Between Mandate and State: On the Periodization of Israeli Legal History

Assaf Likhovski *

*Tel Aviv University, likhovsk@post.tau.ac.il
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Between “Mandate” and “State”: 
Re-thinking the Periodization of Israeli Legal History*

Assaf Likhovski

A. Introduction

QUESTIONS OF PERIODIZATION are an integral part of the work of any historian. Historians deal with the differences between centuries or between decades and with the distinction between various “generations” and “stages.” Therefore, a considerable amount of historical writing focuses on the definition and characteristics of periods — for instance, when did the Middle Ages begin or what were the defining characteristics of the Renaissance.1

Issues of periodization are not merely technical. Categories of periodization are not created ex nihilo. They do not exist “naturally” in history. They are creations that serve visible and hidden ideological purposes. The categories which divide history into periods (like categories in any field) determine the historical facts we observe and those we ignore. The periodization of history creates the framework for research and the structure of the historical narrative. At the end of the day, the manner in which we divide history into periods also determines how we see ourselves: Schemes of periodization create “starting points” for historical narratives and differentiate between the “Self” and the “Other.” They thus assist in the definition of identity. Discussing the categories and schemes of periodization is therefore a precondition to a better understanding of history and of ourselves.2

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The historiography of Palestine in the twentieth century also uses a number of periodization schemes. One of the central milestones in the common periodization scheme of twentieth century Palestinian history is the year 1948. That year is seen by both "old" and "new" historians as a revolutionary year: prior to 1948, Palestine was a single political entity, ruled by the British; after 1948, Palestine was divided into a sovereign Jewish state on the one hand and territories under Jordanian and Egyptian rule on the other hand. A large proportion of the Arab population of the area that became Israel fled or was expelled, whilst the Yishuv, the Jewish community in Palestine, began a process of demographic and social change following the absorption of massive waves of immigrants from Europe and from Arab countries. Thus both the historiographical "establishment" and its foes seem to agree that 1948 was a turning point.  

The centrality of the year 1948 is related to the special character of Israeli historiography, both the "old" and the "new." This historiography emphasizes political and diplomatic history (in which the principle hero is the "State"), and tends to ignore other types of history (such as intellectual or cultural history), the limits and periods of which do not necessarily correspond with those of political history. The central position of 1948 is also a product of

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3 Here are some examples of the pivotal role of the year 1948 as a periodization marker: The series on Israeli history published by Yad Izhak Ben-Zvi and Keter Publishers at the beginning of the 1980s and entitled "The History of Palestine" (Hebrew), dedicated one volume to "The Mandate and the National Home, 1917-1947," and another to the period of the "War of Independence." The computerized catalogs of Israeli libraries (for instance, the library catalog at Tel Aviv University) distinguish between "Israel-History — 1892-1947" and "Israel-History — 1917-1947" on the one hand, and "Israel-History — 1947-1956" and "Israel-History — 1947-1967" on the other hand. See also Shavit, "Periodization," pp. 60-61. The historiography of other nations, which also use politico-constitutional starting points (such as the American War of Independence and the French Revolution), that later become general milestones for all sorts of historical writing because such milestones dictate the classification method used by libraries and archives. See, for instance, C. Arnaud, "La périodisation du passé national dans le catalogue de l'Histoire de France du département des imprimés de la bibliothèque nationale," Perspect., p. 15; F. Hinkeldeimer, "Périodisation et archives," ibid., p. 39. The year 1948 is also seen as a turning point in critical writings on the history of Israel. See, for example, S. Carmi and H. Rosenfeld, "The Political Economy of Militaristic Nationalism in Israel" (Hebrew), in A. Ram, ed., Israeli Society: Critical Perspectives, Tel Aviv, 1994, p. 275. Even in cases where the continuity between the Mandatory period and the State period is discussed, for example, in the institutional history of Israel, what is emphasized is the continuity between the institutions of the State of Israel and those of the Yishuv, and not those of the Mandatory government. See, for example, E. Schwartz, "The First Year: Decisions and Challenges" (Hebrew), in A. Naor, ed., The First Year of Independence, 1948-1949: Sources, Summaries, Affairs and Supplementary Materials, Jerusalem, 1988, pp. 3-4.

Zionist ideology. Israeli historiography of Palestine in the twentieth century is still principally a Jewish nationalist historiography. As such it is focused to a great extent on the history of Jewish settlement in Palestine and its main interest is telling the story of the “development” of this settlement “from Yishuv to State.” Thus, the story of the State of Israel is often told from a point of view that minimizes the influence of non-Jewish institutions and ethnic groups on the history of Palestine. In this context, the Mandatory period is viewed at most as a transition period in the accepted Zionist periodization scheme.

Recently, however, some of the conventions of Israeli historiography (such as the use of 1948 as a central historiographical marker) have been questioned. Even prior to that, writings dealing with the social history of the early years of the State contained descriptions of Israeli society as being a society that combined revolution with continuity, change with routine.

Writings dealing with the history of Israeli law also make use of various types of periodization schemes. "Professional" writing dealing with the history of Israeli law is still relatively rare. However, the use of historiographical categories is not limited to historians only. Lawyers also write legal history. Thus, various types of periodization schemes can be found in writings dealing with Israeli law. For example, one of the main issues in Israeli legal discourse in recent years has been whether one can distinguish between the opinion writing style of the first justices of the Israeli Supreme Court (commonly called the "1950s Court") and the style of the justices of the


7 See B. Kornfeld, "Academic History Caught in the Cross Fire: The Case of Israeli Jewish Historiography," History and Memory, Vol. 7, 1995, pp. 59-86. For a critique on the common periodization of the Mandatory period (according to immigration waves), and for the claim that this manner of periodization cannot be used in the economic history of the country, see N. Givati, "A Note on the Periodization of the History of the Yishuv during the Mandatory Period" (Hebrew), Carlelia, Vol. 18, 1981, p. 174. See also M. Lisak, "Critical Sociologists and ‘Establishment’ Sociologists in the Israeli Academic Community: Ideological Struggles or an Academic Discourse?" (Hebrew), in P. Genesov and A. Ronen, eds., Zionism: A Contemporary Controversy, Jerusalem, 1996, pp. 71-72. It seems that the examination of accepted historiographical conventions is linked to debates about the future of the nation-state (and in the Israeli context, to the rise of Post-Zionism). When modern historiography appeared in the nineteenth century its appearance was linked to the rise of rationalist ideologies. It is therefore not surprising that today, when nationalist ideology is undergoing a crisis, various historiographical conventions are being re-examined.


"new" Supreme Court (called the "1980s Court"). Another example of the use of periodization schemes may be seen in the argument on the "revolutions" that took place (or did not take place) in Israeli law — for instance, the civil code "revolution" in the 1960s or the "constitutional revolution" of the 1990s.11

In this article I do not wish to examine in depth the significance of each and every periodization scheme used in works dealing with Israeli law.12 Instead, I would like to focus on just one periodization marker used by Israeli legal scholars, the distinction between "pre-1948" and "post-1948" law.

In 1948 the character of the (governmental) legal system of Palestine underwent constitutional, institutional and personnel changes. For instance, the formal link between Palestine and the British Empire was severed upon the establishment of the State, and the local legal system became independent of the Privy Council, the imperial court of appeals in London. The British judges who had filled the majority of senior positions in the courts and the British lawyers who had worked in the office of the Attorney General of Palestine were replaced by Jewish judges and lawyers, most of whom had not been connected to the British governmental system during the time of the Mandate.13 Even from the point of view of legal doctrine, the

