Introduction

Law as an Expression of Jewish Culture

Law is society's supreme system of norms. As such, it seeks to express that society's values, ways of life, and culture. It is intuitively obvious to us that the content and form of the law differs from place to place and from one era to another. But what is it that, for example, makes Israeli law Israeli and French law French? Is it the specific content of the law? Is it the particular form of legal norms and institutions? That is, is there an Israeli template of norms and cultural assumptions that necessarily molds the particular legal content of Israeli society? Or is it Israeli law simply because it is created and used by free and sovereign Israelis, who shape their laws in accordance with their culture and needs?

This question preoccupied many in the Zionist movement and the Yishuv, the Jewish community in Palestine prior to the establishment of the state of Israel, from the beginning of the twentieth century onward. It was clear to them that the rebirth of the Jewish people in their ancestral land needed to be accompanied by a revitalization of the ancient Jewish legal tradition, adapted and transformed as needed to make it into the living law of a modern, self-governing polity. For the same reason, the question of what makes Israeli law Israeli has continued to be a subject of argument in Israeli society from the founding of the state to this day. For example, in the constitutional debate just following independence, it was decided not to draft a written constitution, largely because of the fear that it would spark a culture war over the question of Israeli identity. Likewise, the polemic of the last twenty years over Israel's so-called constitutional revolution has centered on the question of Israel's definition of itself as a Jewish and democratic state. Arguments over the Israeli character of Israeli law have also been at the

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center of legislative discussions and the debates over the legal sources that ought to be used by Israeli courts.[1]

This book is about that debate. I will discuss a number of questions that are central to it: What is independent Israeli law? Is it possible to fashion law that is of specifically Israeli content or character? Conversely, could Israeli law ever be "un-Israeli"? I will consider a number of attempts that have been made, since the Zionist movement was established, to shape a modern legal system for the Jewish state rooted in the nation's language, history, and culture. Specifically, its advocates envisioned molding traditional Jewish law to the requirements of a modern state with a secular government and legal system. Following the debates over the proper form the Israeli legal system ought to take, I will examine the risks inherent in the efforts to create a legal system of a fundamentally Israeli nature.

While law is a distinct field, the story of Israeli law is in fact the story of Zionism itself. The issues that have troubled Israeli jurists are the same ones the Zionist movement grappled with from its inception – the question of Jewish and Israeli identity and culture. And the answers to those questions have grown out of those the Zionist movement and Israeli society have found to more general issues. Zionist history is the larger context in which Israeli law has developed, the framework that has granted it meaning. It also forms the background that enables us to understand the story of the specifically Israeli character of Israeli law.

Throughout Zionist history, the central issue in this regard has been the content of the law. While questions of the language, form, and source of authority have been debated, most of those involved believed that Israeli law needs to have specific and identifiable Israeli *content*. But what should that special Israeli content be? That question is very difficult to answer, for two reasons. First, it is difficult to define a national culture and hard to express this culture in legal norms. Second, the law is not the proper arena for cultural debate and for elucidating questions of identity.

A people's national culture can certainly be described with reference to unique folkloristic elements, the language spoken by its members, and sometimes also their religion. The people may observe particular customs; its history can be recounted; perhaps a certain "national character" can be spoken of. Yet it is very difficult to generalize from language, religion, folklore, customs, history, and national character to arrive at a clearly defined national culture. Thus, while it is intuitively easy for us, in our imaginations, to tell a

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[1] Clause 1 of the Foundations of Law Act of 1980 requires Israeli judges to refer to "the principles of freedom, justice, equity and peace of Hebrew Law and Israel's heritage."

French person from a German one and see that both are different from an Indian, when we think deeply about it we find that it is very difficult to formulate precisely what French, German, or Indian culture actually is. It is even harder to translate this national culture into general and abstract legal norms, that is, norms that apply uniformly to a broad public. The sociologist and expert of nationalism Anthony Smith referred to it as "the most perplexing feature of investigation into ethnic and national phenomena: the curiously simultaneous solidity and insubstantiality of ethnic communities and nations." Nations, and even ethnic communities, Smith notes, "so easily recognizable from a distance, seem to dissolve before our eyes the closer we come and the more we attempt to pin them down."[2]

Thus, while it is clear that the law is dependent on culture and history, it is difficult to say clearly what "national law" might mean. Every national culture obviously has legal norms that ground some of its religious or cultural customs and parts of its folklore. But that is not enough to constitute a national legal system. For example, most Israelis presumably would not think that the existence of a few laws such as the Pig-Raising Prohibition Law of 1962, the Passover Law of 1986, or even the Law of Return of 1950 are sufficient to make the country's legal system specifically Jewish or Israeli.[3] Such a view, shared by many Israelis, is the substrate for the ongoing debate that this book covers.

