TRUMAH

Band 26

Beredte Objekte – Provenienzforschung zu NS-Raubgut

Eloquent Objects – Provenance Research on Nazi Looted Property

INHALT

Rezensionen und Rezensionsartikel

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Hebrew Law

A Secular Translation of Jewish Law[*]

Abstract

The author highlights three interrelated aspects of Jewish law: that it is a non-state legal tradition, it is neither secular nor religious, and its application within Israeli law results in a secular hybridization of Jewish law. That is, Hebrew law combines aspects of the Jewish tradition and secularism. Using historicist and critical approaches, the author explains that Hebrew law is the outcome of a specific history of Zionism and broad secular patterns.

Contemporary scholars in Jewish legal studies often seem concerned with the question "what is Jewish law?"[1] I suspect that their concern is commonly the result of three interrelated aspects of Jewish law: that it is a non-state legal tradition, it is neither secular nor religious, and its application within Israeli law results in a secular hybridization of Jewish law.

First, many conversations between scholars of Jewish law and scholars of state law lose sight of the differences between state law and non-state law. Law exists in, within, and outside states; the presumption that only states generate law is positivist and (historically and philosophically) inaccurate.[2] Jewish law is a non-state legal tradition, which means that it can function without, beyond, and parallel to a state. In non-state legal traditions, jurists (or, in the case of Jewish law, rabbis) are the primary (though not exclusive) generators of law. While the Jewish legal tradition includes within it matters of governance relevant to states, the tradition itself is not structured around a state. Scholars habitually attribute to Jewish law several distinctions that are common to non-state legal traditions.[3] Recognizing

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[*] The article is based on a presentation given at the workshop on "Rabbinical Law and Legal Theory", Hochschule für Jüdische Studien Heidelberg, 11 February 2019. For their feedback on this piece, I thank Danielle Drori, Yaacob Dweck, and Yaacov Yadgar.

[1] I have observed this concern in many forums about Jewish law. For one reading of this concern and some of its implications, see Rachel Rafael Neis, "The Seduction of Law: Rethinking Legal Studies in Jewish Studies," in: *Jewish Quarterly Review* 109:1 (2019), pp. 119–138.

[2] On why "law" is a transhistorical category, see Lena Salaymeh, "Decolonial Translation: Destabilizing Coloniality in Secular Translations of Islamic Law," in: *Journal of Islamic Ethics* No.? (2021), pp. 1–28.

[3] By way of example, Ino Augsberg notes, "Robert Cover, for instance, has confronted the respective 'basic myths' of Western and Jewish understandings of law, stating that while the one was based on the myth of the social contract, and therefore conceives of law basically as individual rights, the other was built on the myth of Sinai, and hence follows the general idea of law being an obligation, *mitzvah*. In consequence, whereas Western concepts of law

the differences between state legal systems and non-state legal traditions would elucidate conversations between scholars of Jewish law and scholars of state law.

Second, many scholars implicitly or explicitly compare Jewish law to secular law, while also assuming that Jewish law is a type of religious law.[4] The notion that Jewish law is a "religious law" is both historically imprecise and theoretically untenable. Secularism is a modern ideology that constructs a category of "non-secular" and labels it as "religion."[5] The notion of "religion" constructs a hybrid fusion of secularism and parts of historical traditions.[6] Notably, that transformation was not complete: parts of the Jewish tradition became religions, while other parts continue to be traditions. Accordingly, secular ideology constructs "secular law" and "religious law" and attributes to them certain features. More specifically, as I will elaborate below, modern nation-states convert historical traditions into artifacts known as "religions."[7] "Religious law" is a modern and problematic category that does not fit neatly with "Jewish law," which predates secularism/religion.[8]