10 See M. Maizar, The Decline of Formalism and Rise of Values in Israeli Law (Hebrew), Tel Aviv, 1993; Y. Shachar, R. Harris and M. Groso, "Citation Practices of the Supreme Court, Quantitative Analysis" (Hebrew), Mishpah, Vol. 27, 1996, pp. 203–204.
12 Every such scheme gives rise to a host of interesting questions. For instance, is the distinction between two given legal periods relevant to every type of "law" or just to one specific facet of the legal system (case-law, legislation)? What is the connection between the different periodization schemes of Israeli legal history and the periodization schemes of the political, social or intellectual history of Israel? Etc.
13 On the institutional and personnel changes that took place in the governmental and legal systems, see, for instance, E. Lahav, The Formative Years of Israel's Supreme Court 1948-1955 (Hebrew), Iyyer Mishpah, Vol. 14, 1989, p. 475; A. Rabinstein, Judges of the Land: The Early Years of the Supreme Court of Israel (Hebrew), 1981, p. 78–83; and see also P. Medling, "Governmental Institutions in the First Year of Independence" (Hebrew), in A. Naor, ed., First Year of Independence, 1948-1949. Sources, Summaries, Affairs and Supplementary Materials, Jerusalem, 1988, p. 69. On constitutional change, see A. Rabinstein and B. Medina, Constitutional Law of the State of Israel (Hebrew), 5th ed. Tel Aviv, 1997, pp. 43–62, and especially p. 65: "We must remember that the State was neither
transition from Mandatory law to State law was conceived in terms of a sharp break. Legal continuity was formally retained upon the foundation of the State under Section 11 of the Law and Administration Ordinance, 5708-1948, which stated that the law that existed in Palestine prior to the establishment of the State would remain in force “insofar as there is nothing therein repugnant to this ordinance.” However, the maintenance of the Ottoman-British legal status quo was seen (and to a greater extent is seen even today, fifty years after the establishment of the State) as being only temporary, until Mandatory law be replaced by a legal system that is “Israeli” in origin. 14 For this reason, the 1950s have been described as a “formative” period in Israeli law, 15 and for this reason, when an academic conference was held at the Hebrew University in 1988 on the topic “Forty Years of Israeli Law,” the Mandate period was not viewed as being a substantial part of the history of Israeli law, and the Israeli system itself was described as young and as “having few roots ... being only forty years old, without a mother from whom to suckle or a father to look to for assistance.” 16 These descriptions,

14 See discussion below, Part C.


16 “Speech of Prof. Menahem Elon, Deputy Chief Justice of the Supreme Court” (Hebrew), Mahshaim, Vol. 19, 1990, p. 544. See also, A. Hershon “Foreword,” ibid., p. 341. “This conference is not a conference of forty years, but of the first forty years, that is, of the period of formation and creation” [emphasis added — A.L.]. This view is perhaps also connected to the fact that the institution in which the conference was held — the Hebrew University — began teaching law only after the establishment of the State. See “Speeches of Prof. Steven Goldstein, Dean of the Faculty of Law,” ibid., p. 545: “It is especially fitting that the Faculty of Law in Jerusalem should be holding this conference on Israeli law . . . because there is a strong link between independent Jewish law and our Law Faculty. Prior to the establishment of the State, there was no law faculty in the country which provided university-level legal education and legal research. When the State was founded, it was clear to all that in order to develop the law of the new State, there was an urgent need to establish a faculty such as this, as this is what we did. Today, we celebrate forty years of Israeli law and in another year we will celebrate forty years since the foundation of the faculty of law.” For a different view of the history of legal education in Palestine in the twentieth century, see A. Likhovski, “Colonialism, Nationalism and Legal Education: The Case of Mandatory Palestine” (Paper presented at the Israeli Legal History Conference, Tel-Aviv and Haifa Universities, May 1997).
which emphasize the "youth" of Israeli law, are sometimes the result of considerations dictated by external elements.\textsuperscript{17} But at times it seems that they may also be influenced by the Jewish nationalist nature of most of Israeli history, which tends to ignore the non-Jewish impact on the history of Palestine, be it Ottoman, Arab or British.

Just as the conventions of Israeli historiography have recently been challenged, so there have been calls to re-examine the accepted conventions of Israeli legal history.\textsuperscript{18} I would like to join these calls and to claim that as far as the legal history of Palestine is concerned, in certain legal areas the year 1948 is of little significance — because some of the "revolutionary" aspects that are commonly seen as distinguishing the Israeli legal system from its Mandatory predecessor are the result of processes which commenced during the Mandatory period. What is more, many possibilities for revolution, latent in the transfer that took in 1948 from the Mandatory legal system to the Israeli legal system, were never realized.\textsuperscript{19}

I would like to examine two processes which are often viewed as being characteristic of the "new" Israeli law of the post-1948 period: the creation of a comprehensive system of labor legislation, and the appearance of a constitutional rights discourse in the decisions of the Supreme Court of Israel. It is my claim that these processes commenced before the foundation of the State of Israel. Likewise, this article will deal with two potential legal "revolutions" that did not take place, contrary to what was to be expected immediately after the establishment of the State: the non-adoption of secular Jewish law as the inspirational background of Israeli law; and the non-adoption of Continental legal principles as the backbone of the new Israeli legal system. Using these examples, I shall demonstrate that a critical examination of the accepted periodization schemes of Israeli law, blurring the boundaries between the "Mandatory Period" and the "State Period," is essential for a better understanding of history in Israeli law and perhaps of Israeli history in general.

\textsuperscript{17} Thus, for instance, in 1998 and 1999 Israeli universities held a number of academic conferences celebrating "fifty years of Israeli law." One of the main driving forces of these activities was the existence of state funds set aside for academic activities related to Israel's Jubilee year.


\textsuperscript{19} Obviously, I do not claim that in 1948 and the years following there was no legal change, nor that the changes that did take place were not important. All I claim is that if one adopts periodization schemes taken from other fields of Israeli history, one might overlook some significant processes of legal change, which cannot be wholly attributed to the foundation of the State but rather commenced during the Mandatory period.
B. Mandatory "Revolutions"

1. Labor Legislation in Palestine in the 1940s

The conventional history of labor legislation in Palestine is based on a sharp distinction between the period before the establishment of the State of Israel and the period following it. According to conventional accounts of the history of Israeli labor law, this area of law was "one of the most neglected fields" during the Mandatory period, whilst Israeli labor legislation following the establishment of the State is described as "very impressive." Labor law under the Mandate was "emphatically backward" according to the conventional account, because the Mandatory legislature chose to "intentionally neglect" this area of law.

The sharp distinction between the period preceding the establishment of the State and that following it is based, inter alia, on the belief that the Jewish government of post-1948 Israel was inspired by a socialist ethos, and was therefore interested — or at least more interested than the British colonial government — in protecting the rights of workers. This, in any event, was how the labor legislation was justified by its authors in the 1950s, and this is how it is seen by researchers in the 1990s.

The commitment to socialism of the 1950s Mapai government has recently been questioned. For instance, Shoshanat Carmi and Henry Rosenberg claimed that the labor movement changed its character after the establishment of the State, turning from a movement committed to socialist ideology to a movement dedicated to protecting the interests of a new "statist" middle-class which grabbed key positions in the State's bureaucracy, in the army and in industry in the 1950s. As a result, the "socialist potential," which had been latent in the Yishuv immediately prior to the establishment of the State, was abandoned and exchanged for a nationalist-militarist ideology. A similar claim was made recently by Zeev Sternhell.

20 See, for instance, I. Zamarin, "Labour and Social Security," Seferim Hatzofim: Studies in Israel Legislative Problems, Vol. 16, 1986, pp. 302 – 321; Y. Oktibi, Labour Law in Israel (Hebrew), 1963, p. 16; R. Ben-Israel, Labour Law (Hebrew), Tel Aviv 1989, pp. 23–31, where a distinction is drawn between three different stages in the history of Israeli labor law: the Mandatory period, the period from the establishment of the State to the establishment of the Labor Court in 1969, and the period following the establishment of the Labor Court. The Mandatory period is described as being a period of autonomous sectoral rules (applying to the Jewish sector only), because the Mandatory legislature did not seek to advance labor legislation (p. 28).