No human society is free of concern about identity and culture. As the American anthropologist Clifford Geertz noted in his *The Interpretation of Cultures*, "man is an animal suspended in webs of significance he himself has spun."[4] But in Israeli society, the question of the Israeli nature of the law touches a raw nerve of angst about identity and culture that Jews have been wrestling with for the last 250 years. Zionism was born out of the profound changes brought on by the processes of secularization and modernization that swept through Europe and its Jewish communities in the modern age. For the Jews, these changes produced tensions between long-held traditions and the values and mores of modern and secular life. Zionism emerged out of modern Jews' problems of culture and identity. Zionism's ultimate aim was "cultural" as well: enabling the Jews to live full and free Jewish lives. But the means to achieve that end were political – the establishment of a Jewish nation-state in the Land of Israel, in which Jews would constitute a majority. The Zionists

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[2]   Smith, *Ethnic Origins*, 2.
[3]   The Passover Law, formally named the Festival of Matzot (Prohibition of Leaven) Law, 1986, prohibits the public display of leavened food (such as bread) during the Jewish holiday of Passover. The Law of Return allows Jews the right to immigrate to Israel and gain Israeli citizenship.
[4]   Geertz, "Thick Description," 5.

believed that nationality would bridge disputes over identity and culture and the conflicts they engendered by fashioning a common national identity to which Jews of all kinds could subscribe, and that a sovereign state would guarantee the long-term survival of a free Jewish culture. They drew this conclusion from what they saw in Europe of the nineteenth and early twentieth centuries. Even in countries where Jews had won emancipation and civil equality, the Zionists argued, there was no way of guaranteeing the perpetuation of a productive Jewish culture. They would face depletion and assimilation in such places. Jews living in lands where they did not enjoy equal rights would face constant physical and cultural danger. The Zionist solution was thus based on defining the Jews as a nation and seeking to manifest this nationhood in an independent state, or at the very least some lower level of sovereignty that could enable the perpetuation of Jewish physical and cultural life freely and over many generations.

This highlights two principal problems in the Zionist movement's attitude toward the question of Jewish identity and culture in the modern age, problems that plague Israeli law to this day. The first is that of defining Judaism and Jewish nationality in and of themselves. Zionism's strongest selling point was not the nature of the solution it offered to the oppressed Jewish masses of Europe in the form of an independent Jewish state in the Land of Israel. Much more important was the national story that it offered to those Jews. It told the Jews that they were a nation with a common historical past, culture, and destiny, and that by virtue of this they were entitled to self-determination. Zionism was first of all a narrative, a structure that gave modern Jews meaning, helping them overcome cultural differences and doubts about their identities. It offered collective-national solutions that would provide for autonomous Jewish life.[5] As the Jewish national movement, Zionism had to address, at least in a basic way, the questions of identity and culture that so exercised nineteenth- and twentieth-century Jews: What is the nature of Judaism? What is its connection to religion and tradition? How should modern Jewish nationalism be fashioned? How can the destructive and revolutionary forces inherent in Zionism be reconciled with the need and desire to preserve continuity between Zionism and the Judaism of the past? How can the gaps

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[5] Zionism was not the only national solution on offer. In fact, most Jews preferred other national solutions – cultural autonomy for Jews in Europe, a Jewish territory elsewhere than in Palestine, or schemes for enabling Jewish cultural life of a collective national nature within the multicultural milieu of the United States (or the West as a whole). But Zionism was the national framework for thinking about all these national solutions, in the sense that Zionism "invented" modern Jewish nationalism. See Smith, "Zionism and Diaspora"; Stanislawski, *Zionism*. I discuss this issue at length in Chapter 9.

between religion and modern secularism be bridged? Can Judaism serve as a model for fashioning the civil society of a Jewish state?

The second problem was a second-order issue regarding the proper place of the cultural debate in Zionist thought, discourse, and action. It was a meta-cultural matter, a political-institutional issue regarding the culture itself, growing out of the fact that Zionism not only proposed to see the Jews as a nation but also demanded that nation's right to self-determination and sovereignty in a nation-state. Given the passion and turbulence characteristic of debates over Jewish identity and culture, this inevitably raised the question of whether such culture wars were advantageous or detrimental to the realization of Zionism's goal, the establishment of a Jewish national home. The fear that infighting over culture put the national project at risk was expressed as early as the 1880s in a famous exchange between a prominent Jewish enlightenment poet in Russia and a leader of the proto-Zionist Hovevei Zion movement. It remained the subject of profound Zionist political disputes up until World War I.