Third, many scholars misunderstand that when a secular state applies Jewish law, it transforms it.[9] Every secular, modern nation-state constructs "religions," regardless of the state's demography. As I have illustrated elsewhere, modern nation-states with a Christian majority restrict the Jewish and Islamic traditions through the notion of "religion."[10] Likewise, the Israeli state confines the Jewish tradition through the categories of "religion" and "religious law." More specifically, the Israeli state applies or enforces one contemporary secularization of Jewish law, known as "Hebrew law." In my response to the contributions of this volume, I will elaborate how Hebrew law combines aspects of the Jewish tradition

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are centred around the notion of autonomy, Jewish legal thinking is founded on the notion of heteronomy." (Augsberg, Barely Legal, in the present Trumah issue) The distinction between social contract and communal obligation is primarily the result of the difference between a state legal system and a non-state legal tradition.

[4] On the implicit comparison of Jewish law to other legal traditions and systems, see Lena Salaymeh, "'Comparing' Jewish and Islamic Legal Traditions: Between Disciplinarity and Critical Historical Jurisprudence," in: *Critical Analysis of Law* 2:1 (2015), pp. 153–172.

[5] I do not use the terms "secularism" and "religion" as they are used usually in popular discourse. Instead, I define and explain both terms based on historicism and critical theory. See Lena Salaymeh, "The Eurocentrism of Secularism," in: *West Windows* 26 (14 September 2020). https://www.uni-erfurt.de/philosophische-fakultaet/forschung/forschungsgruppen/was-ist-westlich-am-westen/west-windows/26-the-eurocentrism-of-secularism (accessed 7 December 2022).

[6] Leora Faye Batnitzky, *How Judaism Became a Religion: An Introduction to Modern Jewish Thought*, Princeton 2013.

[7] Lena Salaymeh and Shai Lavi, "Religion is Secularized Tradition: Jewish and Muslim Circumcisions in Germany," in: *Oxford Journal of Legal Studies* 41:2 (2021), pp. 431–458.

[8] On why "religion" is not a transhistorical category, see Salaymeh, "Decolonial translation" (see note 2).

[9] See, by way of example, Suzanne Last Stone, "Law in Light of Zionism: A Comparative View," in: *Israel Studies* 19:2 (2014), pp. 111–132.

[10] Lena Salaymeh and Shai Lavi, "Secularism," in: Sol Goldberg / Scott Ury / Kalman Weiser (eds.), *Key Concepts in the Study of Antisemitism*, Palgrave Critical Studies of Antisemitism and Racism, Cham, Switzerland 2021, pp. 257–271.

and secularism.[11] Using historicist and critical approaches, I explain that Hebrew law is the outcome of a specific history of Zionism and broad secular patterns.

1. Historical and Critical Definitions

Neither the Jewish tradition nor secularism has essential features; nonetheless, at a macro level, both have logics or orientations that make them distinct from each other and from other traditions. Jews generate the Jewish tradition through engagement with Jewish sources and practices. Of course, there are extensive scholarly debates concerning the meaning and historicity of "Jews" and "Jewish."[12] Based on the existing scholarship, I use these terms as broad categories, recognizing their contingency and historical variability. In contrast, secularism is an ideology that emerged in modern Europe.[13] Jewish law is one component of the Jewish tradition, just as secular law is one component of secularism.

"Jewish law" is a transhistorical category that refers to a multi-vocal legal tradition with a long history. That legal tradition is the outcome of Jews studying and interpreting Jewish scriptural sources (particularly, though not exclusively, the written and oral Torah). Scripturality is an orientation of the Jewish legal tradition, rather than "an essential component".[14] Scholars conventionally differentiate between Western and Jewish legal traditions based on the former's concentration on the spirit of the law and the latter's focus on texts. However, this differentiation is a distortion. Legal hermeneutics often integrates emphasis on the "spirit of the law," such that the distinction between "spirit" and "text" is rather ambiguous. Simply put, Jewish law's reliance on legal texts and hermeneutics is not a fundamental characteristic and Jewish law does include emphasis on the "spirit of the law." Jewish law is a discourse and a praxis generated by interpretations of and interplays among legal texts, jurists, judges, and other legal actors. (In the premodern era, rabbis were the primary – though not exclusive –

