The Ottoman Legacy of Israeli Law*

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I. Introduction

This is a very exciting event and I am extremely grateful for Michal Gur Arye of the Israeli consulate and for the faculty of law of Istanbul University for inviting me to participate in this seminar.

The seminar is part of a series of events celebrating the connection of David Ben Gurion - Israel's first prime minister - with Istanbul and the Istanbul University Faculty of Law. Ben Gurion was a student at Ottoman law school, from which this faculty originates, but he was not the only Israeli founding father who studied here. In the second decade of the 20th century, a number of young Jewish students from the Ottoman provinces of what later became Mandatory Palestine and Israel studied in the Ottoman Law School. Not just Ben Gurion, but also Moshe Sharett, who was Israel's second prime minister and Izhak Ben-Zvi, who was Israel's second president. The Ottoman Law School was thus an important training ground of some of the major figures of Israel's political elite immediately after Israeli independence. This was not something exceptional. As legal historian Donald Reid has shown, graduates of the Ottoman Law School formed the core of the political elite not

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just in Israel but in many other post-Ottoman countries such as Syria and Iraq.

Ben Gurion was a good student. In his two years of study here (1913-1914) he got excellent grades, and in his letters and memoirs, he proudly boasted about these grades, saying:

> "The maximum grade [one could get at an exam] was 10. On the first exam (international law) I received 9.5, on the second [exam] (civil law) I receive the maximum 10… the third exam was criminal law. Normally results are not made known the same day, but this time the professor told me with enthusiasm after the problems he had posed to me: 'I have already awarded you a grade of 10' and turning to the second student who had entered the exam with me, he said: 'I am delighted and satisfied when I have the opportunity to give such as student a 10.' Twelve students had been examined before me and all emerged from the exam angry and cursing that professor for being so exacting and pedantic."

Ben Gurion was proud of his achievements as a law student, but his familiarity with law led him later in life to treat lawyers and legal matters rather condescendingly. For example, in a debate in the new Israeli parliament in 1948, Ben-Gurion relied on his credentials as a former law student to dismiss liberal objections to a law which infringed civil rights saying:

> "The question is this: have we been made for the legal principle or has the legal principle been made for us? Every jurist knows how easy it is to weave juridical cobwebs to prove anything and refute anything. . . . [A]s a [former] law student, I know that no one can distort a text and invent farfetched assumptions and confusing interpretation like the lawyer…"

The Ottoman roots of Israeli law were not limited to the educational background of some of the major founding fathers of Israel. Ottoman influence is still evident in the structure and substance of Israeli law today. A striking example of the continuing influence of the Ottoman legacy on Israeli law can be found in the fact that Israel retained the Ottoman Civil Code, the *Mejelle*, much longer than any other post-Ottoman country. While many parts of the *Mejelle* were replaced by Israeli legislation in the 1960s and 1970s, it was only in 1984, two decades ago, that the Israeli parliament finally repealed the *Mejelle*. Israel was thus the *last* post-Ottoman country to retain

this code – which is based on Islamic law - long after countries like Turkey, Syria, Lebanon or Iraq repealed it. I am not sure that many of the advocates of the return to *Shari'a* law in Islamic countries today will appreciate the fact that Islamic law formed the backbone of Israel's legal system until quite recently, but this is a fact that cannot be disputed.

In my talk today I will try to do two things. First, I would like to provide an overview of the Ottoman legacy of Israeli law, and second I would like to address the question why did Israel retain parts of the Ottoman legal heritage longer than any other post-Ottoman country. This, I believe, is a fascinating question, which is relevant not just to Israeli lawyers and legal scholars but also to Turkish ones, because, as I hope you shall see, it reveals some universal dilemmas about the connection between law, religion and nationalism.

I shall begin my talk with a brief survey of history of Israeli law, emphasizing its connection to its Ottoman predecessor. I shall then try to provide a number of explanations for the retention of parts of the Ottoman legacy in Israeli law today.

II. A Brief History of Israeli Law

As you all probably know, during the middle decades of the nineteenth century, the Ottoman Empire underwent a series of administrative and legal reforms – the *Tanzimat*. As part of these reforms, Ottoman rulers enacted a number of codes (criminal, commercial and procedural) mainly inspired by French law. They also codified Islamic civil law. Reform of Ottoman law did not apply to family law, and these matters were governed by Islamic law or by the religious laws of the various minority communities in the empire. The Ottoman legal system was thus a mixed system, using norms taken from a number of different countries.