The Zionist movement thus found itself between a cultural rock and a hard place. On the one hand, it was the *Jewish* national movement. Its principal source of power and the fuel that fired its practical action was its definition of the Jewish people as a national collective and its success in largely bridging gaps of culture, identity, and religion. On the other hand, the debate over these issues, while contained within Zionism, remained heated and threatened the movement's ability to unite different groups of Jews for the purpose of achieving its goal of establishing an independent Jewish state. Zionist history, and within it the history of the Zionist and Israeli legal system, has thus swung between the desire and need to address questions of modern Jewish identity in a profound way and the need to stifle, or at least mute, these very same debates so that they would not become hindrances to the building of the Israeli state and society and thus frustrate the goal of establishing a free Jewish life.

The meta-cultural problem also has another aspect, the danger of cultural coercion. Differences of opinion over identity, culture, and religion have a tendency to be strident and intolerant. Every side forcefully defends its values, symbols, and culture, and more often than not tries to impose them on the opposing parties to the debate. Modern history has shown that a lack of religious-cultural tolerance is a common feature of conservative (and certainly religious) groups in any society. They fear change and thus fortify themselves within cultural ghettoes and seek to enforce a cultural status quo ante. But it is also evident among revolutionary secular-modernist groups, which seek to augment political change with cultural change that is often rigid and brutally

enforced. The violence and terror of the French, Russian, and Chinese revolutions are extreme examples of attempts to impose a new modern culture on those societies. Similar cultural coercion, involving varying levels of violence, can also be found in the Islamic world. In Kamalist Turkey, Iran under the Shah, and the Arab world, a secular and modern culture was imposed on a broad population. Many intellectuals have cooperated with cultural violence, of both the conservative and the revolutionary modernist kind. They have justified it, served as its mouthpieces, and have played an active role in the culturally coercive project of one or another camp. As a general rule, they have turned a blind eye to acts of coercion and violence and even to terror and the harshest atrocities.[6] The law has also lent a hand in these countries. Laws have forbidden the use of new or old cultural systems and legal systems have tried to impose either past or new standards by force.

Cultural coercion was an imminent peril to the Zionist movement and the state of Israel. Since the end of the nineteenth century, intellectuals of all camps have insisted that the Zionist revolution ought to be first and foremost a cultural revolution. They have demanded that the practical achievement of Zionist political goals be preceded by cultural reeducation. Practical Zionism, they declared, had to be accomplished in tandem with cultural projects. The arguments among writers, rabbis, and thinkers were tempestuous and fanatical. In practice, it was the Zionist political leadership that kept the flames down. Of course, these leaders of the Yishuv and Israel viewed Zionism as a total revolution that encompassed not just politics but also economics and culture. They sincerely subscribed to the enlightenment idea that an exemplary society can be created on the basis of a worthy model. Nevertheless, with the exception of local projects of cultural and religious coercion (especially among the immigrants who arrived in Israel from the Islamic world in the country's early years), the Zionist movement was able to carry out a profound secular and modernist revolution without engaging in cultural warfare or violent compulsion. It succeeded in creating an open, dynamic, democratic, and, in the final analysis, pluralist society.[7] As Nissim Calderon has put it, Israelis became "pluralists despite themselves."[8] This was a pluralism less motivated by a coherent liberal or multicultural worldview and more a product of sharing a country with a socially, ideologically, and religiously diverse population that, facing mortal danger from enemies outside its borders and major economic and social challenges from within, had to find a way to

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[6] See Lila, *Reckless Mind*.

[7] Rozin, *Rise of the Individual*; Rozin, *Home for All Jews*.

[8] This is Hebrew title of Calderon's *Multiculturalism versus Pluralism*.

live together. But whatever the origins of Israeli pluralism, the Zionist move-ment and Israeli society conducted themselves in the end with relative moderation on the cultural front.

Zionism succeeded in establishing a sovereign democratic state and in building an open and vibrant civil society. Moreover, it was able to implant in Jews (even among most of its opponents) the view that they constitute a modern nation. In the end, Zionism managed to navigate the cultural laby-rinth. It became a source of identity for millions of Jews and put in place a common modern Jewish culture while at the same time preventing cultural clashes from descending into violence and intimidation. Nevertheless, even after 140 years of Zionism, cultural tensions are still clear and present and threaten Israel's ability to face its internal and external challenges.

