Law and the Culture of Israel
LAW AND THE CULTURE OF ISRAEL

Menachem Mautner
For Betty, Maty, Joseph, Shawn, and Ori
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CONTENTS

Preface ix

Introduction 1

1. Zionism and the Evolving New Culture 11
   A. The Rise of the Jewish Enlightenment 12
   B. Zionist Thought on the Culture of the Evolving Society in Eretz Israel 14
   C. The Culture that Evolved in Eretz Israel in the First Half of the Twentieth Century 22
   D. Conclusion 29

2. The Cultural Struggles Over the Shaping of the Law 31
   A. The Attempt to Create a Linkage between Israeli Law and the Halakhah: The Movement for the Revival of Hebrew Law 32
   B. The Anglicization and Liberalization of the Law 35
   C. The Foundations of Law Statute and the Place of ‘Israel’s Heritage’ in Israeli Law 41
   D. The Basic Laws of 1992 and the Definition of Israel as a ‘Jewish and Democratic State’ 44
   E. Conclusion 52

3. From Judicial Restraint to Judicial Activism 54
   A. The Concept of Judicial Activism and the Rise of the Court’s Activism 54
   B. Doctrines Regulating Petitioning to the High Court of Justice 56
   C. Substantive Law Doctrines 68

4. The Decline of Formalism and the Rise of Values 75
   A. Legal Formalism 75
   B. Legal Formalism in Israeli Law 78
   C. The 1950s Jurisprudence of the Supreme Court in a Cultural Context 86
   D. The 1980s and the 1990s: The Decline of Formalism and the Rise of Values in Israeli Law 90
E. Changes in the Perception of the Court’s Role in the 1980s and 1990s 96
5. From Hegemony to War of Cultures 99
   A. Introduction 99
   B. The Decline in the Hegemony of the Labor Movement 103
   C. Anxiety 127
   D. The Jurisprudence of the Supreme Court in the 1980s and 1990s in Light of the Transition to a Post-Hegemonic Situation 143
6. The Supreme Court and the Future of Liberalism 159
   A. The Court’s Two-Front Struggle 160
   B. Rethinking the Court’s Judicial Activism 170
7. Israel as a Multicultural State 181
   A. Israel’s Multicultural Condition 181
   B. The Unique Traits of Israel’s Multiculturalism 190
   C. The Schism between Jews and Arabs 193
8. Law and Culture in the Coming Decades 201
   A. Political Liberalism 201
   B. Defining the State’s Identity: ‘A Jewish State’ 208
   C. Defining the State’s Identity: Making Room for the Arab Citizens 211
   D. A New Equilibrium between Uniformity and Diversity 214
Conclusion 223

Bibliography 227
Index 261
PREFACE

This book tells the story of the Supreme Court widely regarded as the most activist in the world. The legal culture is premised on step-by-step, cautious, incremental development. But within a short span of time in the course of the 1980s, the Supreme Court of Israel effected far-reaching changes in its legal doctrine and in the way it perceives its role among the state’s branches. This book locates those changes in the context of the great historical process that took shape in Israel in the second half of the 1970s: the decline of the political and cultural hegemony of the Labor movement, and the renewal of the struggle over the future orientation of the country’s culture.

Two social groups have confronted each other at the heart of this struggle: a secular group that is aiming to strengthen Israel’s ties to Western liberalism, and a religious group intent on associating Israel’s culture with traditional Jewish heritage and the Halakhah. The Supreme Court, the institution most closely identified with liberalism since the establishment of the state, collaborated with the former group in its struggle against the latter. As might have been expected, the Court lost much of its legitimacy among members of the religious group. The more puzzling fact, however, is that in recent years the Court has lost much legitimacy among the secular group as well, which for many years provided it with unmitigated support.

The story of the Court serves as the axis of another two stories. The first deals with the struggle over the cultural identity of the Jewish people throughout the course of modernity. The second is the story of the struggle over the cultural identity of Israeli law, which took place throughout the twentieth century.

In addition to the divide between secular and religious Jews, there is a national divide in Israel between Jews and Arabs. These two divides are interrelated in complex ways which shape the unique traits of Israel’s multicultural condition, first and foremost ‘the zero-sum game of Israel’s multiculturalism’: the more Israel accentuates traditional Jewish elements in its public culture, the more appealing it would be to Jewish religious Israelis, but the more repugnant to Israel’s Arab citizens, and vice versa. The book ends with a discussion of this unique condition and with
a few suggestions as to how, given this condition, Israel's regime, political
culture and law should be constituted in the coming decades. The sug-
gestions borrow from the discourses of liberalism, multiculturalism and
republicanism.