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[11] A tradition is a varied and fluctuating array of ideas and practices shared by diverse people over time. While I refer to "the Jewish tradition," it should not be understood as homogenous or singular. I base my definition of tradition primarily on Mark Bevir, "On Tradition," in: *Humanitas* 13:2 (2000), pp. 28–53. See also Martin Krygier, "Law as Tradition," in: *Law and Philosophy* 5:2 (1986), pp. 237–262. "Tradition" is not the opposite of modernity, although I recognize that "tradition" has been used in the discourse of the "modernity myth." Walter D. Mignolo, "Enduring Enchantment: Secularism and the Epistemic Privileges of Modernity," in: Purushottama Bilimoria / Andrew B. Irvine (eds.), *Postcolonial Philosophy of Religion*, Dordrecht/London 2009, pp. 273–292.

[12] There is no authentic or essential "Jew" or "Jewishness." On these debates, see, by way of example, Daniel Boyarin, *Judaism: The Geneaology of a Modern Nation*, New Brunswick, NJ 2019; Shaye J.D. Cohen, *The Beginnings of Jewishness: Boundaries, Varieties, Uncertainties*, Berkeley, CA 2009; Zvi Y. Gitelman, *Religion or Ethnicity? Jewish Identities in Evolution*, New Brunswick, NJ 2009. On the role of anti-Semitism in defining "Jew" under Zionist ideology, see Yaacov Yadgar, "'Jewish' Politics or the Politics of 'Jews'? On Israeli Nation-Statehood," in: *ReOrient* 6:1 (2020), pp. 20–46, 36.

[13] Salaymeh, "The Eurocentrism of Secularism" (see note 5).

[14] Ladeur, in the present Trumah issue.

agents of Jewish legal thought.) The Jewish legal tradition is not static and it is not equivalent to rabbinic orthodoxy. Political struggles, sociopolitical changes, and geographic conditions shape the form and the content of Jewish law. At any given historical moment and in any precise geographic location, law is the outcome of specific conditions and broad patterns. Although the Jewish legal tradition does not have essential features, tradition is its centripetal force. This means that the Jewish legal tradition is structured around an engagement with historical practices and legal precedents. Accordingly, Jewish law's engagement with scripture can be one of ignoring, rejecting, or reacting against.[15]

In comparison to Jewish law, "secular law" is a modern category that refers to a legal system based on secular ideology. The secular legal tradition is the outcome of secular actors studying and interpreting secular legal texts. Secular law is a discourse and a praxis generated by interpretations of secular texts by secular legal actors. Secular law is not static or homogenous; it varies depending on its specific temporal (within modernity) and geographic manifestations. Multiple secular approaches to law share an engagement with secular ideology and secular institutions. Secular law is commonly the product of secular states and institutions; in the secular legal tradition, the secular state is the centripetal force. A significant distinction between Jewish law and secular law is that the latter predates and exists outside of modern nation-states, while the former is largely the product of modern nation-states and modern transnational organizations.

Nonetheless, "Jewish" and "secular" are not mutually exclusive categories, which is why they can be combined. One product of the fusion of secularism and the Jewish tradition is contemporary Zionism. Zionism is a modern political ideology that advocates establishing a Jewish-majority, modern nation-state. Since the late nineteenth century, Zionism has been a settler-colonial ideology.[16] Thus, Zionism is an ideology that simultaneously combines colonialism, secularism, and nationalism. I will only focus on the secular dimensions of Zionism in this essay. The state of Israel is a leading (though not the sole) generator of Zionism.[17] From an analytical, rather than ideological, perspective, Israel is a Zionist state, meaning a secular state for colonial settlers who identify as Jewish. Notably, there is no consensus on what a "Jewish state" means because people understand "Jewish" differently. As Yaacov Yadgar has demonstrated, the widespread claim that

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[15] It is common for legal traditions to include some legal actors who emphasize literal interpretations of texts and other legal actors who emphasize the broader objectives of legal texts. We might understand this distinction as animating some of the differences between two schools of legal interpretation, Beit Hillel and Beit Shammai. See Haim Shapira, "The schools of Hillel and Shammai," in: Berachyahu Lifshitz (ed.), *The Jewish Law Annual*, London 2007, pp. 159–208.