Israeli law prominently displays the Zionist movement's ambiguity about culture on two counts. As the principal normative system of Israeli society, it seeks to treat (in both senses of the word) modern Jewish doubts about the nature of Jewish identity and to articulate a new national culture that seeks to bridge over those doubts, as well as over the differences between different Jewish groups (and, in Israel, between Jews and non-Jews).[9] Yet the law is a quite problematic place to treat cultural problems. As already noted, it is very difficult to translate the national character, culture, customs, and values into "national law." The attempt to define national culture and translate it into legal norms is all the more difficult in the Jewish nation, which has undergone major transformations in lifestyle, ways of thinking, and culture, and which sought to found, for the first time in its history, a state based on modern values. The demand that Israeli law give expression to "Israeli culture" assumes that the different worldviews and values of Israelis – Jews and non-Jews, religious and secular – form an identifiable Israeli culture that can be expressed in legal norms. The French, Columbians, and Thais have similar problems with making their legal systems express their cultures. But the fact that other countries have the same problem is no consolation to those Israelis who continue to demand that Israeli law manifest Jewish-Hebrew identity and culture.

Therefore, it is plausible to claim that it is not the content of the law that makes a legal system a national one. On the contrary, we distinguish between, say, Belgian and Dutch law not through distinguishing their specific provi-sions but simply because, in a formal sense, each code is the law of a different country. It is much like the quip popularized by the linguist and Yiddishist

9   Likhovski, *Law and Identity*; Mautner, *Law and Culture of Israel*.

Max Weinreich: "A language is a dialect with an army and a navy." Along the same lines, national law is a formal system of norms with an army.[10]

The difficulty in ascertaining the Israeli nature of Israeli law has another source as well, connected to the nature of law as a social institution. I call this the problem of decision. As the society's principal normative system, the law's major (but not sole) purpose is to establish social order and resolve conflicts. These objectives require the law to decide: it must resolve a given dispute or provide legal norms that guide behavior. Legal institutions are the main societal institutions charged with the task of deciding cases in which rival values clash. The law is a system whose social role is to translate (or convert) disputes about culture, values, and interests into "legal" disputes that can be decided, with relative clarity, on the basis of established procedure and well-defined rules of the game.[11] Herein lies the danger of bringing the polemic over identity and culture into the legal realm. Law, by its definition and social role, would then have to reach a decision about these issues and put an end to the conflict. The legal system is simply not sensitive enough to address cultural disputes.

The discourse of identity needs to be distinguished from its legal manifestations. The former, in its true form, is primarily a perpetual private dialogue that takes place on an ongoing basis within each individual. On the one side are tradition and the world of values into which a person was born, to which he or she is connected and obligated (like it or not); on the other are the cultures and values the person encounters over the course of his or her life, as well as the needs, difficulties, and possibilities life presents. It takes place between the closed past and the open future; between the familiar and the foreign, new, and mutable; between the need for certainty and stability and the no less potent longing for change and growth. Of course, the discourse of identity is also a social process. It is an ongoing dialogue between individuals and groups, a constant, perpetual interpretation of the traditions, values, and culture of individuals and communities, carried out in the presence of other cultures and worldviews.[12]

Law is not the proper arena for such a dialogue. It cannot delve deeply into such individual and collective ambiguities about identity, nor can it express the complexity of human identity and culture. It cannot conduct an open,

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[10] Weinreich, "YIVO and the Problems," 13. Chapter 10 deals with this issue at length.

[11] That is why we speak of the "legal system" and "legal institutions" but not of systems or institutions governing morals, religion, or mores (while there are religious institutions, they have an entirely different function than the institutionalized legal system).

[12] See Giddens, *Modernity and Self-Identity*; Goldberg and Krausz, *Jewish Identity*.

continuing intercultural dialogue about the complex and changing identities. At most, we can ask the law to recognize every person's need to belong to an identity group bearing a certain tradition and culture (even if these are dynamic and shifting). The law can be expected to be considerate of the sentiments and needs emerging from this affiliation and to recognize rights that they imply (e.g., the right to speak a language or educate one's children in accordance with one's values). But even in these cases, the law must smooth out uncertainties about identity and culture and place the disputes that emerge from them in a Procrustean bed of procedures and legal rules so that they can be decided in a practical way.