Sternhell argued that from the outset, even before the establishment of the State, the labor movement had made its socialist ideology subject to a commitment to nationalism.24 These ideas also influenced historians of Israeli law. Ron Harris, for instance, showed that Mapai members in the 1950s sometimes opposed legislation inspired by socialist ideology.25

It is not my intention to discuss the nature of the Labor movement, nor the significance of labor legislation of the 1950s. Instead, I would like to argue that whether the labor legislation of the 1950s reflected "true" socialist ideology or not, the turning point in the history of labor law in Palestine is World War II and not the period following the establishment of the State, and that the main cause of this turning point was not the ideology of the Jewish Labor movement, but rather the needs of the British Empire during the war. What follows is a brief history of labor legislation in Mandatory Palestine.26

During the Ottoman period, labor relations were regulated by the Ottoman civil code, the Mejelle, although there existed a separate law meant to deal with strikes.27 The history of labor law legislation in Palestine during the Mandate period commences in 1922. In that year, the Controller of Labor of the government of Palestine, Albert Hyamon, first discussed the need for labor legislation. Hyamon argued that any labor legislation would be "premature."28 Lack of interest in regulating labor conditions in Palestine stemmed from the level of development of the Palestinian economy, but it also had other causes. First, until the 1960s, English labor organizations, and English law, shunned legal interference in labor relations, and therefore the scope of English labor laws in the first half of the twentieth century was narrower than that of labor law in other western countries.29 Secondly, the policy of the British Colonial Office was not to intervene in labor relations in the colonies, because intervention on behalf of the employees could

24 Z. Sternhell, Nation-Building or a New Society? The Zionist Labor Movement (1924–1948) and the Origins of Israel (Hebrew), Tel Aviv, 1999.
25 R. Harris, "Why was Imprisonment for Debt not Abolished during the Era of Labor Domination?" (Hebrew), in M. Manaster and D. Gutwein, eds., Law and History, Jerusalem, 1999, p. 423.
27 J. Bar-Shira, Digest of Palestinian Labor Laws (Hebrew), Jerusalem, 1929, pp. 3. 182.
28 Israel State Archives, Jerusalem (hereafter ISA), Division (RG) 3, File LS 606/23.
antagonize the local elite, upon whom British colonial rule was based. Thirdly, in the specific political context of Palestine at the beginning of the 1920s, Arab politicians viewed the legislative activities of Hyamson and of Norman Bentwich, the Attorney-General of Palestine, — both of whom were Jews — as part of a Zionist plot to undermine Arab control of Palestine. It is possible that Hyamson (and Bentwich) did not want to further antagonize the Arab elite by enacting labor laws.

Nonetheless, at this early stage, indirect attempts were already being made to regulate labor conditions in Palestine. At the beginning of the 1920s, the Mandatory government initiated the enactment of the Licensing of Trades and Industries Ordinance the provisions of which were taken from parallel Egyptian legislation. Among other things, the Ordinance was designed to "safeguard the health of the public and of industrial workers," and it included provisions authorizing the government to issue regulations to ensure safe and sanitary working conditions, to fix the working hours of women and children and to prohibit the employment of children under a certain age. The Colonial Office was opposed the enactment of the Ordinance, taking the view that the supervision mechanisms set out in it would impose a serious burden on the Palestine budget. Therefore, the enactment of the Ordinance was delayed for quite some time. However, the British Colonial Office was not operating in a vacuum: Britain was obliged to enact labor laws in Palestine by virtue of international conventions adopted at the International Labor Conference in the United States in 1919 and ratified by Britain in 1921. A special clause in the Versailles

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30 See, for instance, Public Records Office, London (hereafter PRO), CO 733/32, Minutes, Eberhard, June 17, 1922; PRO, CO 733/32, Minutes, Eberhard, June 17, 1922; PRO, CO 733/32, Minutes, Shickluna, June 20, 1922.
31 See, for instance, ISA, RG 65/2, 10, "Report on the State of Palestine Presented to the Right Honourable Mr. Winston Churchill by the Executive Committee of the Arab Palestine Congress," ISA, RG 65/2, 10, "Arab Resignation from Advisory Council: Serious Crisis in Palestine."
32 See PRO, CO 733/32, Samuel to Churchill, January 26, 1922; PRO, CO 733/32, Minutes Shickluna, June 20, 1922.
33 See PRO, CO 733/32, Churchill to Officer Administering the Government of Palestine, June 22, 1922; PRO, CO 733/68, Amery to Samuel, June 19, 1924.
Peace Treaty provided that the application of such conventions by Britain to its colonies be conditional upon the suitability of the conventions to local conditions. However, as far as Palestine was concerned international pressure was applied on Britain to act in accordance with the conventions. Already in 1924, at a meeting of the Permanent Mandates Commission in Geneva, the representative of the International Labour Office requested that the High Commissioner of Palestine, Herbert Samuel, enact a comprehensive labor code in accordance with international labor conventions.35

At the same time, the General Organization of Hebrew Workers in Palestine (the Histadrut) also put pressure on the Government of Palestine.36 At the beginning of the 1920s, the need arose for legislation that would regulate labor pickets. In order to placate the Histadrut, officials of the Government of Palestine decided to link this legislation with an ordinance providing compensation for victims of work accidents.37 The conservative officials of the Colonial Office in London resisted this initiative at first, but when a violent strike broke out in Haifa, the need for legislation which would regulate the issue of picketing on the one hand, while appeasing the Histadrut on the other hand, became obvious.38 A special committee was set up to examine labor matters. This committee commenced drafting labor legislation. Initially, the Workmen’s Compensation Ordinance was enacted, together with an ordinance intended to regulate picketing activities.39 Later on, an attempt was made to resurrect the draft Licensing of Trades and Industries Ordinance which dealt inter alia with the regulating labor conditions in general, and with the working conditions of women and children in particular.40 The Colonial Office once again objected to such legislation and finally a compromise was reached whereby the elements of the Licensing Ordinance that dealt with the employment of women and children would be enacted as a separate law, called “Industrial Employment of Women and Children Ordinance.”41

37 See PRO, CO 733/91, p. 54, Workmen’s Compensation Ordinance, First Schedule.
38 See PRO, CO 733/91, p. 72, Young to Plumer, July 13, 1925; PRO, CO 733/91, p. 73, Amery to Samuel, July 24, 1925; “More details on the incidents on Mount Carmel” (Hebrew), Haaretz, August 25, 1925.
40 See PRO, CO 733/115, p. 58, Plumer to Amery, July 6, 1926.
41 See PRO, CO 733/115, p. 49, Amery to Plumer, October 30, 1926. The text of this ordinance was published in PG, November 29, 1927. Notice of the ordinance’s entry into force was published in PG on January 1, 1928. At the same time, an abridged version of the “Licensing of Trades and Industries Ordinance,” omitting the clauses dealing with the employment of women and children, was also published.
This, in addition to a few other less important pieces of legislation represented the first crop of mandatory labor laws. In the 1930s, following the rise of the Labour government to power in England, and the appointment of the Fabian Society’s Sidney Webb (Lord Passfield) as Colonial Secretary, a special committee for labor legislation was set up in Palestine, with the purpose of improving and broadening labor legislation of the 1920s. However, the committee's work came to an abrupt end when the Arab Rebellion broke out in 1936.43

The 1920s and 1930s in Palestine were thus characterized by the appearance of labor legislation in certain areas. A further characteristic of that period was the non-enforcement of these laws, since the government of Palestine did not establish appropriate supervision mechanisms. Disregard of the labor legislation was so widespread that even government departments—such as the public works department—ignored some of the provisions of these laws, for example, the prohibition against employing young children in certain types of work.44

The real change in the British attitude toward labor legislation in Palestine took place during World War II. The war forced the British government to abandon its traditional non-interventionist stance in labor relations, and to massively intervene in working conditions and labor relations.45 In order to prevent labor unrest, the British government (which also contained Labour Party members) promised workers in Britain and the colonies a future...

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42 In all, during a period of three years (1925–1928) some eight labor ordinances were enacted as follows: Smear Bottles Ordinance, 1925, PG, Supp. 1, 391; White Phosphorus Matches Prohibition Ordinance, 1925, PG, Supp. 1, 342; Mining Ordinance, 1925, PG, 1924, Supp. 1, 961; Prevention of Intimidation Ordinance, 1927, PG, 1926, Supp. 1, 569; Workmen’s Compensation Ordinance, 1927, PG, 1926, Supp. 1, 358; Industrial Employment of Women and Children Ordinance, 1927, PG, Supp. 1, 829; Traders and Industries (Regulations) Ordinance, 1927, PG, Supp. 1, 824; Machinery (Fencing) Ordinance, 1928, PG, 1927, Supp. 1, 856. In 1934, a further ordinance was enacted, Municipal Corporations Ordinance, 1934, PG, 1933, Supp. 1, 1200, which, inter alia, dealt with the prevention of construction accidents. For details of this legislation, see PRO, CO 733/441/17, R. M. Groves, “Survey of Labour Legislation in Palestine,” p. 41. For a discussion and critique on labor legislation in the 1920s from the Jewish labor movement’s point of view, see Bar-Shira, Digest.