The book is aimed at five major audiences of readers. First, law and soci-
ety scholars interested in the interrelationship between law and society
(eg, how a Supreme Court successfully promotes liberal values in the con-
text of a culture governed by a collectivist nation-building ideology, and
how various cultural groups engage in an ongoing struggle over the shap-
ing of their country's legal culture). Second, scholars of the modern history
of the Jewish people, Zionism, and the State of Israel. Third, comparative
constitutional law scholars interested in the ways different constitutional
courts function in the context of varying political and cultural conditions.
Fourth, legal historians interested in questions such as how 'cultural bor-
rowing' can result from military occupation (the British Mandate over
Palestine), radically transform a legal system and determine its charac-
ter for many decades to come. Fifth, scholars of multiculturalism. Israel's
multicultural condition is unique, but it gives rise to the kind of problems
that are of concern to many other countries in the world in the current
post-nation-state era.

* * *

I am grateful to many friends and colleagues who read earlier versions
of the manuscript and discussed them with me: Hadar Aviram, Daphne
Barak-Erez, Gad Barzilai, Eyal Benvenisti, Yishai Blank, Jose Brunner,
Hanoch Dagan, Meir Dan-Cohen, Yoram Dinstein, Nitza Drori-Peremen,
Chaim Gans, Aeyal Gross, Daphna Hacker, Ron Harris, Avner Holtzman,
Aaron Kirschenbaum, Aviad Kleinberg, Roy Kreitner, Dan Laor, Shai
Lavi, Assaf Likhovski, Guy Mundlak, Ilan Saban, Avi Sagi, Eli Shaltiel,
Hila Shamir, Anita Shapira and Merav Shmueli.

Part of the research for this book was done in the course of a sabbat-
ical year at Harvard Law School. I am grateful to HLS and to Tel Aviv
University for enabling me to do the research. I wish to thank my friends
at Harvard, Lucian A Bebchuk, Morty Horwitz and Pnina Lahav, for
their encouragement and support. Special thanks go to Joseph Weiler for
many fruitful conversations on the topics of the book and for his lasting
friendship.

I also want to thank the Cegla Center for Interdisciplinary Research of
the Law at the Faculty of Law, Tel Aviv University, and the Minerva Center
for Human Rights at Tel Aviv University and The Hebrew University, for
their support.
INTRODUCTION

In this book I take a view of Israeli law as an important arena in which the struggle over the shaping of Jewish culture and identity, which has been part of the life of the Jewish people throughout the modern era, is being waged; as an important arena for tracing the major cultural processes that have taken place in Israel since its establishment; and as a major arena in which Israeli culture and identity in the coming decades will be shaped.

Edmund Burke recommended that ‘infinite caution’ be exercised before pulling down a functioning edifice and building a new one ‘without having models and patterns of approved utility.’¹ Over a short span of time in the course of the 1980s, Israel’s Supreme Court introduced a series of far-reaching changes into its jurisprudence: The Court adopted highly activist doctrines enabling it to sweepingly intervene in decisions undertaken by other branches of the state; it substituted its traditional formalistic style of reasoning with a value-laden approach that openly exposes the normative meaning and the distributive implications of the law; and it has adopted, instead of its traditional self-perception as a professional institution whose function is to resolve disputes, a perception of itself as a political institution that, side by side with the Knesset (Israel’s parliament), takes part in normative and distributive decisions. These changes are striking, not only because the legal culture is premised on cautious, step by step, incremental development, but also because for almost a decade and a half the changes in the Court’s jurisprudence have not encountered any significant opposition or criticism.

The changes in the Court’s jurisprudence should be understood in the context of the great historical process that began to take place in Israel in the second half of the 1970s: The decline of the political, social and cultural hegemony of the Labor movement and the renewal of the ‘war of cultures’ in Israel, ie, the struggle over the country’s future cultural orientation. The group I refer to as ‘the liberal former hegemons’—identified with Western,

secular, liberal values—lost much power in Israeli politics and culture and found itself facing an alternative cultural option for the country, premised on the Halakah and traditional Jewish heritage. In these circumstances, the liberal former hegemons shifted much of their political action to the Supreme Court: They submitted many dozens of petitions against the government and the Knesset. The Court, which since the establishment of the State of Israel has been the state institution most closely identified with liberal values, collaborated with the group by devising wholly new legal doctrines, all meant to subordinate the activities of the two other branches to the Court’s supervision, and thereby to the values and worldview of the liberal former hegemons.

During the entire decade of the 1980s it was hard to find any serious political conflict anywhere in the world that did not show behind it the not-so-hidden hand of religion.\(^2\)

Israel is one of many countries grappling with the question regarding what place is to be reserved for religion in public life.\(^3\) Even countries premised on the separation of church and state, such as the United States, find the coexistence of religion and state to be far from amiable. The question regarding what place is to be reserved for religion in the life of the individual and in the public sphere has stood at the center of the Jewish people’s most divisive disputes in the modern era. Its reappearance in the context of the state of Israel is therefore just one more round in the Jewish people’s ongoing contention with modernity.

Israel is one of many countries that have faced the rise of religious fundamentalism in the closing decades of the twentieth century. ‘Fundamentalism is generally presented as a response to the crises of modernity rather than as reaction to modernity itself.’\(^4\) In the case of Israel, the ‘crises of modernity’ are the ‘crises of Jewish secularity’:\(^5\) The lack of depth of Jewish secular culture following its transition, within a short span of time, from rejection of the contents of Jewish heritage to their adoption; from a collectivist worldview, which considers the good life to consist of contributing to the national project, to an individualistic worldview that sees life as a project


\(^5\) Id, at 329–30.
of personal self-determination; and from social-democracy to capitalism and neo-liberalism.

