example, Divrey ha-Knesset 4 (February 7, 1950): 734, in which Yisrael Bar Yehuda says: "The Jewish people in the Diaspora, because it was persecuted and had no rights, has acquired a characteristic that must be uprooted immediately—the ability to 'handle' the law.... [W]e must educate the people and the authorities to [comply] with our law." See also Criminal Appeal 226/54 Alafi v. Attorney General, PD 9 1345 (a case of an official who took bribes, in which it was noted that "with dismay, we see the devastating influence of those with whom [the official] cooperated.... [T]hese new immigrants who in their countries of origin were not accustomed to civil rights and duties. And this was the civic education philosophy that the appellants and others of their kind were to impart: defraud, cheat, lie, bribe, and use any unlawful means you can to evade your duties as an individual toward the state.")
idea of using law as an educational tool and a tool for social change was definitely a minority position in Israel of the 1950s where formalism and judicial passivity were the dominant legal ideology.  

Conclusion

When Israel was established in 1948, many observers expected that the country would replace the Mandatory legal heritage with a new legal system linked in some way to Jewish law. This expected change did not occur. Practical reasons were certainly a factor in the retention of the Mandatory legal heritage. However, another important factor was the opposition of many Jewish lawyers to Jewish law. The professional opponents of Jewish law saw it as a threat to their monopoly on access to the legal system. In their battle to preserve the Mandatory legal heritage, these lawyers made successful use of cultural images prevalent in Israeli society at the time in order to prevent legal change.

In particular, they made use of several prominent cultural images. First, the image of Jewish law as a religious system unfit for a secular Zionist society. Second, an image of law generally as a bourgeois pursuit unfit for the pioneering, idealistic, socialist society that Israel imagined itself to be in the 1950s. Finally, an image of Israeli society generally and the new immigrants that arrived after 1948 in particular, as a “desert generation”—an ingathering of exiles with no common homogeneous basis which would enable the creation of a new legal system based on Jewish law. As long as the process of the formation of a new Israeli society was incomplete, some lawyers such as Eliezer Malchi could argue that “the time has not yet come to repair the world in the kingdom of God,” and to link Israeli and Jewish law.

The story told here may contain a general lesson. Lawyers are not totally free to determine the identity of the legal system. While their professional interests play an important role in shaping the law, lay actors such as politicians, intellectuals, and even ordinary citizens also influence the shape of the legal system. In order to achieve their desired goals; lawyers must justify their position in ways that resonate with wider cultural perceptions about law and society. Israeli lawyers in the 1950s succeeded in preventing a “Jewish legal revolution” because they made use of widely held cultural images that supported the retention of the legal status quo. Once the constitutional moment of 1948 was gone and the legal revolution thwarted, inertia guaranteed that Jewish law would have only marginal influence on Israeli law.

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89 See generally Mautner, Law and the Culture of Israel, 75–90.