Kinship, Law, and Politics

Why are we so concerned with belonging? In what ways does our belonging constitute our identity? Is belonging a universal concept or a culturally dependent value? How does belonging situate and motivate us?

Joseph E. David grapples with these questions through a genealogical analysis of ideas and concepts of belonging. His book transports readers to crucial historical moments in which perceptions of belonging have been formed, transformed, or dismantled.

The cases presented here focus on the pivotal role played by belonging in kinship, law, and political order, stretching across cultural and religious contexts from eleventh-century Mediterranean religious legal debates to twentieth-century statist liberalism in Western societies.

With his thorough inquiry into diverse discourses of belonging, David pushes past the politics of belonging and forces us to acknowledge just how wide-ranging and fluid notions of belonging can be.

Joseph E. David is Professor of Law at Sapir Academic College, Israel, and a visiting professor at the Program in Judaic Studies and Law School at the University of Yale. His research focuses on Jewish studies, law and religion, legal history, and comparative jurisprudence, on which he has published extensively.

The Law in Context Series

Editors: William Twining (University College London),
Maksymilian Del Mar (Queen Mary, University of London) and
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To my beloved Noga

Contents

Preface

The ambivalence of feeling at home in some respects yet feeling displaced in other ways speaks to me very personally. The fact that belonging has become a serious concern perhaps is a unique feature of these highly mobile and globalized times. The extent to which our belonging is a matter of choice or fate, its impact on our identity and well-being, and the consequences of being rejected from certain realms of belonging are in our world existential questions for both individuals and society. The studies in this volume probe several aspects of belonging in a voyage traversing historical moments and intellectual crossroads that reflect means of intellectual grappling and turning points in the history of the idea of belonging and its meanings.

I consider myself privileged to have a wonderful and supportive family, which not only gives me my most meaningful belonging but also is the heart and the powerhouse of my intellectual energy. Through the years, my different experiences of affiliations and belongings have kept me contemplating what belonging is. I found myself intensively busy in my mind and writings with the complex relations between the feeling of belonging and its conceptualization, and this troubling is a fundamental backdrop to the chapters that follow: the search for insights that adequately capture the emotional experiences of belonging and the quest to decipher the circularity that exists between our emotional experiences and our conceptualizations, the extent to which our feelings of intimacy and closeness are products of our ideas and conceptions of belonging, and conversely, the extent to which our emotions dictate and shape our understanding of reality.

Through my scholarly engagement with the relationships between law, philosophy, and religion in non-Western and premodern contexts, I became acquainted with the turning point in Karaite law where the catenary doctrine of incest laws was refuted and rejected. This was an unambiguous change in a lively legal tradition that immediately caught my attention and triggered my instincts as a legal historian who seeks to comprehend legal developments in theoretical terms. The fact that such a legal change had hardly been studied surprised me then – as it still puzzles me today – and piqued my curiosity. My collaborative work with Martin Goodman at the University of Oxford some years ago gave me occasion to closely consult several Bodleian medieval

manuscripts with relevance to this legal change, which launched my inquiries into the topic. The combination of my jurisprudential sensibilities, improved access to Karaite writings, and expanding knowledge of the Karaites' Mua'tazili background drove me to examine the opinions and stances that had been expressed about this legal change. I found myself walking along a pathway that had been paved by Isaak Dov Ber Markon and Leon Nemoy, leading twentieth-century scholars of medieval Karaism who both recognized the importance of the change. Markon published the central work of Yeshu'ah ben Yehudah, the dominant proponent of the change, with the intention to follow them with the other relevant works, while Nemoy preferred to understand the change against the social conditions of Karaite communities of the time.

I arrived at the understanding that the importance of this transition went far beyond the particular history of Karaism. It is an outstanding test case for theories of legal change and a perfect subject for the law-in-context method and integrative study of legal history and legal theory. Its importance for general legal studies lies in its being a counterexample to the legal transplant thesis: a legal change that emerged from a deep revision of the conceptual vocabulary of belonging within the Karaite scholarly world, with no external impact or import. Further, unlike similar reforms, such as the Fourth Lateran Council of 1215, this legal change was not an expression of an established controlling power, but an outcome of scholastic activities that appealed to deliberative prudence and argumentative capacities.

Another unique aspect of this watershed has to do with the distinction between a radical legal change and a silenced one, where radicality and silence are not measures of a change but modes of announcing and presenting it. At times, a silenced legal change may be a revolution that is camouflaged by traditionalist language. Such change is typical of those who formally comply with tradition and are committed to acting within traditional contours. A distinct example of a silenced fundamental change is Maimonides's insertion of Aristotelian philosophy into Jewish theology and law, with which he claimed to reveal the original meaning of Scripture in continuation of the Talmudic tradition. Contrarily, the Karaites were much more deliberative, and their abolition of the catenary theory thus was accompanied by a declaration of the erroneous understandings of its advocates.