45 See Davis and Freedland, Labour Legislation, p. 42.
in which economic inequality would decrease. Such a promise was enshrined in documents like the Beveridge Report of 1942, which was one of the milestones in the creation of the postwar welfare state in Britain.46

These events in Britain also had an effect in Mandatory Palestine.47 In 1940, the Palestine Government appointed Richard Graves, a British Trade Union activist, as Superintendent of Labour. In 1942, Graves was appointed as head of the new labor department established in Palestine.48 Only now did the Mandatory government start enforcing the labor legislation of the 1920s. The labor department set out on an intensive campaign to enforce labor legislation. Labor department supervisors began appearing at industrial factories around Palestine, reporting breaches of the law and bringing those in breach to trial.49 At the same time, the new labor department set about modifying and improving existing legislation dealing with employment matters, and a number of new ordinances were enacted.50 This legislative process was not only intended to improve the standards of existing legislation, most of which dealt with labor conditions (for instance, by imposing stricter limits on the employment of children and young persons). It was also intended to regulate new areas such as collective labor relations. Thus, for example, the Defense (Employment Disputes) Order, 1942 recognized for the

46 Ibid., p. 65.
49 According to reports of the department; in 1942, 708 letters were sent to factories that had not observed the provisions of the labor laws. In 1943, 4,777 such letters were sent, while in 1944, 6,393 letters were sent. See Government of Palestine, Department of Labour: Annual report for 1942, 4; Government of Palestine, Department of Labour: Bulletin no. 10 (January–March 1945). 2. Copies of the reports are to be found in the archives of Rhodes House, Oxford, in the Fabian Society files. See RH, Mas. Brit. Emp. s. 365, box 178.
first time the authority of workers representatives to negotiate on behalf of all workers in an employment dispute.\textsuperscript{51}

The enforcement and legislative activities of the new labor department did not go unnoticed by lawyers in Palestine. In an article published in 1945, Advocate Israel Bar-Shira, legal counsel for the Histadrut, wrote that, following the labor laws promulgated in July 1945,\textsuperscript{52} “our country has taken a great step forward along the path of employment legislation ... and it may be that this date will be remembered in the future as the historical date in which Palestine had joined the ranks of progressive countries that protect workers.”\textsuperscript{53} Bar-Shira added that this legislative process was the result of the creation of the labor department, and he reminded his readers that several other ordinances dealing with the minimum wage and the regulation of trade union activities were in the process of being enacted. He therefore concluded that “a new legal area is growing before our eyes. In another year or two, with the promulgation of these new laws, Palestine shall have a modern comprehensive code of labor.”\textsuperscript{54}

The initiative displayed by the British authorities in enforcing existing labor legislation and in broadening its scope beyond the narrow limits of supervision of labor conditions, demonstrates that already in the 1940s the process of creating a comprehensive modern labor law had commenced in Palestine; a process which is usually seen as having commenced in the 1950s. This process was not connected to the establishment of the State, nor to the socialist ideology of the founders, but rather to the changes which Palestine underwent during World War II. The Israeli labor legislation in the 1950s and 1960s was obviously more comprehensive than that of the 1940s, but it was not revolutionary, since the British had already commenced in the creation of a modern labor law system in Palestine.\textsuperscript{55}


\textsuperscript{52} Bar-Shira was referring to the Employment of Children and Young Persons Ordinance, 1945, PG, Supp. 1, 87; Employment of Women Ordinance, 1945, PG, Supp. 1, 101.


\textsuperscript{54} Ibid., p. 231.

\textsuperscript{55} In the twenty years between the establishment of the State and the establishment of the Labor Court, the following labor and social laws were passed: Discharged Soldiers (Reinstatement in Employment) Law, 5720-1949; Night Bakers (Prohibition) Law, 5711-1951; Hours of Work and Rest Law, 5711-1951; Annual Leave Law, 5711-1951; Reserve Services (Compensation) Law, 5712-1952; National Insurance Law, 5714-1954; Apprenticeship Law, 5713-1953; Youth Labour Law, 5713-1953; Employment of Women Law, 5714-1954; Labour Inspection (Organization) Law, 5714-1954; Settlement of Labour Disputes Law, 5715-1957; Collective Agreements Law, 5717-1957; Wage Protection Law, 5718-1958; Employment Service Law, 5719-1959; Sevextance Pay Law, 5723-1963; Male and Female Workers (Equal Pay) Law, 5724-1964; Emergency Labour Service Law, 5727-1967. See Ben-Israel, Labour Law, pp. 29-30; Gilsa, Labour Law in Israel, p. 16.
2. **Constitutional Rights Discourse in the 1940s**

In 1948, one of the leading attorneys in Palestine, Bernard Joseph, published a book on British rule in Palestine. In his book, Joseph stated that “Liberty of the individual is a thing of the past, or of the future, in Palestine.”

Pnina Lahav, in her pathbreaking article on the creation of a system of civil rights in Israeli law in the 1950s, uses Joseph’s words as the starting point of her description of the way in which the justices of the Israeli Supreme Court of the 1950s—especially Justice Shimon Agranat—created a system of fundamental constitutional rights in Israeli law. The image of the justices of the Supreme Court of the 1950s as pioneers who created Israeli civil rights law ex nihilo, appears in other works dealing with the Israeli Supreme Court in the 1950s. If there is any dispute on this issue it is whether the “revolution” in the field of civil rights occurred only in the 1980s, or whether its beginning can be seen already in the decisions of the justices of the Supreme Court in the 1950s.

However, the history of the Israeli rights discourse has a Mandatory “pre-history” which the justices of the Israeli Supreme Court and legal scholars ignored. In the following paragraphs I will survey this “pre-history” in order to show that already during the Mandate, the Supreme Court of Palestine recognized the existence of a system of fundamental constitutional rights that limits the powers of government in Palestine. I will first deal with the creation, and later the contraction of judicial review of Palestinian

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61. Despite the fact that during the Mandatory period the courts recognized property rights as fundamental rights, the Israeli court did not refer to such judgments when discussing the expropriation of land after the establishment of the State. See, for instance, High Court of Justice Petition 1048, Zeer v. Guberak, P.D., I, p. 58. One should note, however, that in the first case in which the Israeli Supreme Court declared the existence of unwritten constitutional rights—High Court of Justice Petition 1479, Becerman v. Police Nisim, P.D. Vol. 7, p. 80— the court did consider, inter alia, Mandatory cases outlining some basic constitutional principles (H.C. 69/25 Federman v. Strauss, [1926] 1 P.L.R. 57).
legislation by Mandatory courts. I will then deal with the appearance of rights discourse in judgments of the Mandatory Supreme Court in the 1940s.

The special structure of the Mandatory government of Palestine, a government created as part of the League of Nations mandate system following World War I, imposed constitutional limitations on the legislative powers of the British authorities in Palestine. The Palestine Mandate, an international treaty on the basis of which control over Palestine was transferred to the British Empire, expressly granted the Arab and Jewish inhabitants of Palestine some fundamental constitutional rights. Thus, for instance, article 2 of the Palestine Mandate stated that the Mandatory government was under an obligation to safeguard "the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion." Article 15 stated that there shall be no discrimination "between the inhabitants of Palestine on the ground of race, religion or language."64 These provisions of the Palestine Mandate became part of Palestinian law by virtue of article 17 of the King's Order in Council, which authorized the High Commissioner to enact ordinances on condition that the ordinances did not infringe the provisions of the Mandate.65

During the 1920s, a number of attempts were made to rely on the Palestine Mandate in order to invalidate primary and delegated Mandatory legislation. Thus, for instance, one case discussed a Mandatory Ordinance (the Urtas Springs Ordinance, 1925) which expropriated the water of the springs of the village of Urtas in order to supply water to Jerusalem. In that case, residents of the village, who owned the water of the spring, claimed that the expropriating ordinance contradicted the provisions of article 2 of the Palestine Mandate, and was therefore void. The Supreme Court of Palestine held that it had the authority to annul primary Mandatory legislation that contradicted the Palestine Mandate by virtue of article 17 of the King's Order in Council, 1922. The Supreme Court further held that the specific ordinance contravened the provisions of article 2 of the Palestine Mandate, because it did not provide for full compensation to residents of the village for the expropriation of the water of the spring. On appeal, the Privy Council in London overruled this decision, but also held that the Supreme Court of Palestine could review Mandatory legislation. However, it was held that the interpretation given by the Supreme Court to article 2 of the Mandate was mistaken. The Privy Council held that that article dealt with