The court system of the late Ottoman Empire had a similar, mixed, nature. The Ottomans established a hierarchy of secular courts, at the apex of which stood a French-inspired Court of Cassation in Istanbul. But side by side with these secular courts, Islamic, Christian and Jewish religious courts continued to function.

During the First World War, British troops occupied the territory that is called today Israel which was part of the Ottoman Empire until then. At first the British ruled this territory – mandatory Palestine - by virtue of their military power, but in 1922 Palestine was granted to Britain by the League of Nations as part of the mandate system. During the period of the British Mandate,

which lasted until 1948, the legal system of mandatory Palestine underwent a process of partial transformation. This process is often called "Anglicization." However, Anglicization influenced only some parts of the legal system that the British inherited from the former Ottoman rulers of Palestine. Important parts of the Ottoman legal legacy were retained by the British. The ultimate result of the process of Anglicization during the three decades of British rule was therefore a system which was even more mixed and heterogeneous than the late Ottoman system.

The British retained the basic Ottoman court structure with some modifications. Just like their Ottoman predecessors, British rulers divided the court system between secular and religious courts, relaying on the Ottoman *millet* system which gave certain autonomy to the courts of recognized religious communities. Since litigants could no longer turn to the Court of Cassation in Istanbul, the British established a Court of Appeal (later named the Supreme Court) in Jerusalem to hear criminal and civil appeals and also to decide (sitting as a High Court of Justice) administrative and constitutional law matters. Appeal from the Supreme Court of Palestine lay with the Privy Council in London but the right of appeal was limited only to certain legal matters.

During Ottoman times, the official language of pleadings in the courts was Turkish, although Arabic was often used as well. After British occupation, Arabic replaced Turkish as the main language of the courts. However, English and Hebrew were also used by the courts. Because of the polyglot nature of the population, many other languages were also heard in the courts. Judge Gad Frumkin, another graduate of the Ottoman Law School (who translated the *Mejelle* from Turkish to Hebrew) wrote in his memoirs that he once heard seven different languages used in his court in a single day (apart from English). The Arabs, he said, were addressed "in Arabic, Greeks and Armenians in Turkish, Jews in Hebrew, Yiddish and Judeo-Spanish and European priests in German and French."

I have described the partial retention of the Ottoman court structure by the British. What about the substantive norms of Ottoman law? Ottoman law was viewed unfavorably by many British officials, who often described it as outdated and archaic, intricate and obscure, illogical and unreasonable, harsh and monstrous. However, while as a general matter British officials did not view Ottoman law favorably, British colonial legal policy tended to prefer the practical and perhaps option of preserving the legal status quo. Legal reform was not something that the British were keen to do,

and when they reformed local law in their colonies, they often used two legal categories which limited the process of reform. One was the distinction between substance and procedure; the other the distinction between the public and private spheres.

The British were not keen to replace local substantive law. They were more willing to replace procedural law. The replacement of local rules of process and evidence was a practical need, because British judges were used to the evidentiary and procedural notions of the common law.

Changing substantive law was more difficult than replacing local procedure, but here too Anglicization was often at work. Those areas of law conceived by the British as most "private" (or "religious") -- the law of marriage and divorce, laws of inheritance and to a lesser extent the rules governing land tenure -- were usually left unchanged. An intermediate area of law, the rules of contracts and torts, was usually replaced by English rules, but the process sometimes took a long time. Finally, the more "public" areas of law -- criminal law and commercial law were almost invariably Anglicized.

Importation of English law was not always intentional. When new legal questions appeared, English-trained lawyers and English judges naturally turned to English law to solve them, and thereby imported this law into the legal systems of the colonies inadvertently. Importation was also the result of lack of familiarity with the local legal system.

Lack of familiarity with local law was certainly evident in Palestine. This was not only due to the fact that Palestine was often merely one station in the long careers of British officials who moved from one legal system to the next every few years. It was also the result of the fact that some of the British officials in Palestine, especially during the first years of British rule, were not professional lawyers. In addition, Ottoman law was objectively hard to ascertain. An unofficial French translation of Ottoman legislation had been made in 1905, but there was no authoritative English version of Ottoman legislation. Copies of the French translation were rare and not all British officials had access to them.