Law and religion are two competing cultural systems that constitute individual identities, collective identities and social interaction. As in many other countries in the world, the rise of religious fundamentalism in Israel has threatened well-established constitutional premises. But in Israel we may talk not merely of a clash between religion and state, but also of a clash between religious fundamentalism and legal fundamentalism.

One of the tenets of religious fundamentalism is that nothing should be left ‘outside the boundaries of religion,’ ‘[n]othing remains religiously neutral.’ For fundamentalists, religion is ‘the exclusive source of authority and guidance in the entire realms of the life of the individual and society.’

If there is one thing that epitomizes the activism of Israel’s Supreme Court, it is a saying by Justice Aharon Barak, the Court’s Chief Justice for twelve years, and the person most closely identified with the Court’s new jurisprudence: ‘The whole earth is full of law. Any human conduct is the object of a legal norm.’ Barak, an exceptionally creative and innovative jurist with exceptional analytical and argumentative skills, meant by that that every human action is always ‘normatively justiciable’, and almost always ‘institutionally justiciable’ in the sense that a court of law should have competence to legally review it. This is nothing short of legal fundamentalism, and hence the clash of two fundamentalisms, one religious, the other legal, in Israel of the closing decades of the twentieth century.

One manifestation of religious fundamentalism in Israel has been the proliferation of the practice of seeking rabbis’ rulings in all areas of life (da’at Torah). That finds its legal equivalent in the Court’s depiction by legal sociologist Ronen Shamir as functioning like ‘a council of sages—those that in the name of their wisdom appropriate the authority to determine the criteria of what is normal, appropriate, desirable and acceptable.’

As part of its activism, the Court practically extinguished the doctrine of standing, and dramatically expanded the scope of the doctrine of justiciability. As a result, Israel of the closing decades of the twentieth century turned into a highly legalized country. Submitting petitions to the

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7 Hirschl, above n 3.
8 Aran, above n 4, at 296.
Supreme Court became part of the routine of political and administrative decision-making: A group dissatisfied with the outcome would petition the Court to overturn it. The Court became the arbiter that has the last word on any important political and administrative decision.

This in turn has had several problematic consequences. Amnon Rubinstein, the author of Israel’s leading constitutional law treatise, is renowned for having been the first to identify the new trend when, in June 1987, he wrote: ‘Israel is currently amidst a stunning process of profound legalization that has no match in any other country.”11 In May 2008 Rubinstein said at an academic conference that Israel’s public administration has been badly infected with ‘the disease of paralysis’: Decision-making processes unnecessarily linger on for months and years until legal advisors give them the go-ahead. In a similar vein, Knesset Speaker Ruvi Rivlin said in March 2010:

Legalization, the disease that has overtaken our public sphere in its entirety, threatens not only the ability to govern, but the sheer existence of a normative space not controlled by legal counsels. The disease has bred a new religion that idolizes the legal

continued Rivlin:

Once upon a time not everything was justiciable, and people made use of common sense, logic, reasonableness and decency. Nowadays only law’s high priests are entitled to determine what is reasonable and appropriate and to apply discretion.12

Thus, paradoxically enough, the over-legalization of politics and the public administration has led not only to inefficiencies, but also to corruption: a whole new semi-official industry of intermediaries who ‘know’ how to expedite decision-making processes has sprung up.13

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11 Amnon Rubinstein, ‘The Legalization of Israel’ (June 5 1987) Haaretz.
12 ‘The Legalization that Overtook Our Lives’ (March 2010) The Lawyer, 8. The renowned sociologist S.N. Eisenstadt writes that the Court’s activism ‘weakened—albeit not intentionally—the parliamentary tissue’ as well as the ‘legitimacy’ of ‘the democratic order.’ S.N. Eisenstadt, Changes in Israeli Society (Tel Aviv, Ministry of Defense, 2004) 54 (Hebrew).
13 As might have been expected, the over-legalization of Israel has also been manifest in the astonishing growth of the legal profession. Gad Barzilai has gathered a data set about lawyers in 39 countries. Here are some of his findings: [A]mong European and most Western nation-states and most democracies, Israel has the highest number of lawyers per population size. In 2005 the country had one lawyer per 211 citizens, a figure which is significantly higher than in most liberal societies like the US [one lawyer per 434 citizens] United Kingdom [one lawyer per 489 citizens], Germany [one lawyer per 619 citizens], Australia [one lawyer per 672 citizens], Holland [one lawyer per 1251 citizens], and France [one lawyer per 1281 citizens]; Gad Barzilai, ‘The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence and Dissent’ in Terence C. Halliday, Lucian Karpik and Malcolm Feeley (eds), Fighting for Political Freedom (Oxford, Hart Publishing, 2007) 247.
Also, as might have been expected, expansive legalization has been corrosive of culture. The organizational culture of military units is a case in point. President Theodore Roosevelt famously said that:

[I]t is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errr, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds.\textsuperscript{14}

Israel's minister of defense, Ehud Barak, said in November 2008 that the fact that a combatant officer needs to take into account, in the midst of military action, possible ex post legal scrutiny of his action may infringe upon his decision-making.\textsuperscript{15}

Aharon Barak often celebrates the rise of rights talk in which:

[T]he pupil and the teacher, the patient and the doctor, the employee and the employer, the student and the professor—they all, and many, many others, phrase their arguments one toward the other, and all toward the state branches…in terms of constitutional rights.\textsuperscript{16}

Scholars of rights have portrayed a more ambivalent picture of what rights talk entails. They have acknowledged the indispensable contribution of entrenched rights to the assurance of vital human interests, of course, but they have also assailed rights talk for what Mary Ann Glendon famously phrased, in words having their roots in Marx, as

its penchant for absolute, extravagant formulations, its near-aphasia concerning responsibility, its excessive homage to individual independence and self-sufficiency, its habitual concentration on the individual and the state at the expense of the intermediate groups of civil society, and its unapologetic insularity;

for the fact that it 'heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground'; and for the fact that it promotes 'mere assertion over reason-giving' and 'the short-run over the long-term, sporadic crisis intervention over systemic preventive measures, and particular interests over the common good.'\textsuperscript{17}

\textsuperscript{14} Theodore Roosevelt, \textit{The Man In The Arena}, Speech at the Sorbonne, Paris, France, April 23 1910.


One conclusion to be drawn from Glendon’s remarks then is that in conditions of excessive legalization, law, otherwise thought of as the ultimate means for peaceful resolution of disputes, instead intensifies conflict, antagonism, confrontation and rivalry.

Grant Gilmore writes:

The better the society, the less law there will be. In Heaven there will be no law… The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.  

Gilmore alludes to the famous words of the author of Ecclesiastes, 3, 16: ‘I saw under the sun the place of judgment, that wickedness was there; and the place of righteousness, that iniquity was there.’ The great Israeli poet Yehuda Amichai gave expression to this same sentiment when he wrote:

From the place where we are right/ flowers will never grow/ in the spring. // The place where we are right/ is hard and trampled/ like a yard. // But doubts and loves/ dig up the world/ like a mole, a plow.  

Looked at from this perspective, Israel of the closing decades of the twentieth century was far from Heaven on earth. It was a hard place of wickedness.

The rise of over-legalization in Israel went hand in hand with the ascension of neo-liberal economic ideology. At the core of neo-liberalism is the belief that the logic of the market should be extended to as many spheres of life as possible: The running of schools, hospitals and prisons, the provision of welfare, the commodification of sex and body parts, etc. The rise of over-legalization and neo-liberalism attest to a profound crisis in the status of culture in Israel: the Israelis have very much lost their confidence in their ability to do things together within cultural frameworks. Joint action can take place only if governed either by the logic of the law or by the logic of the market.

There are interesting corollaries between the legal and market worldviews. First, very much like a market exchange, a legal dispute is a competitive zero-sum game. Second, at the core of the legal worldview lies the concept of the (negative) right—a ‘defensive wall’ that creates for the individual a sphere shielded from external intervention and in which he or she may do whatever they choose to do. That finds its equivalent in the market as a sphere of impersonal, self-regarding action in which individuals work for the materialization of their subjective desires by drawing on the

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resources at their disposal.\textsuperscript{21} Third, money, the institution that lies at the basis of the operation of the market, serves as the common denominator to which all wishes of market actors are translated and made commensurable. That finds its equivalent in the law’s concept of the right into which various interests are translated and through that made commensurable.

What all of this means is that the legal worldview and the market worldview are two specific worldviews of human interaction with quite a few similarities between them. What it also means is that extension of the logic of the law (through over-legalization) and the logic of the market (through neo-liberal ideology) to too many spheres of human interaction entails normative impoverishment: Various spheres of activity, dense with distinct ‘internal’ values of their own, are being flooded and overwhelmed by the logic of the law and/or the logic of the market.\textsuperscript{22} This, in turn, may prove to be of far-reaching implications in a setting of rising religious fundamentalism, such as Israel of the early twenty-first century: the greater the number of spheres of human interaction overtaken by the logics of the law and the market, the more the outcome is a sense of normative impoverishment, the more fundamentalist sentiment is nourished, the more liberal law feels threatened, the more it becomes aggressive and expansionist in its struggle with fundamentalism, and so on. A vicious circle is in place.

Israel is not the only country that has witnessed far-reaching legalization of its politics and public administration in the years following World War II. With the enactment of many new constitutions, the adoption of judicial review, and the spread of the human rights discourse, this has been the case in many other countries, as well.\textsuperscript{23} But there is a crucial difference between Western countries, such as the United States, and Israel, and not only because according to several assessments Israel of the recent decades has set a world record in legalization. Importantly, the difference also lies in the fact that in Western countries law serves as an expression and bearer of non-contested values that are widely shared in society.\textsuperscript{24} In Israel, by contrast, with the eruption of the war of cultures between secular and religious Jews, the very existence of liberal law is being contested. Therefore, even if it may be hard to assess the effects of the Court’s activism


\textsuperscript{24} Glendon, above n 17, at 3.
on the ground, perhaps its more important effect was the way it vigorously signaled the unmitigated commitment of the secular, pro-Western liberal group to pushing forward its normative system in the struggle over the future cultural orientation of the country.