63 This discussion will be based on the description found in Malchi, History of Law in Palestine, pp. 80–84, and on Y. Shachar, "The Dialectics of Zionism and Democracy in Legal Palestine" (Paper presented at the Israeli Legal History Conference, Tel Aviv and Haifa Universities, May 1997).
64 See Malchi, History of Law in Palestine, pp. 202, 204.
the protection of the civil and religious rights of residents of Palestine "irrespective of race and religion" and therefore the purpose of the article was only to prevent discrimination on a religious or racial basis. In the Utrias case, it was not claimed that the ordinance discriminated against the residents of the village for reasons of race or religion and therefore the ordinance was held to be valid.66

Another 1920s case that dealt with the interpretation of article 17 of the King's Order in Council was the "Sabbath case." The issue in this case was the legality of a municipal by-law passed by the Tel Aviv Municipality ordering Jewish residents of Tel Aviv to close their shops on the Sabbath. The appellant in this case was a Jewish restaurateur who opened his restaurant on the Sabbath and was brought to trial. He claimed that the municipal by-law was void because it discriminated against the Jewish population of Tel Aviv. The Supreme Court of Palestine accepted this claim, holding that the by-law was indeed discriminatory. The Court confirmed the ruling that it had the authority for judicial review of primary legislation (and a fortiori of delegated legislation) that contradicts the provisions of the Palestine Mandate, as mentioned in the King's Order in Council.67

Thus, the Mandatory Supreme Court in the 1920s recognized the existence of constitutional rights arising out of the Palestine Mandate and even to recognize the existence of the authority of the court to exercise judicial review to the extent that it could invalidate primary and delegated legislation that contradicted those rights. This broad approach got narrower with the years. During the 1920s, the courts in Palestine were prepared, in many cases, to view the Palestine Mandate as a source for certain constitutional rights in the law of Palestine, and to maintain the court's right to annul legislation by virtue of these rights. However, in judgments from the 1930s and 1940s, the courts in Palestine rejected attempts to attack various types of legislation by virtue of the provisions of the Palestine Mandate.68 Thus, for instance, an attempt to appeal against the force of primary Ottoman legislation that contradicted the provisions of freedom of religion set out in the Palestine Mandate was rejected. In the Shunri case, handed down in 1935, an Arab who was smoking in public in the Arab town of Tulkarm during Ramadan was brought to trial because smoking in public during Ramadan

66 Ibid., pp. 82-84; C.A. 8925 Jerusalem-Jaffa District Governor v. Muna, 1926, 1 P.L.R. 71 P.
was an act forbidden according to the provisions of section 99 of the
Ottoman Criminal Law. The Magistrate’s court accepted the man’s claim
that this specific section in the Ottoman law contradicted the provisions of
the Palestine Mandate guaranteeing freedom of religion and was therefore
void. However, on appeal, that claim was rejected, on the grounds that the
source of the Ottoman legislation is not to be found in the King’s Order in
Council and therefore even Ottoman laws that contradict the provisions of
the Palestine Mandate were valid.69

A similar trend can also be seen in the Rozenblatt case, the judgment of
which was handed down at the end of the Mandatory period. That matter
dealt with the Land Transfer Regulations, 1940 which had been enacted
following the 1939 White Paper. The regulations imposed strict limits on the
abilities of Jews to purchase land in many areas of Palestine, and as such they
were in contradiction of the provisions of the Palestine Mandate. The
regulations were enacted by virtue of clause 16D of the King’s Order in
Council, 1939, which authorized the High Commissioner to make regula-
tions limiting the sale of Arab land to Jews. The petitioner claimed that the
provisions of clause 16D were void because they contradicted the prohibition
against religious or racial discrimination contained in article 15 of the
Palestine Mandate. The Supreme Court of Palestine rejected this claim,
holding that the Palestine Mandate itself had no legal effect in Palestine
other than that given to it by the King’s Order in Council, 1922. Although
article 17 of the King’s Order in Council, 1922 set out the obligation of the
High Commissioner to enact ordinances in accordance with the provisions
of the Palestine Mandate, the Land Transfer Regulations, 1940 were not
enacted under the provisions of article 17, but by virtue of a special provision
(article 16D), which was added to the King’s Order in Council in 1939,
when the British sought to give legal force to the White Paper. Article 16D
did not limit the High Commissioner’s legislative authority by mentioning
the Palestine Mandate, and therefore even if the Land Transfer Regulations,
1940 contradicted the non-discrimination clauses of the Palestine Mandate,
they are not void. The court held that in a case such as this, the remedy is to
be found only on an international level, and not in the context of a petition
to a court in Palestine.70

To sum up this issue, whilst at the beginning of British rule, the courts
were willing to give constitutional validity to the provisions of the Palestine
Mandate, and to review legislation which contradicted those provisions,
during the 1930s and 1940s, the scope of this authority was reduced in
various ways. This seems to support Bernard Joseph’s claim in 1948 that
recognition of civil rights in Palestine was “a thing of the past.” However, a

re-examination of the decisions handed down by the Palestine Supreme Court in the 1940s shows that despite a watering down of the constitutional provisions of the Mandate and despite massive amounts of emergency legislation enacted at the end of the 1930s and in the 1940s, the Supreme Court of Palestine did not abandon the idea that the law of Palestine contained a layer of basic constitutional rights. On the contrary, in the 1940s, in the middle of World War II, and even afterwards, during the struggle between the Yishuv and the British government in Palestine, there were recurrent declarations in the judgments of the Supreme Court of Palestine to the effect that basic constitutional rights do exist in the law of Palestine, grounded not in the specific provisions of the Mandate, but rather in local and English case law.

The emergence of an original rights discourse, recognizing the existence of fundamental law in Palestine, can be seen as early as 1941, in the Guirzman case. In that case, the Mandatory government expropriated the petitioner's apartment, in order to allow residents who had been evacuated from their own apartments due to a plague to live there. The expropriation of the apartment was effected by virtue of the Public Health Ordinance, 1940. The Palestine Supreme Court cancelled the expropriation order, rejecting the claim that the authority set out in the Public Health Ordinance, 1940 also included the authority to expropriate apartments. "The duty of Courts," it was held in that matter, is to "safeguard private rights, and where such rights conflict with what are alleged to be the rights of the community, it is a fundamental principle of English law that the private rights prevail unless there is a definite and unambiguous statutory provision." Judge Gad Frumkin of the Supreme Court of Palestine came to a similar conclusion in another case decided in 1945. In that case, which dealt with certain provisions of Ottoman property law, Judge Frumkin held that the court should interpret those provisions narrowly, in order to protect the "liberty of the subject in disposing of his property in the way he likes."3

The notion that the law of Palestine contained a set of fundamental principles or was grounded in some kind of fundamental law gained momentum with the appointment of William Fitzgerald as Chief Justice of Palestine in 1944. As in many other fields of law, in constitutional law too Fitzgerald embraced change. For instance, the Greiber case (handed down in 1945) dealt with the ability of an owner of an apartment subject to the Rent Restrictions (Dwelling-Houses) Ordinance to raise the rent, after the end of

71 H.C. 97/41 Guirzman v. Director of Medical Services, (1941) 8 P.L.R., p. 533.
72 Ibid., p. 533.
74 In general, see Likhovski, "In Our Image."
the rental contract, to the standard rent set out in the ordinance. In a similar matter decided in England, it had been held that the owner of an apartment had this right by virtue of the common law, and Chief Justice FitzGerald confirmed in his judgment that this right existed in Palestine as well, arguing that such a right stemmed from “the right of a person to dispose of his property as he wishes,” a right which is part of the “fundamental law of Palestine.” In another judgment handed down in the same year, Chief Justice FitzGerald held that “freedom of contract ... is a fundamental keystone of British law [and thus of the law of Palestine].”

The recognition of constitutional rights not mentioned in the Palestine Mandate was accompanied by changes in the definition of holders of rights. Jews and Arabs living in Palestine were usually referred to as “inhabitants” in the decisions of British judges, but references to inhabitants of Palestine as “citizens” began appearing in case-law in the 1940s. One early use of the term “citizen” can be found in Judge Frumin’s decision in the Sherman case of 1940. Towards the middle of the 1940s, British judges joined this trend. An example of this is the Katzak matter handed down in 1947, which dealt with the expropriation of an apartment owned by a Jewish woman (who was also a British citizen). In that matter, the court rejected a petition to annul the expropriation order, but noted that its role was to defend “citizens living under the protection of the Crown,” and described the petitioner herself as a “loyal law-abiding citizen.”