The distinctions between process and substance and between the public and the private spheres that the British employed in many of their colonies also appeared in Palestine. Two major mechanisms existed for importing English law into the law of Palestine: the first was legislation, the second was judicial decisions. During the three decades of the mandate, British legislation replaced a number of

Ottoman laws by enactments based on English or British-colonial codes. The process of replacement took place in a way that reflected the substance/process, public/private dichotomies. The British began with procedural and public law and gradually moved on to more private/substantive areas of law. In the 1920s, the British replaced Ottoman commercial laws, the Ottoman code of criminal procedure and some Ottoman rules of evidence. They also reorganized the land registration system, began a cadastral survey of the land and promulgated town planning legislation.

The process of legislation in the 1920s was orchestrated by the Attorney General of Palestine at the time, Norman Bentwich. Bentwich, who was an English Jew, was keen to aid the Zionist project. He therefore concentrated his efforts on providing Palestine with a set of modern commercial laws that, he believed, would facilitate the economic development of the country, and thus attract more Jewish immigration to Palestine. Bentwich's interest in commercial law was also an attempt to deal with the different needs of the two major communities of Palestine. The Palestine legislator, he said, is "a circus rider with his feet on two horses [i.e., Arabs and Jews], one that will not go fast, and the other that cannot go slow." His solution to this problem was to restrict legislation to specific areas of law. The "main motive of law making is the demand for modern institutions by the progressive population which came to Palestine from ... Europe [i.e., the Jews]," said Bentwich in 1932. The Arabs, on the other hand, would be "allowed" to keep the law "governing their contracts and simple dealings."

It is interesting to note that legislation in the 1920s was aimed mainly at replacing the French-based parts of Ottoman law. "The Civil code and the Land code," said Bentwich, both "regarded as an Eastern and Moslem heritage, were left broadly in force to govern day to day transactions." But he continued, "it was otherwise with the Commercial law. No sacredness of religion or custom attached to the Ottoman version of the French code; and the provisions, imported in 1860 ... were clearly unsuitable for a country developing, under British administration, the enterprise of the most alert commercial people in the world."

The conscious use of legislation as a tool for development disappeared in the 1930s, partly, no doubt, as the result of Bentwich's enforced resignation. The major change in the 1930s was that the French-based Ottoman Penal Code and the code of Civil Procedure were replaced by codes based on English law together with the enactment of a Bankruptcy Ordinance. Generally speaking, how-

ever, this period was one of little legislative activity and this state of relative inaction continued into the 1940s. Only in the late 1940s, when British rule in Palestine was nearing its end, did the British begin to intervene in such areas of law as tort and labor, which had been left poorly regulated until then.

When the British left Palestine in 1948, the process of Anglicization was thus only partly completed. Major parts of the law of Palestine were still Ottoman other parts were now English. Consequently, the legal system that was left behind was even more mixed than the one the British inherited from the Ottomans. It was a legal system which now had parts taken from Islamic, French, and English law.

Since 1948, Israeli law has gradually shed parts of the mixed Ottoman-English legal system that it inherited from Mandatory Palestine. Israelis reformed the private law they inherited from the Ottomans and the British, ultimately creating a continental-like series of civil acts which will eventually become a civil code. Constitutional, administrative and commercial laws have also been greatly modified.

However, the abandonment of the Ottoman legacy did not take place overnight, and indeed, in some cases, such as that of the *Mejelle*, Israelis retained Ottoman laws long after these laws were repealed in Turkey or other post-Ottoman states. Indeed, even today in 2007, some parts of the Ottoman legacy are still around: The dual secular-religious court system based on the Ottoman *millet* system still exists in Israel today; some sections of the Ottoman Code of Civil Procedure are still in effect, and numerous provisions of the *Mejelle,* have been incorporated into Israeli legislation and case-law and thus continue to survive albeit in a modified way in Israeli law. In addition, one should note that Ottoman land law, which is not in force any longer within Israel proper, nevertheless continues to exert enormous impact on Israeli society. The Ottoman land law was still in force in Jordan in 1967, when Israel occupied the West Bank during the Six Day War, and the Israeli government has used this law quite extensively to facilitate the process of Israeli settlement building on what Ottoman land law defined as “state lands” in the West Bank.