And yet, despite the immense importance of the law as both a symbolic and constitutive normative system, the renowned Israeli author Amos Oz was right when he noted that it is through the attractiveness of a culture’s contents and practices, not through legal victories or legislation, that victory is won in a war of cultures. ‘A cultural struggle is a struggle of seduction,’ wrote Oz. ‘It is a struggle over people’s hearts and souls. . . . We need to make our version of Jewishness attractive. . . . We have to entice.’

The Supreme Court has paid a heavy price for its identification with one of the two major groups contending in the struggle over the shaping of Israeli culture in the coming decades: unsurprisingly, it lost much legitimacy among the Jewish religious group, which feels very much alienated from the Court and regards it as a partisan institution that serves as a tool in the hands of the rival group for remedying their political and cultural losses.

The striking point, however, is that in recent years the Court has also lost legitimacy among the liberal former hegemons, the group that for some three decades provided it with unmitigated support for whatever it did. Yet whereas the reason for the Court’s loss of stature among the Jewish religious group has to do with the Court’s cultural identity, the reason for the Court’s loss of stature among its supporters has to do with the erosion in the Court’s standards of conduct, and in particular because of the Court’s involvement in the appointment process of justices to its ranks.

The Israeli system, uniquely in the world, enables the Supreme Court to practically dominate the process of appointment of judges. But in spite of numerous claims on the part of the Court’s justices that this has made the Israeli appointment procedure ‘the best in the world’ in fact exactly the opposite is true: the Court’s involvement in the appointment process has exposed a highly unappealing political dimension in the Court’s conduct, which, in turn, has undermined the Court’s stature. One lesson that can clearly be drawn from the Israeli case is how destructive it is for courts to be involved in the process of appointment to their ranks.

The upshot of all of this is that at the beginning of the twenty-first century the Israeli Supreme Court finds itself in a highly precarious situation, having lost a substantial amount of legitimacy not only among its

adversaries, the Jewish religious group, but also among its traditional supporters, Israelis that identify with the Western, secular, liberal cultural option for the state. This is a moment of crisis not only for the Court, but for Israeli liberalism, for since the establishment of the state the Court has played a crucial role in entrenching and cultivating Israel’s liberal-democratic political culture. It may prove to be a turning point in the development of Israel’s political culture in its entirety.

In addition to the schism within the Jewish group, there is an additional, profound schism between the Jewish group and the Arab group, which constitutes around 20 percent of the country’s population. The Jewish group wishes to adhere to Israel’s current definition as a ‘Jewish and democratic state’. The Arab group perceives Israel differently. Some Arabs would like Israel to perceive itself as a bi-national state run in collaboration by the elites of the two national groups that compose its population. Others would rather Israel cease perceiving itself as the nation-state of the Jewish people, where they exercise their right of self-determination, and turn itself instead into a state that, modeling itself after the United States of America, does not have any clear national identity—‘a state of all its citizens’, as this option is known in Israeli parlance. The Arab group is also widely discriminated against in terms of the allocation of state resources; it is excluded from important political decisions; and by and large it lives in a separate civil society. Add to that the belief of the Arab group that the establishment of the state and its continued existence is based on the use of violence against them, plus the ongoing state of war between Israel and the Palestinian people in the Occupied Territories, and it is easy to see how explosive the situation is.

Israel certainly will need lots of goodwill, creative thinking and luck in the coming decades to overcome the profound schisms that exist both within the Jewish group and between the Jewish and Arab groups.

Despite Zionism’s enormous, even unprecedented accomplishments, when the Israeli condition is looked at from the perspective of the country’s cultural divisions, two unresolved issues stand out. The first is the cultural schism between secular and religious Jews, which has been a factor in Jewish life for the past 250 years, since the rise of the Jewish Enlightenment in the second half of the eighteenth century. For most of the twentieth century, the struggle between these two groups over the shaping of the culture of the Jewish society in Eretz Israel appeared to have ended with the decisive victory of the secular group. But with the eruption of the cultural struggle in Israel in the waning decades of the century, it became clear that the issue regarding the country’s cultural orientation is far from resolved.
Zionism’s second unresolved issue concerns the demography of Israel. The aim of Zionism was to establish a nation-state for the Jewish people in Eretz Israel. But by the time the Zionist endeavor began to take shape, an Arab society existed already in Palestine, and in the course of the twentieth century only a minority of world Jews responded affirmatively to the Zionist call to immigrate to Eretz Israel. As a result, not only did the Arabs constitute the majority of the population in Palestine throughout the first half of the twentieth century, and a sizeable minority of some 40 percent of the Jewish state that was supposed to be established under the 1947 United Nations ‘Partition Resolution’, but they continue to be a sizeable minority in Israel within its present borders. Israel officially defines itself as a ‘Jewish and democratic state’, but demographically it is a bi-national state. The discrepancy between the definition and the demography will continue to give rise to many of the problems Israel faces in the coming years.