Declarations about the existence of substantial constitutional rights, or the recognition that the inhabitants of Palestine were “citizens,” often had little practical consequence, especially in cases dealing with Jewish terrorism or illegal immigration. For example, when the Supreme Court of Palestine was asked to issue a writ of habeas corpus in respect to an underground fighter who had been exiled to Eritrea in 1944, Chief Justice FitzGerald held that the role of the court was to protect the liberty of the subject, but he refused to issue the writ on the grounds that the courts of Palestine did not have jurisdiction to issue writs that would apply to Eritrea, even if the arrest and exile were illegal. In a similar petition for a writ of habeas corpus, this

77 See C.A. 119/40 Sherman v. Daruvitz, (1940) 7 E.L.R. 69; H.C. 27/47 Toumany v. Chief Secretary, (1947) 14 E.L.R. 81, p. 83; for a discussion on this judgment, see also Lahavski, “In Our Image.”
78 C.A. 113/40 Sherman v. Daruvitz, supra no. 80, pp. 373, 372.
80 H.C. 89/45 Zilberstein v. General Officer Commanding Palestine, (1945) 12 E.L.R., pp. 556, 557. This judgment came up for discussion in the Privy Council where it was held that the right to a writ of habeas corpus exists in the law of Palestine, but the discussion of the legality of the arrest of the petitioner’s son in Eritrea was outside the jurisdiction of the court in Palestine. See H.C.A. 43/46 Zilberstein v. General Officer Commanding Palestine, (1946) 13 E.L.R., p. 616.
time regarding illegal immigrants who had arrived in Palestine in 1946, the court held that the role of this court is to "protect the liberty of the subject," but once again refused to intervene and hold that the arrest warrant, by virtue of which the illegal immigrants were sent to Cyprus, was itself illegal.81

The constitutional rights discourse found in the decisions of British judges also permeated the pleadings made by Jewish advocates. In cases decided in the late 1940s one can see Jewish advocates relying on English constitutional documents such as the Magna Carta or the Bill of Rights in order to cast doubt on the validity of the King's Order in Council.82 For example, when the constitutional validity of Mandatory legislation prohibiting the sale of land to Jews came before the courts, one can find claims that such legislation contradicted "the fundamental principle" of English law under which it is the right of "every citizen [to] freely transfer his property."83 Such arguments were probably made out of a feeling of helplessness, because it was fairly obvious that the British judges would reject such claims; however, the very fact that Jewish advocates were willing to make such claims (and the fact that the judges were willing to hear them)84 is an indication of the change of character of Mandatory case law in the 1940s.

What factors contributed to the rise of a constitutional rights discourse in the decisions of the 1940s Court? One factor was clearly the change in the personal make-up of the Mandatory court in the 1940s, when younger British judges replaced the conservative British judges of the previous generation.85 Another factor was the impact of World War II. An indication of this impact can be found in a speech made by Chief Justice FitzGerald in April 1944, about one month prior to his appointment as the Chief Justice of Palestine. In this speech, FitzGerald drew a distinction between law in the period preceding World War II and the law that would be created in the era following the war (which he called "the Era of Reconstruction"). The new law, he stated, would be different from the law in Britain and the British Empire up till then: The old law had not been sufficiently democratic and

84 Thus, for instance, the claim that the Land Transfers Regulations, 1942 were void, by virtue of the fundamental principles of freedom of property in British law, was rejected not because those principles were held not to be part of the law of Palestine, but because English law itself contains no absolute protection of the right to sell private property — since property rights in English law are limited by the provisions such as the Town Planning Acts, which impose limitations on the free transfer of land. See the Rosenblatt case, p. 291.
85 See Likhovski, "In Our Image," p. 338.
had not properly reflected the will of the "people." On the other hand, the law that would be created in the Empire after the end of the War would be based on the assumption of "equality" between all people and on the existence of rights "arising out of human dignity."

Another indication of the influence of World War II can be found in a decision handed down in 1946 dealing with the expropriation of an apartment. The apartment in question had been expropriated by the Galilee District Commissioner for his personal use. Judge Curry, who wrote the decision, held that, formally, the expropriation order issued by virtue of the Defense (Emergency) Regulations 1945, was valid. He held that the court was not authorized to consider the unreasonableness of the expropriation order, unless the public authority had not acted in good faith. However, the Judge did criticize the expropriation order. "The ordinary citizen's rights," he claimed, "have been very seriously curtailed as a result of the Defence Regulations," and it would seem that this citizen "must often wonder what freedoms remain to him after this war [World War II, A.L.] which one understood was fought to establish the freedom of the subject. Because he is not a Government official it does not follow that he belongs to an lower class of humanity who has no social obligations and whose convenience need not be considered." The expropriation order can only "increase the bitterness of feeling which undoubtedly exists amongst the ordinary citizens against the Government and I do not think that [that] feeling is entirely unjustified." Therefore, Judge Curry summed up his judgment in calling authorities of the Palestine government to reconsider whether it would be proper to protect these sorts of actions in the future.

In the 1940s, then, judgments of the Supreme Court of Palestine declared that the law of Palestine contained constitutional rights that did not originate in any constitutional documents (such as the Palestine Mandate) but rather in judge-made law. Amongst these rights were the right to personal freedom, freedom of contract and the right of property. In some cases, these rights were mentioned, even though they were not actually used. In other cases, the Mandatory court annulled administrative actions justifying its actions using the argument that it was protecting individual rights.

86 See W. Fitzgerald, "The Law in the Era of Reconstruction" (Hebrew), Hapatadi 1, June 1944, p. 8.
87 "Reception in Honor of the New Chief Justice" (Hebrew), Hapatadi, Vol. 1, July 1944, pp. 26, 27.
88 H.C. 24/46 Salahi v. District Commissioner, (1946) 13 P.L.R., pp. 218–219. The technique used here — the non-cancellation of a specific order with the expression of dissatisfaction and a call to the executive branch to reconsider the expropriation — was also used in another matter where the expropriation of land in the area of Tulkarem was approved but the judges called for the government to reconsider the expropriation. See H.C. 47/46 Salahi v. Acting District Commissioner, (1946) 13 P.L.R., pp. 317, 322.
C. Israeli "Revolutions" that Did Not Take Place

From the above paragraphs it can be seen that the beginnings of two "revolutionary" processes usually seen as beginning in the 1950s — the appearance of labor legislation and the appearance of rights discourse in the decision of the Supreme Court — in fact occurred in the 1940s. I will now move to the events of 1948 itself. Anyone reading the journals of that time senses that many of the "first Israelis" felt that they were living in a revolutionary period. This was also true of lawyers. Legal journals such as Ha'aprait, published by the Israeli Bar Association, contained numerous articles discussing the character that the Israeli legal system should adopt, and it seems that there was little dispute that Israeli law had to be very different from the law of the Mandate period. Despite this atmosphere, very few Mandatory enactments were actually replaced. The legal revolutions foreseen in 1948 never took place. The great opportunity for a legal "revolution" (if there was indeed any such opportunity) was missed.89

1. Jewish Law90

Towards the end of the Ottoman period and at the beginning of the Mandatory period, it seemed that the law of Zionist Jews in Palestine, and the legal system of any Jewish State that might arise, would be a national secular law grounded in the Halacha, Jewish religious law. Although Zionist thinkers from central Europe, especially Theodore Herzl, saw the Jewish State as one that would adopt Western laws,91 some of the Zionists in

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89 In writings of the period, one can well sense the disappointment arising from the non-occurrence of the anticipated revolution (see for instance, O. Teutsch, "Introduction to 2nd Edition," Studies in Israeli Law (Hebrew), 2nd expanded edition, 1959. "Up till now no fundamental renewal has taken place in our law that might be seen as an historical turning point. In this respect, as with other respects of our renewed national life, it is hard for a unique identity or indeed any identity to take shape. The problems of positive law are still, in the main, the problem of a colonial and levantine system." On this matter, see also E. Karp, "The Legal Council" (Hebrew), in A. Barak and T. Sponse, eds., In Memory of Uri Yadin, Jerusalem, 1980, Vol. 2, pp. 209, 234 (discussing the argument that took place in the Legal Council on the future character of law in the State of Israel and its relationship to Jewish, continental and English law). One should also note that there were many other possible legal "revolutions" that did not occur. For instance, contrary to what might have been expected, a rigid constitution was not adopted. On the format of this constitution, see, for instance, F. Dayan, "Notes on the Israeli Constitution" (Hebrew), Ha'aprait, Vol. 6 (1949), p. 2, and see also Harris, "Israeli Law," p. 244–245.