The next parts of my lecture ask why was the Ottoman legal legacy retained in Israel for so long. First, I describe what may be called “the Jewish Legal Revolution”, which could have provided one alternative to the existing legal status quo, and then I discuss

several reasons why this legal revolution failed and why Israelis retained the Ottoman-English legal legacy until this very day.

III. The Attempt to Replace the Ottoman-English Legacy of Israeli Law

The "first Israelis" who lived through the months before and immediately after Israeli independence in 1948 felt they were living in a revolutionary period. This is also true of the first Israeli lawyers. The pages of the journal of the Jewish Bar Association of Palestine, *ha-Praklit*, contained many articles that discussed the desired character of Israel's legal system and declared that the legal system of the new Israeli state should be entirely different than the system Israel inherited from the Ottomans and the British. That legal system, the majority of Israeli lawyers declared, should be linked in some way to Jewish law. This desired linkage was not a utopian dream, that briefly appeared in 1948. It had a long history which goes back to the early decades of the Zionist project. In this section I will trace the attempt to create a nationalist legal system for the Jewish community in Ottoman and British-ruled Palestine, and discuss several reasons why this attempt failed and why Israelis retained the Ottoman-English legal legacy after 1948.

Before I do so, I should note that the Jewish law alternative was not the only one contemplated by Israelis in 1948. Another possibility would have been to replace the mixed Ottoman-English mandatory legal system with one based on continental law. Many of the most influential legal figures in Israel in the first few decades after independence were German-Jewish lawyers. Why these lawyers did not move Israeli law in a more continental direction is a very interesting question which I have discussed in more detail elsewhere.

Nationalists often seek to revive ancient cultural traditions. Like many nationalist movements, Zionists too sought to revive the Jewish cultural past. The best-known aspect of Zionist cultural activity is the revival of the Hebrew language. But linguistic revival was not the only item on the Zionist agenda. Some Zionists also sought to revive what they called *Mishpat 'Ivri* (literally "Hebrew law") and make it the legal system of the Jewish community in Palestine. The revival of law, like the revival of a large part of Hebrew culture by the Zionist movement, was not so much a continuation of the Jewish past as a break with it; not the restoration of an old tradition, but the invention of a new one. Secular Zionists sought to create a new "Hebrew" person who would be the antithesis of the old exilic Jew. The revivers of Jewish law therefore envisioned the creation of a new

legal system *based* on Jewish law but not *identical* to it. They used the term *Mishpat 'Ivri,* literally "Hebrew Law" in order to distinguish their modernized notion of Jewish law from the traditional law of Jewish communities in the Diaspora -- the *Halakha*.

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

Such ideas had an immense influence on legal movements in many countries. They also influenced some Zionist legal thinkers. These thinkers, who came mainly from Russia, called for the creation of a national Jewish legal system that would be based on Jewish law. In the beginning of the twentieth century, a number of Russian-Jewish students, educated in central European and Russian universities, decided that the time had come to begin the work of legal revival. They established a "Hebrew Law Society" which advocated the project of Jewish legal revival in Russia immediately before the Russian Revolution. In the early 1920s, as conditions in the Soviet Union worsened, the society was disbanded, and some of its members moved to Palestine.

Meanwhile, in Ottoman Palestine, Zionist immigrants created a system of secular Jewish courts. These courts, called the Hebrew Courts of Arbitration (*Mishpat ha-Shalom ha-'Ivri*), were established in 1909. The main reason for their creation was the practical desire of Zionist Jews not to be subjected to the jurisdiction of Ottoman, rabbinical or consular courts. However, the notion of nationalist legal revival, to which even some secular socialist Jews were committed at this time, also played a part in the creation of these courts.

After the end of World War I, the amount of litigation in the Hebrew Courts of Arbitration increased dramatically. It was also at this time that their activity became fused with the activity of the Hebrew Law Society, which was now reestablished in Palestine.