[16] On Zionism as settler-colonialism, see Ran Greenstein, "Colonialism, Apartheid and the Native Question: The Case of Israel/Palestine," in: Vishwas Satgar (ed.), *Racism After Apartheid: Challenges for Marxism and Anti-Racism*, Johannesburg 2019, pp. 75–95; Gabriel Piterberg, "Israeli Sociology's Young Hegelian: Gershon Shafir and the Settler-Colonial Framework," in: *Journal of Palestine Studies* 44:3 (2015), pp. 17–38; Yakov M. Rabkin, *What is Modern Israel?*, trans. Fred A. Reed, London 2016, pp. 58–65.

[17] On Zionism's secularization of the Jewish tradition in Israel, see Yaacov Yadgar, *Sovereign Jews: Israel, Zionism, and Judaism*, Albany, NY 2017.

Israel is a "Jewish state" turns out to be rather nonsensical because it is based on a secular and disputed interpretation of "Jews" and "Judaism."[18] Indeed, there is a long history of Jews, based on their understandings of the Jewish tradition, opposing Zionism on the grounds that it is a secular ideology.[19] Importantly, Zionism's fusion of secularism with some elements of the Jewish tradition is a manifestation of broader dynamics.

2. Secularization as Transformation and Translation

In order to understand fully the implications of Zionism being a secular ideology, we need to examine secularism critically. Recent critical scholarship illuminates that secular ideology primarily defines religion.[20] Much recent scholarship has emphasized that the notion of religion was invented when secularism emerged in early modern Western Europe.[21] Timothy Fitzgerald proposed, "what counts as 'religion' and what counts as 'the secular' are mutually delimiting and defining concepts, the distinction between them continually shifting depending on the context."[22] Although there is no consensus on its precise meaning and it should not be essentialized, religion was and continues to be constituted in dialogical relationship to secularism. For the sake of clarity and coherence, I define "religion" as "non-secular."[23]

Secularism alters traditions by converting them into religions. More specifically, secular state law secularizes traditions by regulating them in (at least) three dimensions that are simultaneously related and conflicting. In previous scholarship, Shai Lavi and I proposed a secularization triangle for explaining how secular state law constructs religions in three angles: religiosity is defined as a matter of private belief, individual right, and autonomous choice; religious law is defined as a divinely ordained legal code; religious group is defined as public threat.[24] Thus,

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[18] Yaacov Yadgar, *Israel's Jewish Identity Crisis: State and Politics in the Middle East*, Cambridge, UK / New York, NY 2020. See also Yadgar, "'Jewish' Politics or the Politics of 'Jews'? On Israeli Nation-Statehood" (see note 12).

[19] Yakov M. Rabkin, *A Threat from Within: A Century of Jewish Opposition to Zionism*, London 2006.

[20] Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam*, Baltimore, MD 1993; David Scott and Charles Hirschkind (eds.), *Powers of the Secular Modern: Talal Asad and His Interlocutors*, Cultural Memory in the Present, Stanford, CA 2006; Daniel Dubuisson, *The Western Construction of Religion: Myths, Knowledge, and Ideology*, trans. William Sayers, Baltimore, MD 2007.

[21] Wilfred Cantwell Smith, *The Meaning and End of Religion*, Minneapolis, MN 1991; William T. Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict*, Oxford 2009; Peter Harrison, *The Territories of Science and Religion*, Chicago, 2017.