90 I use the term "Jewish law" because this is the conventional English translation. A more accurate translation would be "Hebrew law" (Midyat levt). On the difference between "Jewish" and "Hebrew" law, see generally, A. Likhovski, The Invention of Hebrew Law in Mandatory Palestine," American Journal of Comparative Law, Vol. 46 (1998), p. 339.

Palestine sought to create an independent national legal system that would integrate Jewish and Western norms.\footnote{For a general discussion of Jewish legal nationalism during the period of the Mandate, see Lakhonski, "The Invention of Hebrew Law," R. Shamir, "Law and Nationalism."}

The process of legal "revival" commenced at the same time in both Russia and Palestine. Already in 1909, an autonomous Jewish judicial system was set up in Palestine — the Hebrew Peace Courts — meant to provide members of the new Yishuv with an alternative to the Ottoman, consular or rabbinical courts. A little while later, Russian Jewish lawyers established a Jewish Law Society (Hirvat ha-Mishpat ha-Yehudi) in Moscow. After the British conquest of Palestine, many members of the Jewish Law Society immigrated to Palestine. They joined the ranks of judges and administrators in the Hebrew Peace Courts, they published journals and books and reestablished the Jewish Law Society, this time in Palestine. In the 1920s it seemed that the project of reviving Jewish law and cloaking it in a secular Zionist dress would enjoy as much success as the project of reviving the Hebrew language. However, various factors brought about a decline both in the activities of the Hebrew Peace Courts and of the research activities of the Society for Jewish Law.\footnote{On this process, see Shamir, ibid.}

If the revival of Jewish law looked to be at the point of extinction in the 1930s, prior to the establishment of the State it gained renewed interest.\footnote{The discussion that follows is based, inter alia, on Rubinstein, Judges of the Land, pp. 45-49.} The original activists of the Jewish Law Society and of the Hebrew Peace Courts, headed by Paltiel Dikhstein and Shmuel Eisenstadt, increased their activities in the late 1940s. In an article published in December 1947, entitled "A Jewish State Needs Jewish Law," Dikhstein demanded that even if the existing mandatory laws were to be retained after the establishment of the State, a provision should be enacted to the effect that wherever there is a legal "vacuum" or where there are "contradictory provisions," the courts and other government agencies would be required to turn to Jewish law.\footnote{This provision had been intended to replace the provisions of Article 46 of the King's Order in Council, 1922, and to bring about an effect similar to that caused by Article 46 in respect of English law. See P. Dikhstein, "A Jewish State Needs Jewish Law" (Hebrew), Hapraklitut, Vol. 4, 1947, pp. 329-330. See also P. Dikhstein, "Proclamation of Jewish Law" (Hebrew), Hapraklitut, Vol. 3, 1948, p. 3 (in which Dikhstein suggested the following provision: "wherever the existing laws do not deal with a certain point at all, or wherever such laws are ambiguous or contradictory, the courts and the government must use Jewish law in accordance with the requirements of the present time"). For other versions of the...}
born Jewish State. In an article published in 1946 and entitled “Looking Forward” the German-Jewish lawyer, Haim Cohn, stated that in order to prepare for the impending establishment of the Jewish State, Jewish law should be revised by drawing up “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 regime in Palestine weakened and the establishment of a Jewish State became a real possibility. At the beginning of 1947, the idea of creating autonomous Jewish courts in Tel Aviv arose again, and naturally, there was debate about the law that such courts would apply. It was at that time that the call went out to “zealous redeemers who would return Jewish law to the path of the natural life of the people and the State.” Moshe Silberg, who had already sought the codification of Jewish law in the 1930s in order to turn that law into the law of the future Jewish State, came back to this subject in September 1947 when he once again claimed that the Jewish State would have to adopt Jewish law as its national law, after having undergone suitable codification. Naturally, in the first months of 1948, immediately prior to the establishment of the State and immediately thereafter, there were increased calls to adopt Jewish law as the law of the State of Israel — both on the part of members of the Jewish Law Society and on the part of traditionalists (who spoke not of “Jewish law” but of “traditional law” or of “the laws of our Holy Torah”).

Some ideas, see Karp, “The Legal Council” (citing a suggestion that “judgment in civil courts should be based on the laws in force the day before the termination of the Mandate and in accordance with the principles of the laws of the Torah and the rules of justice and equity”).


These demands found a practical expression. In December 1947, the Legal Council was set up and Freiman was appointed as head of the Council's sub-committee dealing with Jewish Law.\textsuperscript{102} However, Freiman was killed in the Mount Scopus convoy, and the sub-committee did not succeed in completing its work, which might be one of the reasons why after the establishment of the State, the Israeli government did not make any of the declarations regarding Jewish law that activists in favor of this law had anticipated.\textsuperscript{103}

There were also members of the Jewish community in Palestine who opposed the idea of using Jewish law as a basis for the law of the State of Israel. Lawyers who had studied in Central and Western Europe identified Jewish law with religious law (\textit{Halacha}) and wanted to create a legal system that would have a stronger connection with modern western law. Politicians such as David Ben-Gurion, who were not interested in creating a legal system identified with the religious sector, sided with this view. However, even these lawyers and politicians paid lip service to the idea of using Jewish law as a basis for the law of the State of Israel. This is what Ben-Gurion and Moshe Smoira, the first Chief Judge of the Israeli Supreme Court, did in their speeches to a conference of the Bar Association in June 1949. Ben-Gurion, for instance, stated in his speech that “we would not be what we are were it not for our continuous drawing from the sources of our ancient existence, nor for our affinity to the roots of our past.”\textsuperscript{104}

It soon became apparent that a “national revolution” would not take place in the area of law, and in September 1949, Paltiel Diikstein already complained that the new Israeli legislation ignored Jewish law.\textsuperscript{105} These complaints did not have any practical effect, and a decade after the establishment of the State, it was clear that the fate of Jewish law was sealed. In an article written at the end of the 1950s, Haim Cohn, who had been one of the chief supporters of adopting Jewish law in the period prior to the establishment of the State, wrote that the conservatism of the Rabbinical establishment brought about the situation whereby “amongst [secular] lawyers, it was possible seven, six, even five years ago, but it is impossible now to gain support to renew Jewish law.” Thus, Cohn added, “the revival of Jewish law

\textsuperscript{102} See Karp, “The Legal Council,” p. 222 (the sub-committee dealt with “the role of Jewish law in the law of Israel”).

\textsuperscript{103} P. Dikhstein, “Dr. Abraham Haim Freiman” (Hebrew), Ha'apala, Vol. 5, 1948, p. 67; Menochem Elron, interview with the author, November 21, 1995.

\textsuperscript{104} See “Report of the XIII Conference of the Israel Advocates’ Union” (Hebrew), Ha’apala, Vol. 6, 1949, p. 97 (Ben-Gurion), p. 103 (Smoira).

\textsuperscript{105} P. D., “On Legislative Methods in Israel” (Hebrew), Ha’apala, Vol. 6, 1949, p. 144.
as the law of the State is no longer up for discussion; it is the concern of yesterday."106

2. Continental Law
Alongside the "Jewish option," the first Israeli lawyers also had a "Continental option." The modern legal world is divided into two: The Anglo-American family of legal systems, and the Continental family of legal systems, the origins of which are to be found in Roman law. These two families may be distinguished from one another both on the basis of their substantial rules and their fundamental principles. Thus, for instance, the two families are distinguishable in respect of the sources of legal norms, the manner of holding trials, rules of evidence, and many other matters.107

The Mandatory system was a complex amalgam of English and Continental rules and principles. The Ottoman system that had been in place (at least formally) in Palestine prior to the British conquest had its foundations in Islamic law. However, in the middle of the nineteenth century, the character of the Ottoman system changed, when it began to adopt European — mainly French — norms and procedures as part of the reforms undergone by the Ottoman Empire (the "Tanzimat").108 When the British conquered Palestine, the process of replacing the Ottoman system with British legal rules and principles began. Almost all of the Ottoman laws stemming from French sources was replaced by legislation based on English law or on English-Colonial law. The structure of the legal system and its procedures also changed, with the English rules of procedure and evidence replacing Ottoman laws.