These two unresolved issues are perhaps best summed up by the following data: In 1960, only 15 percent of the students in the Israeli primary-school system were either ultra-Orthodox Jewish students or Israeli Arabs. At present the figure stands at 46 percent, and it is expected that as early as 2020, ie, about a decade from now, the majority of primary-school students will be children from these two groups. The Western, secular, liberal Jewish group that led Israel in its first six decades will face major challenges in the coming years. The face of Israel is bound to change. How will all of this affect the country’s regime, political culture and law?
CHAPTER 1
ZIONISM AND THE EVOLVING NEW CULTURE

In this chapter I will focus on the main trends in Zionist thought as to the culture of the new Jewish society that took shape in Eretz Israel (Palestine) in the first half of the twentieth century. I will also consider the key constitutive principles of the new culture.

This chapter has threefold significance for the discussion in the following chapters. First, in Chapter 2 I will discuss several early twentieth-century proposals for the structuring of the law of the new Jewish society, locating these proposals in the broader context of Zionist thought on the culture of the Jewish society developing in Eretz Israel, as discussed in this chapter. Second, in Chapter 2 I will examine the cultural characteristics of the jurisprudence of Israel’s Supreme Court as it has developed since the establishment of the State of Israel. I shall locate these characteristics as well within the broader context of Zionist thought regarding the issue of culture, as discussed in this chapter. Third, in Chapter 5 I will argue that since the late 1970s two groups have been struggling over the stewardship of Israeli culture. One is a secular Jewish group that seeks to shape Israeli culture according to the values of liberalism and through strong contacts with Western culture. The other is a religious Jewish group that seeks to shape Israeli culture according to the Halakhah and traditional Jewish culture. I will further show in Chapter 5 that since the late 1970s the Israeli Supreme Court has been a central player in the struggle between these two groups. For the moment, I will show that the two cultural alternatives offered by these two groups have been present in the life of the Jewish people throughout the modern period, and in the life of the Zionist movement since it began.
A. THE RISE OF THE JEWISH ENLIGHTENMENT

In the course of the last two decades of the eighteenth century a Jewish Enlightenment movement [Haskalah] developed in Germany.¹ The Jewish Enlightenment challenged the confinement of Jewish culture² to its halakhic contents and the exclusivity of the leadership of the rabbis. The maskilim, as the supporters of this endeavor came to be known, strove to create a fusion between Judaism’s religious legacy, on the one hand, and the philosophy, the sciences, and the secular culture of the European Enlightenment on the other. They sought to reshape Jewish culture, identity,³ education and daily practices through reliance on elements borrowed from Western culture. Thus, unlike the European Enlightenment, the Jewish Enlightenment was not premised on a total denial of the authority of tradition. Only a century later did that happen, with secular Zionism’s attempt to construct a novel and original Jewish culture from scratch in Eretz Israel (see below).


² The concept of culture is notoriously complex, with little or no agreement as to its content. William H. Sewell Jr, ‘The Concept(s) of Culture’ in Victoria E. Bonnell and Lynn Hunt (eds), Beyond the Cultural Turn—New Directions in the Study of Society and Culture (Berkeley, University of California Press, 1999) 35. I define culture as the contents of the mind by means of which human beings experience and express meaning as to what transpires in the course of their lives. Culture provides human beings with the collection of frames of reference through which they perceive and understand the world. Clifford Geertz, The Interpretation of Cultures (New York, Basic Books, Inc, 1973); Clifford Geertz, Local Knowledge (New York, Basic Books, Inc, 1983); Clifford Geertz, After the Fact (Cambridge, Harvard University Press, 1995); Clifford Geertz, Available Light (Princeton, New Jersey, Princeton University Press, 2000); David M. Schneider, ‘Notes Toward a Theory of Culture’, in Keith H. Basso and Henry A. Selby (eds), Meaning in Anthropology (Albuquerque, University of New Mexico Press, 1976) 197. Culture not only constitutes the minds of human beings and determines the meaning their lives have, but also shapes their practices and conduct. Theodor R. Schatzki, Karin Knorr Cetina and Eike von Savigny (eds), The Practice Turn in Contemporary Theory (2001); Pierre Bourdieu, Outline of a Theory of Practice (Richard Nice trans, 1977); Ann Swidler, Talk of Love—How Culture Matters (2001); Ann Swidler, ‘Culture in Action: Symbols and Strategies’ (1986) 51 Am Soc Rev 275. The building blocks of culture are cultural categories: Each culture is composed of a vast number of categories that not only organize the world for human beings, but also determine the normative value of things in the world. Richard A. Shweder and Robert A. LeVine (eds), Culture Theory (1984); James W. Stigler, Richard A. Shweder and Gilbert Herdt, Cultural Psychology—Essays on Comparative Human Development (1990); Dorothy Holland and Naomi Quinn (eds), Language and Thought, (1987).