My realization that belonging to the law is not a trivial matter resulted from prolonged contemplation of the nature of Jewish law in comparison with other types of law, such as Islamic law and the law of the modern state. This comparison demonstrates an intriguing interrelation between law and religion, in that belonging to the law is both a jurisprudential and a theological concept. The studies presented here on this theme are revisionist readings of two commonplace perceptions: the phenomenology of Judaism as a law-based religion and the nature of the jurisdiction of Jewish law.

The identification of Judaism, like Islam, as a law-based religion is a prevalent convention that impacts on a broad range of areas. As Rev.

Rowan Williams famously exemplified in his 2008 discussion, "Civil and Religious Law in England: A Religious Perspective," the phenomenology of law-based religions is an utmost challenge to multicultural democracies that insist on the rule of law and equality before the law. This phenomenology is a major obstacle for the Western ideal of the separation of church and state in societies that are dominated by law-based religions. The identification of Judaism as a law-based religion also plays a central role in interfaith discourses that emphasize the affinities and similarities between Judaism and Islam as sister religions that peacefully coexisted in the past. Invited by the German Association of Comparative Law to give remarks about "Nomocentric Religions and Legal Pluralism" in September 2015, I inquired into how consistent this phenomenology was as an internal perspective on Judaism or an external projection that fulfilled social and ideological functions. Tracing its origins to early modernity, I developed a revisionist perspective that has in the meantime been endorsed and argued by several other scholars with regard to both Judaism and Islam.

The question of belonging to the law also troubled me in a practical legal sense, with regard to the manner in which law is perceived to communicate with its addressees. The commonplace rabbinic view has since the time of the Second Temple been that jurisdiction in Jewish law is personal, which is consistent with the idea that it remains valid and applicable in exilic circumstances. Yet after years of studying and teaching legal theory and medieval legal traditions, I realized that the approach to this question espoused by the great medieval thinker and jurist Nahmanides did not necessarily dovetail with such an assumption. Nahmanides was traditionally portrayed as a mainstream rabbinic authority and a pioneering figure in the emergence of the cabala in Gerona and its integration with the halakhah. However, new readings of his works in view of the legal reality and rhetoric of his time led me to view his legal theology as an innovative and even radical suggestion to view Jewish law as based on territorial rather than personal jurisdiction.

My attentiveness to the political meaning of the family in liberal contexts emerged from my exchanges with the late political philosopher Yaron Ezrahi during the time we jointly taught a research seminar on theo-political thought. My dialogues with Yaron helped me better understand the deep interplays between the political and domestic orders and between relations of belonging in the familial context and in the political arena. Outlining the landmarks of the analogy between the familial and the political led me to acknowledge the inner tensions within liberal worldviews regarding the political meaning of private families and to reflect on how liberal society grapples with this challenge.

The above vagrancy between topics of belonging reflects my intellectual journeys in recent years, and I am grateful to the many persons and institutions that have enabled and supported these voyages. I am thankful to the libraries that allowed me to examine original manuscripts, including the Department of

Manuscripts and Institute of Microfilmed Hebrew Manuscripts of the National Library of Israel, the Bodleian Libraries of the University of Oxford, and the library of the University of Leiden. I am grateful to the various forums that provided me with the opportunity to present and discuss my ideas as they formed, including the Van Leer Jerusalem Institute, the seminar of the Judaic Studies Program of the University of Yale, the David Patterson Seminar of the Oxford Centre for Hebrew and Judaic Studies, the biannual meeting of the Gesellschaft für Rechtsvergleichung at the University of Bayreuth, and the faculty seminar of Sapir Academic College Law School. I am also thankful to the students who participated in my seminar "Between Identity and Otherness" at the Hebrew University and Sapir College. I am also grateful to the academic editorials of the journals in which some of my arguments and theses were discussed and cultivated. That includes *The Oxford Journal of Law and Religion, The Jewish Quarterly Review and Law, Culture and Humanities*.

Over the years, I have been privileged to visit various academic institutions that encouraged my research and provided me with fora to exchange and discuss ideas. I am grateful to the Center for the Study of Law and Religion at Emory University; the Max Planck Institute for Social Anthropology in Halle, Germany; the Judaic Studies Program at Yale College; and the Abdallah S. Kamel Center for the Study of Islamic Law and Civilization at Yale Law School.

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