In the 1920s, the project of creating an autonomous nationalist legal system for the Jews of Palestine seemed feasible. By the early 1930s, however, the movement for Jewish legal revival lost much of its momentum. However, in the years 1945-1948, as prospects of the establishment of an independent Jewish state in Palestine grew, the idea of using Jewish law as the basis of the legal system of the new Jewish state became popular again.

It is important to note that the advocates of Jewish legal revival realized it could not take place overnight. They did not demand replacing mandatory law with Jewish law at one fell swoop. Far more modest (and realistic) proposals were made. One such proposal was integrating norms taken from Jewish law into new Israeli legislation, or declaring that there was a link between Israeli law and Jewish law in the constitution of the new state, or enacting a law that would require Israeli judges to turn to Jewish law in cases of lacunas or conflicts in existing laws.

However, it soon transpired that there would be no "national revolution" in the field of the law, not even the simple declaration that Jewish law could be used to fill in gaps in existing legislation. The first act of legislation after the establishment of the Israel, the Law and Administration Ordinance of 1948, refrained from explicitly linking the new Israeli legal system with Jewish law.

The idea of linking Israeli and Jewish law did not disappear completely. Another attempt to associate Jewish law with Israel's legal system was made in 1980, when a law called "the Foundation of Law Act" was enacted by the Israeli Parliament. This law instructed judges that in cases in which no answer could be found in Israeli legislation or case law, they should decide the case in accordance with the "principles of freedom, justice, equity, and peace of Israel's Heritage." While some observers had high expectations of this act, a series of Israeli Supreme Court decisions from the 1980s and 1990s made certain that it would have no real influence on the shape of Israeli law.

IV. The Reasons for the Failure of the Jewish Legal Revolution

1. Practical Explanations

Why did the repeated attempts to link Israeli and Jewish law fail, especially the attempt at the decisive "constitutional moment" of 1948? One set of explanations for the failure of the "Jewish legal revolution" is practical. First, it is obvious that legal reform was

simply not a major issue on the agenda of Israelis during the first few decades after Israel's independence. Security and economic concerns were more important. Given the threats facing Israel in its first years, lawyers and politicians could hardly have been expected to dedicate much attention to reforming Israel's legal system.

Second, Jewish law itself is problematic. It is an ancient and religious legal system whose norms cannot be easily incorporated in the law of a modern state. Its use in post-1948 Israel would have required the investment of substantial time and effort in order to modernize it.

Third, there were institutional barriers to legal reform. There was a legal committee (called the Legal Council) charged with preparing the legal system of the state-in-the-making in 1947 and 1948. One of its duties of this Council was to decide about the role of Jewish law in the law of the future Jewish state. However, as is often the case with such committees, it included too many members and had too many subcommittees, and its bad institutional design, rather than any deep ideological or political controversy, prevented the change in the legal status quo, and hindered the creation of a linkage between Jewish law, or some modernized version of it, and the Israeli legal system which came into being in May 1948.

Finally, the absence of a Jewish legal revolution in Israel in 1948 was not necessarily only the result of Israel's specific conditions. It may also have been due to the very nature of law, and specifically of Anglo-American law. Even if Israel's security and economic problems had not been as great as they were in 1948, even if Jewish law was easily amenable for incorporation in the law of the new state and even if the institutional structure of the committee responsible for the creation of the new Israeli legal system had been different, it would not have been realistic to expect Israel to transform its legal system overnight. Legal revolutions are not common and many new countries, even those born out of a war with foreign occupiers, tend to preserve the occupier's legal system after gaining independence. Law is inherently conservative. Changes that are too rapid undermine the political and economic certainty that the legal system seeks to guarantee. The United States is a case in point. For many years after gaining independence in 1776, the American legal system maintained close links to English law. Another legal system, whose history is closer in some senses to that of Israel, is India. After Indian independence in 1947, there were nationalist calls for abolishing the legal system of British India and for its replacement

by a uniquely "Indian" legal system. But in India too, nationalist legal aspirations were not fulfilled.