Thus, prior to the establishment of the State, the Mandatory legal system was one whose core has become English, although in many areas, there were remnants and even large sections of law that were Continental in character. The English character of the law was foreign, to a greater or lesser extent, to many Jewish lawyers in Palestine who had acquired their legal education in European countries. Examples of such lawyers are Pinchas Rosen, the first Minister of Justice; Haim Cohn, the Attorney General; and Uri Yadin, the head of the Legislation Division of the Ministry of Justice, all of whom had studied law in Germany. Some of the first justices of the Israeli Supreme Court were also educated in the Continental tradition. Of the first five

judges of the Supreme Court, two had studied law in the Continent: Moshe Smorn, the first Chief Justice had studied in Germany, and Menahem Dunkleblum, a former chairman of the Jewish Bar Association, had studied law in Poland, Austria and Holland. The dominance of Continental education amongst the leaders of the Israeli legal system in its first years was also reflected in the fact that independent Jewish legal education itself had a Continental orientation.

One might have expected that with the British departure from Palestine the character of its legal system would change, its English orientation being replaced with a Continental one. In fact, initial steps in this direction were taken by Uri Yadin, head of the legislation division of the Ministry of Justice. In an article based on Yadin's diaries, Yoram Shachar pointed to Yadin's attempts to gradually replace the basis of the legal system, including an attempt to adopt Continental rules of evidence in new legislation.

Yadin was not the only lawyer striving to reorient the new legal system. Other important legal figures such as Pinchas Rosen, the minister of Justice, and Gad Tedeschi, a leading scholar at the Hebrew University, supported him. Rosen, for example, called for a transition from an English to a Continental orientation, whilst Tedeschi, one of the most important legal scholars in the first years of the Israeli law, who had studied law in Italy prior to his immigration to Palestine, wanted to replace English legislative models with Continental ones. Israeli law, Tedeschi said in one of his articles, should take into consideration the Continental model because such models were adopted by neighboring Arab countries, and the adoption of similar models could lead to legal cooperation.

The "Continental law revolution" failed just like the "Jewish law revolution." The failure came about because both alternatives to the existing legal system suffered from bad public image. Just as Jewish law suffered because of its identification with the Jewish religion, the Continental system suffered from the connection with German law and German culture. As Shachar shows, Yadin tried to hide this connection by talking about "original" Israeli

110 See Lifshitz, "Colonialism."
114 O. Tedeschi, "On the Movement of Reception and Codification in Neighboring Countries," ibid., p. 69.
solutions when in fact he was borrowing from German law. Despite Yadin’s activities, however, the Israeli system retained its common law character.

D. Conclusion

We have seen that for several reasons, 1948 cannot be considered a turning point in the history of Israeli law. Some of the legal changes which are commonly viewed as commencing in that year or in the years immediately following have a Mandatory "pre-history," while other legal changes or "revolutions" which might have been expected to have occurred in 1948 did not take place at all.

Why is it important to question the accepted scheme of periodization of the history of Israeli law? One answer to that question might be that the tendency to begin the story in 1948 conceals certain processes. For instance, one of the most interesting debates among Israeli legal scholars deals with the formalism of Israeli Supreme Court decisions in the 1950s. This debate is based on the presumption that Mandatory legal thinking was entirely formalistic, and that the formalism of the 1950s was a mere continuation of trends that had commenced during the Mandatory period. However, if we change our perspective, if we ignore 1948 and look at the history of Israeli law as including the period of the Mandate, we will discover that Supreme Court decisions during the Mandate period were not always formalistic. Legal thinking in the Jewish community in Palestine, especially amongst supporters of Jewish law, was greatly influenced by anti-formalistic Continental trends, inspired by the German Historical School of Law and of German Free Law movement. Similar trends (recognition of the link between law and society and recognition of the creative role of the judge) can be found in judgments handed down by English judges in the 1940s.

116 The climax of this activity was what was termed "the new civil legislation" in the 1960s and 1970s based mainly on Continental sources. But even this legislation still retained "common-law jurisprudential conception." See M. Mautner, "Standards in the New Civil Legislation" (Hebrew), Mishpatim, Vol. 17, 1987, pp. 321-345.
118 See I. Lahav, "An Outline of Justice Agranat's Legal World View," in A. Barak et al., eds., Essays in Honour of Shimon Agranat, Jerusalem, 1987, pp. 9, 16; Mautner, Declaration, p. 40. For the claim that case law of the 1950s was not entirely formalistic, see Harris, "Israel Law," pp. 255-260.
119 See e.g., Ronen Shain, "Law and Nationalism," see also, for example, A. Epstein-Halevi, "The Jewish Court of Arbitration, its Characteristics and Required Reforms" (Hebrew), Ha'eshkol, Vol. 2, 1928, p. 127; L. Bendicks (ed.), "Irrational Factors Effecting the Mind of the Judge" (Hebrew), Hatpilut, Vol. 1, Oct. 1944, p. 3; "Farewell to Dr. Benda" (Hebrew), Hatpilut, Vol. 4, 1947, p. 62.
especially in those of the last Mandatory Chief Judge, William FitzGerald. If we do not distinguish between “Israeli law” and “Mandatory law” but rather see them as a single entity, we can ask new questions about the judicial decision-making style of the 1950s. For instance, why did the change from the non-formalistic style of decision making of the 1940s not leave its mark on judgments of the Israeli Supreme Court of the 1950s, which “regressed” to a formalistic style?

Does the blurring of the boundaries between the Mandate period and statehood have any significance for historians not interested in legal history? Law is a semi-autonomous field. Its history (and periodization schemes) are connected to the periodization schemes of general history, but this link is not always strong. Therefore, the fact that in many ways the year 1948 was not an important turning point in the history of Israeli law does not necessarily lead to the conclusion that we must rethink our periodization schemes in other fields of the history of Palestine. Nonetheless, despite these reservations, it seems proper that a discussion of the issue of the periodization of the history of Israeli law give rise to rethinking in non-legal fields also. The centrality of 1948 in Israeli history partially stems from the desire to define Israeli society and the Israeli institutions that arose after 1948 as unique. This is a dominant way of thinking in the Zionist historical narrative. A narrative which has ignored the great similarity between the history of Israel and the history of other post-colonialist societies such as India or Pakistan. In contrast to those societies, which are to a great extent a product of the colonial period, Israel has been seen by its founders as the unique product of Zionist ideology and Jewish culture, whilst the contribution of other elements — such as the British element has been minimized. Drawing to these elements (and generally to comparative aspects of Israeli history)


122 Conventional Israeli historiography, like the national historiography of other small nations, tends to emphasize national uniqueness at the expense of the comparative element. See Perel, “Innovation and Revisionism,” pp. 130–131. In the last few decades, writings dealing with the history of twentieth-century Palestine from a comparative point of view have begun to appear (usually comparing Zionism with other colonialist movements). See, for instance, B. Kisterling, Zionism and Territory: The Socio-Territorial Dimensions of Zionist Politics, Berkeley, 1983; G. Shavit, Land, Labor and the Origins of the Israeli-Palestinian Conflict, 1882–1914, Cambridge, 1989. Nonetheless, in these studies too (as in traditional literature), the central figures are still the Yahav and the Zionist movement. Thus instead of comparing Palestine in general with other colonial societies,
will assist us to better understand the present situation of Israeli society struggling to this very day, like other third-world societies, with the heritage of its colonial past. Dealing with the colonial heritage of our law and with our own colonial past is also important for the rethinking of our own identity. Like many other post-colonial societies, Israeli society (and Israeli law) are imbued with a constant feeling of temporariness, of non-completion and of failure. This feeling stems from the unachievable desire of Israeli society and Israeli law to become "truly" Western. Part of the process of maturity of Israeli law should be the recognition that this goal cannot be reached and coming to terms with the post-colonial nature of Israel. Questioning accepted schemes of periodization in Israeli historiography is an important step in this process.

researchers compare the Zionist movement with other colonial movements. This type of comparison contributes to a better understanding of labor relations or land policy, but it may not be appropriate for legal history, where in many cases both Jews and Arabs were to be found on the same side of the native/colonizer dividing line. See generally, Likhovski, "In Our Image:"


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