³ The term identity has come into use in recent decades in a series of contexts where it has acquired multiple meanings. Rogers Brubaker and Frederick Cooper, ‘Beyond “Identity”’ (2000) 29 Theory and Society 1. However, the term has today two main meanings. First, the identity of a person is the system of categories that she internalizes out of the culture in which she lives and that determines the way she perceives the world and gives meaning to what transpires in her life. The second meaning of identity refers to certain traits of a person that the culture in which she lives attaches meaning to as regards how that person should be treated. This last sense of the term is the one that has been in use in the context of ‘the politics of identity’ of recent decades.
The Jewish Enlightenment was an institutionalized and organized movement. It developed a distinctive agenda for intellectual and educational activity. It ran its own publishing houses and periodicals, and maintained a separate school system that followed distinctive curricula.

In the course of the nineteenth century the Jewish Enlightenment spread to central and Eastern Europe, reaching its apogee in Russia during the 1860s and 1870s. In the 1880s, many maskilim turned to Zionism.4

The rabbinic establishment understood the heresy embodied by the Enlightenment challenge to the exclusive role of Halakhah in the lives of the Jews. It also understood the threat that the Jewish Enlightenment posed to the rabbis’ own status as leaders of the Jews and as their mentors in day-to-day conduct. Following the consolidation of the Jewish Enlightenment into an institutionalized movement, a persistent, bitter, and at times violent struggle erupted between the maskilim and the rabbis—a ‘kulturkampf’—over the shaping of the culture, education and daily practices of the Jews.

The Jewish Enlightenment, together with the spread of secularization practices in the course of the eighteenth century among Jews living in the urban centers of western and central Europe,5 gave birth to a new kind of Jewish existence and identity, hitherto unknown in Jewish history, that of the secular Jew.

There have been many recurring manifestations of the schism between the Jewish Enlightenment and traditional halakhic Judaism in the history of the Jewish people in the 250 years that have elapsed since the dawn of the Jewish Enlightenment movement. The struggle that is currently being waged in Israel over the respective places of Western culture and of the Halakhah in Israel’s culture and law is one further transmutation of this schism (Chapter 5 below).6 Indeed, the term ‘kulturkampf’, which is used to describe the nineteenth century struggle between the maskilim and the rabbis, has also been applied to the relationship between secular and religious Jews in late twentieth century Israel (Chapter 7, below).

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4 Shmuel Feiner ‘Out of Berlin: The Second Phase of the Haskalah Movement (1797–1824)’, in Ezra Fleischer, Gerald Blidstein, Carmi Horowitz, Bernard Septimus (eds), Me’ah She’arim—Studies in Medieval Jewish Spiritual Life (Jerusalem, Magnes Press, Hebrew University, 1991) 403 (Hebrew); Immanuel Etkes (ed), The East European Jewish Enlightenment (Jerusalem, Zalman Shazar Center, 1995) (Hebrew); Mordechai Zalkin, A New Dawn—The Jewish Enlightenment in the Russian Empire—Social Aspects (Jerusalem, Magnes Press, Hebrew University, 1990) (Hebrew); Gideon Katzenelson, The Literary War Between the Ultra-orthodox and the Enlightened (Tel Aviv, Dvir, 1954) (Hebrew).


B. ZIONIST THOUGHT ON THE CULTURE OF THE EVOLVING SOCIETY IN ERETZ ISRAEL

(a) Introduction

Zionism was not only a response to the distressing conditions of Jewish existence in Eastern and central Europe, but an answer to the grave cultural crisis that Jews faced in the nineteenth century. The crisis resulted from a combination of two developments. One was the decline in the power of religion and of the Halakhah to shape the lives of the Jews following the spread of the Enlightenment and secularism in the course of the nineteenth century. The other was the failure of the emancipation processes from which Jews living in various European countries benefitted in the course of the nineteenth century, ie, the rejection of the Jews’ attempt to be accepted as equals by the non-Jewish societies in which they lived. Hence, Zionism was not only a political movement, but also, and to no lesser degree, a movement of cultural change.

Furthermore, as a national movement Zionism was not driven by a stable, organic national culture that, at some point in its history, sought institutionalization as a nation-state. To the contrary, in the case of Zionism the national movement preceded the national culture: The new national culture of the Jewish people was largely the creation of the Jewish people’s national movement. Zionism, then, was not only a movement of cultural change, but a movement for the creation of a new culture ex nihilo.

As might be expected, the orientation and contents of the culture of the new Jewish society in Eretz Israel—the heart of it all, as David Vital refers to it—were in dispute among Zionists from the very beginning of their endeavor in the 1880s. For over two decades, until the early years

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7 Shlomo Avineri, Herzl (Jerusalem, Zalman Shazar Center, 2007) chapter 2 (Hebrew).
10 Vital, above n 8, at 28.
of the twentieth century, Zionist leaders and activists engaged in bitter controversies over the issue of culture, which time and again threatened to break apart their newly established movement. At the core of these controversies lay the question regarding the balance between the Halakhah and European culture in the life of the new Jewish society taking shape in Eretz Israel.