One cannot ignore practical explanations. However, it would be inaccurate to say that legal revolutions never occur. There are some examples of such revolutions. One such example is late 19th century Japan. A legal revolution also took place in Turkey in the early 1920s, after the collapse of the Ottoman Empire, and in Egypt of the early 20th century. In addition, one must note that while it would have been unrealistic to expect Israel to change its legal system overnight, it would have been quite easy and costless to enact a provision requiring judges to use Jewish law in cases of lacunas or conflicts in existing mandatory legislation. However, even this did not occur. Practical concerns thus provide only a partial explanation for the failure of Israel in 1948 or later to link its new legal system to Jewish law.

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

Sociologist Ronen Shamir has argued that one reason for the failure of Jewish law is to be found in the opposition of the Jewish legal profession to it. Many Jewish lawyers in Palestine made their living by mediating between Jewish litigants and the mandatory legal system. Their monopoly as mediators was based on their familiarity with the existing Ottoman-English legal system. These lawyers therefore had an interest in preserving that system.

The legal literature published during the first years after Israel statehood contains very few statements in defense of the legal *status quo*. However, it is possible to find a few explicit statements in which lawyers openly supported the retention of the mandatory legal system, and rejected the use of Jewish law in the legal system of Israel. One such example is in an article by Eliezer Malchi, a lawyer and later a judge. In 1950, Malchi described the demands for the replacement of the mandatory penal code with a code based on Jewish law as "a most dangerous thing, [which] must be left to later generations." Another lawyer, Aharon Ben Shemesh, wrote an article in which he advocated the preservation of Ottoman land law, which Israelis inherited from the mandatory era. Ben Shemesh argued that the basic principles of this law were close to those of Jewish law, and this made the need for the use of Jewish law redundant.

One can also find some observers who actually linked the preservation of the legal status quo to the interests of the profes-

sional guild. Thus, Gad Tedeschi, a legal scholar who taught at the Hebrew University, explained that abandoning the mandatory heritage would not inconvenience the general population, which in any case was not well versed in that law. Instead, Tedeschi explained, it would only hurt the lawyers' guild.

While the interests of lawyers were certainly an important factor in preventing a Jewish legal revolution in 1948, this alone cannot explain the preservation of the legal status quo. First, the legal profession during the Mandate and in the first decades of statehood was hardly monolithic. Not all lawyers were well versed in Mandatory law. Many Israeli lawyers were immigrants from Central and Eastern Europe with little knowledge of the English language or indeed of Turkish. In addition, many of the leaders of the Jewish bar were deeply committed to the Jewish legal revival project, for example Paltiel Dikshtein, editor of the journal of the Jewish Bar Association, who was also one of the major advocates of the Jewish legal revival project since its inception.

Furthermore, the lawyers were not alone. In this respect, a comparison between post-independence Israel and India is illuminating. One reason for the failure to create a legal system based on Hindu law in post-1947 India was that the strong guild of Indian lawyers, whose interest was to preserve Anglo-Indian law, did not face any serious political or legal opposition. There was no organized group that stood to gain from the revival of Hindu law nor was there any educational institution that could have produced lawyers with an interest in such a revival. The situation in Israel was different. Both the Hebrew University of Jerusalem and the Tel Aviv School of Law and Economics, the two Jewish higher-education institutes in mandatory Palestine where law was taught, were rhetorically (and to some extent practically) committed to the revival of Jewish law. There were also Israeli political parties that expressed an interest in such a revival.

The fact that many lawyers opposed the linkage of Israeli law to Jewish law was, of course, an important factor in preventing such a linkage. However, in order to understand why these lawyers *succeeded*, an additional, cultural, set of explanations must be added.

3. The Role of Culture

Cultural images of Jewish law, of law generally and, most importantly, of Israeli society, were major factors that inhibited the

linkage between Jewish and Israeli law. Unlike the Hebrew language, which could easily be separated from religion and thus be adopted willingly by secular Zionists, Jewish law was too strongly tied with religion, and thus was perceived by Zionists as antithetical to the secular ideology of the Zionist movement. Despite attempts to secularize Jewish law in the early 20th century, most Israelis identified (and still identify) Jewish law with religion and with Jewish life in the Diaspora. Zionism was, in essence, a secular movement that attempted to extricate the Jews from the ghetto of religion. Lawyers opposed to the revival of Jewish law manipulated this link between Jewish law and the Jewish religion when they described Jewish law as an outdated, petrified religious system, ill suited to life in a modern sovereign secular state.