This explains the behavior of Israeli courts when called on to rule on the "Who is a Jew?" question. According to Israeli law, every citizen is registered in the civil registry as belonging to a certain faith community. In the "Who is a Jew?" cases the court was asked to order the civil registrar to register a certain person as a Jew, according to that person's declaration. When judges have failed to find a way to dismiss such cases on procedural grounds, they have avoided discussing the substance of the issue (the definition of "Jewish"). They understood that the question touches on the very foundations of Jewish identity for most Israelis (as well as for Jews outside the country), and there is no way to prove or decide which definition is correct. Instead, judges have examined only a small segment of the dispute – the question of whether the Ministry of the Interior's registrar has discretion to decide to register (or refuse to register) a given person as a Jew.[13] The question of a state official's powers is one that can be litigated and subject to a final binary decision – it is either legal or not. In the same spirit, Israeli Chief Justice Aharon Barak opened his judgment on the Bar-Ilan Street case by stating that the court would discuss only the question of governmental power:

> [T]he issue at bar involves the scope of the Central Traffic Authority's discretion to direct its local counterpart in regulating traffic on Bar-Ilan Street, so that the street will be closed to traffic during certain hours during

[13] See HCJ *Rufeisen v. The Minister of Interior Affairs* [1962] IsrSC 16 2428. The case involved Oswald Rufeisen (also known as Brother Daniel), a Polish-born Jew who survived the Second World War, during which he converted to Catholicism and became a friar of the Discalced Carmelite Order. On immigrating to Israel, he sought citizenship under the Israeli Law of Return, but was refused by the Israeli Interior Ministry. And see HCJ 58/68 *Shalit v. The Minister of Interior Affairs* [1970] IsrSC 23(2) 477. In this case, an Israeli Jew married to a Protestant woman filed suit asking the court to order the Ministry of the Interior's population registrar to register their children as Jewish. The ministry had refused to do so, on the grounds that, according to Jewish law, a Jew is a person born to a Jewish mother or who has converted to Judaism.

the Sabbath.... Our concern is not with the relationship between the secular and the religious in Israel; nor is it with the relationship between religion and state in this country. Nor is our concern the character of Jerusalem. We are simply concerned with Bar-Ilan Street, in its literal sense, and with the Central Traffic Authority's powers and the scope of its discretion.[14]

When suits regarding questions of identity and culture cannot be translated into binary questions of authority, the courts generally dismiss the suits before hearing them on the grounds that the questions are not justiciable. By this they mean that the law as a social tool, or the court as an institution, is not appropriate for deciding the question. That is what the Jerusalem District Court did in 2008 when it turned down a petition in which a group of Israelis asked that the court order the Interior Ministry to record on their identity cards that their nationality (i.e., ethnic affiliation, as opposed to citizenship) was "Israeli" rather than "Jewish." The court declared that the demand is not justiciable:

> The statement that there is an *Israeli nationality* has far-reaching consequences for the identity of the State of Israel.... From a *normative* point of view, the issue may be analyzed with legal tools, but it is *not justiciable* from an *institutional* point of view [i.e., the court is not the appropriate institution to make that decision]. The main character of the subject is meta-legal: public, ideological, social, historical, and political. The Court's opinions in these matters is not privileged over other opinions. The legal aspect of the subject is ancillary to the main point.[15]

Even though the law expresses society's values and culture, the people involved in the law cannot allow themselves to spend a lot of time pondering cultural issues. They must in the end decide for one side or the other on the question before them. This is true of legislators, political leaders, and state officials, and of course also of judges and attorneys offering their clients legal advice. It is, of course, necessary to provide reasons for a legal decision, reasons

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[14] HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1; [1997] IsrLR 149. The English translation is taken from the Israeli Judicial Authority website: http://elyon1.court.gov.il/files_eng/96/160/050/A01/96050160.a01.htm.

[15] HP 07/6092 (Jerusalem) *Ornan v. The Minister of Interior Affairs* [2008]. The Supreme Court ruled on appeal that the issue is also institutionally justiciable. Nevertheless, the Supreme Court too avoided reaching a substantive cultural decision on the question. It rejected the appeal on the evidential-procedural ground that the appellants had not proven that there is a distinct Israeli nationality (but did not explain how such a claim might be proved), and as such their demand to be recognized as members of the Israeli rather than Jewish nation was redundant. CA 8573/08 *Ornan v. Minister of the Interior* [2013].