(b) Four approaches toward the issue of culture in early Zionism

Four main approaches are discernable in the writings of Zionist thinkers on the issue of the evolving Jewish culture in Eretz Israel.

(i) The cultural revival approach

It was in the Jewish Enlightenment movement of the second half of the eighteenth century that the cultural revival approach had its sources. According to this approach, Zionism was supposed to effect a revival of the waning religious Jewish culture by turning it into a national, secular culture. The culture evolving in Eretz Israel should therefore be a secular culture based on a fusion of elements derived from Judaism’s religious legacy and from European culture. This approach, then, was premised on an unfavorable view of religious Jewish life in the Diaspora combined with deep appreciation of European culture.

At the end of the nineteenth century and the beginning of the twentieth century, the cultural revival approach was identified with the secular Jewish intelligentsia, the writers and the intellectuals of Eastern Europe active in the Zionist movement, and it enjoyed the broadest support among the Zionists of the time. Its most prominent spokesman was Ahad Ha-Am.13
Ahad Ha-Am perceived Judaism as a national culture, and religion as only one of its components, albeit of central significance. ‘Israel indeed has a national spirit that is not solely confined to religious beliefs,’ he wrote. In that spirit, he called for a reshaping of Jewish culture through the transformation of the religious contents of Jewish tradition into categories of a national culture. In his view, the traditional contents of Judaism should no longer be regarded as religiously binding, but treated instead as the embodiment of the culture and history of the Jewish people.

As part of the process of transforming Jewish religion into a national culture, Ahad Ha-Am proposed the selection of contents from Judaism’s rich legacy and a restructuring of these contents by drawing on categories taken from modern, secular European culture. Ahad Ha-Am saw this not as a revolutionary process, but as one more stage in the sequence of Judaism’s historical development. He therefore perceived the culture of the new Zionist society not as an antithesis to the Jewish culture of the Diaspora, but as another link in the chain of its historical development.

Ahad Ha-Am called for the establishment of a ‘spiritual national center’ in Eretz Israel (as opposed to the political conception of Zionism, which advocated the establishment of a Jewish state). He envisaged ‘a center of Torah and wisdom, of language and books,’ where institutions of scholarship and research would work together with writers and thinkers to turn religious Jewish culture into a national culture. Ahad Ha-Am maintained that if the creation of a Jewish state was not preceded by a reshaping of Jewish culture, the result would be detrimental both to the Jewish state and to Judaism: The Jewish state would be just one more Western state, with a culture lacking genuine Jewish characteristics.

(ii) The Halakhic approach

The second approach concerning the character of the evolving Jewish culture in Eretz Israel was that endorsed by religious Zionists.

At the end of the nineteenth century, the religious Jewry of Eastern Europe was split between the ultra-Orthodox and the religious-Zionists.

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15 Ahad Ha-Am, The Way of the Spirit, id, at 41, 47. See also: ‘A Spiritual Center’, in Ahad Ha-Am, Essays, Letters, Memoirs, above n 13, at 201.
The ultra-Orthodox were hostile to Zionism because they viewed it as a secular movement the activities of which would only ‘postpone the end’—delay the end of the exile and ingathering of the Diaspora by seeking to do so through human initiative, instead of waiting for it to be carried out by divine will. The ultra-Orthodox, therefore, were entirely indifferent to the issue of the culture of the new society in Eretz Israel.

Unlike them, the religious sectors that did support Zionism paid heed to this issue. They were suspicious of and hostile towards the cultural revival approach, advocating instead that the emerging culture in Eretz Israel should be a traditional Jewish culture founded on the Halakhah, in line with the motto ‘Eretz Israel to the people of Israel according to the Torah of Israel.’ Religious Zionists, however, never succeeded in developing a detailed plan for their vision of a Jewish state governed by the Halakhah. Furthermore, this vision itself shattered against the reality that began to unfold in Eretz Israel in the first half of the twentieth century: Most Jewish immigrants were secularists who saw nationalism as an alternative to religion and as the primary source of their self-identity. A largely secular Jewish society emerged as a result (see below).

(iii) The European culture approach

On the third approach in Zionist thought, the evolving culture in Eretz Israel was perceived as a branch of European culture. In the early days of Zionism this approach was identified with the liberal Zionist intelligentsia of Western Europe. Perceiving Zionism primarily in material-political terms, proponents of this approach gave little thought to the cultural traits of the new Zionist society in Eretz Israel. When they did deal with the question of culture, they saw the cultures of central and Western Europe as the only ones worthy to serve as models for the culture of the new Zionist society.

The most prominent representative of the European culture approach was Theodor Herzl, the founder of the Zionist movement and the first president of the World Zionist Congress. Until the very end of his life Herzl remained alienated from the cultural revival approach, and hostile to the Halakhic approach. ‘Culture for him was identical to European culture.’

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17 Almog, above n 11, at 74.