Another cultural image that may have played a role in the reluctance to effect any transformation of the mandatory legal system was the image that the first Israelis had of law generally. Israeli culture in the 1950s and 1960s was dominated by the socialist ideology of the ruling MAPAI party, and this ideology was mainly concerned with absorbing the mass of Jewish refugees from Europe and the Middle East which came to Israel in the 1950s. Law was considered by many Israelis as a bourgeois pursuit that suited Diaspora Jews. As one contemporary observer said, law was a matter that simply could not "engender enthusiasm in the hearts of idealists." As a result, the mandatory heritage was maintained, in part, because the idea of devoting energy to legal matters simply did not appeal to the first generation of Israelis.

In addition to these images, another important factor inhibiting legal change was the cultural image that Israelis had, not of law, but of their own society. In the 1950s, massive immigration from Europe and the Middle East dramatically changed the demography of Israel. The assimilation of the immigrants into Israeli society was not unproblematic. Many observers described the new immigrants as a "desert generation" – referring to the biblical Israelites that fled Egypt with Moses and had to wander in the Sinai desert for 40 years before reaching the promised land. Many Israelis in the 1950s believed that a new Israeli culture and identity would crystallize only once this "desert generation" was gone. Lawyers seeking to maintain the legal status quo successfully manipulated this self-perception of Israeli society to argue for the preservation of mandatory law.

The "desert generation" argument was used in constitutional debates to justify the delay in the enactment of a written formal

constitution (until this very day Israel does not have such a constitution). It also appeared in general discussions about the retention of mandatory legal system. As long as a new Israeli society was not fully formed, so the argument went, there was no point in replacing the Ottoman-English legal heritage of the Mandate with a new legal system linked in some way to Jewish law. As long as Israeli society was heterogeneous, declared lawyers who opposed legal change, the Ottoman-English law that Israel had inherited from the British must not be replaced.

A 1950 article by Eliezer Malchi can serve as a good example of the use of the argument in this way. In his article, Malchi rejected demands for the replacement of the mandatory penal code (which was based on English law) with "an 'original' penal code that would draw on the principles of Jewish law to the greatest extent possible." Malchi argued that the mandatory penal code should be preserved, explaining that, "the character of Israeli society has still not crystallized, and it is undergoing a process that could take an entire generation, until a new generation will replace the hybrid desert generation." Instead of a legal revolution, Malchi proposed a "conservative" approach of preserving the status quo.

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

V. Conclusion

When Israel was established in 1948, many observers expected that the country would immediately replace the Ottoman-English legal heritage it inherited from the Ottoman Empire and British Mandate with a new legal system linked in some way to Jewish law. This expected change did not occur. Practical reasons were certainly

a factor in the retention of the mandatory legal heritage. However, another important factor was the opposition of many Jewish lawyers to Jewish law. The professional opponents of Jewish law saw it as a threat to their monopoly on access to the legal system. In their battle to preserve the mandatory legal heritage, these lawyers made successful use of cultural images prevalent in Israeli society at the time in order to prevent legal change and preserve the legal status quo.

Three such images can be identified: First, the image of Jewish law as a religious legal system unfit for a secular Zionist society. Secondly, an image of law generally as a bourgeois pursuit, and therefore its reform as something that should not concern the pioneering, idealistic, socialist society that Israel believed itself to be in the 1950s. Finally, an image of Israeli society generally and the new immigrants that arrived after 1948 in particular, as a "desert generation" – an ingathering of exiles with no common homogenous basis which would enable the creation of a new legal system based on Jewish law.

Israelis retained the Ottoman legal legacy, one can conclude, because Israel, unlike other post-Ottoman societies, perceived itself as a society in the making whose nature has not been fully determined yet. The mixed Ottoman-English legal system that Israelis inherited from the Ottoman Empire and the British mandate period was seen as something foreign, but *precisely because of this foreignness* Israelis could continue to use it, as a neutral alternative which would allow them to postpone the decision of who exactly they were and what laws would therefore best serve them. The logic of the German Historical School which argued that law should be a reflection of the *volksgeist*, meant, when applied in the very particular case of Israel, that this country would retain the Ottoman legal legacy long after the Ottoman Empire ceased to exist.