[22] Timothy Fitzgerald (ed.), *Religion and the Secular: Historical and Colonial Formations*, London 2007, p. 15.

[23] The circularity of this non-essentialist definition of religion is intentional; the term "non-secular" recognizes the role of secularism in defining religion while highlighting the anachronism of applying the term prior to the emergence of secularism.

[24] Salaymeh and Lavi, "Religion is Secularized Tradition" (see note 7).

secularism converts historical legal traditions into "religious law."[25] The notion of "religious law" is distinct from the Jewish legal tradition because "religious law" is limited primarily to legal doctrines, thereby excluding processes of legal reasoning. Just as religion is a secularization of a tradition, Jewish religious law is a secularization of the Jewish legal tradition. Whereas Jewish law is oriented towards tradition, religious law is oriented towards a state. (Nonetheless, there are both state and non-state manifestations of the secularization of Jewish law.) Although there are multiple articulations of "Jewish religious law," a particularly influential version is Hebrew law (*mishpat 'ivrī*). Hebrew law can be defined as "Zionist law" since it is largely a result of the Zionist movement.[26]

In the nineteenth century, there was an important debate about the nature of Hebrew law, with one camp claiming that it is a new creation and another camp claiming that it is a revival.[27] This debate should be situated within its historical context: some Zionists sought to replace exilic Judaism and the rabbinic tradition with the new, modern Hebrew person, nation, and language.[28] The debate about Hebrew law is analogous to the debate about the modern Hebrew language: both debates involved historical narratives of stagnation and confusion about how to classify hybridity. Many of the nineteenth-century (and later, twentieth-century) figures involved in advancing modern Hebrew as a language of daily use claimed that their objective was "reviving" the Hebrew language. Yet many contemporary scholars contest the portrayal of the Hebrew language as having been unused prior to the eighteenth century. Jack Fellman notes that "even as a purely spoken language […] Hebrew was not dead."[29] Similarly, legal traditions are not organisms and Jewish law continued to be practiced, taught, discussed, and studied throughout history. Depictions of Jewish law as having been weak prior to the Zionist movement often reflect a presumption that a modern nation-state is a necessary element for the survival and flourishing of a legal tradition. By way of example, Arye Edrei assumes that Jewish law was deteriorating prior to Zionism. Edrei asserts, "Since the abolition of Jewish autonomy at the end of the 18th century, Jewish law has had no active arena in which to function as a legal system, causing it to atrophy".[30] However, only some – not all – Jewish communities lost autonomy at the end of the 18th century. Zionist ideology narrates the histories of

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[25] Salaymeh, "Secular Translations" (see note 2).

[26] Likhovski explains, "Hebrew law, like the rest of Zionist culture, was constructed by its early advocates, most of whom were secular Jews, as a reflection of Zionist ideology and identity needs. It was to be a new legal system, not the 'restored' old system of the Jews of the Diaspora." Assaf Likhovski, "The Invention of 'Hebrew Law' in Mandatory Palestine," in: *The American Journal of Comparative Law* 46:2 (1998), pp. 339–373, 340.

[27] On this debate, see Amihai Radzyner, "Between Scholar and Jurist: The Controversy over the Research of Jewish Law Using Comparative Methods at the Early Time of the Field," in: *Journal of Law and Religion* 23:1 (2007), pp. 189–248.

[28] See, by way of example, Shai Ginsburg, *Rhetoric and Nation: The Formation of Hebrew National Culture, 1880–1990*, Syracuse 2014.

[29] Jack Fellman, "Concerning the 'Revival' of the Hebrew Language," in: *Anthropological Linguistics* 15:5 (1973), pp. 250–257,251.

[30] Although Edrei participated in this symposium, he published his paper as Arye Edrei, "Halakhah from the Bench? A New Perspective on the Use of Jewish Law in Israel's Supreme

the Hebrew language and of Jewish law as having been in decline prior to Zionism. Recent scholarship indicates that these narrative histories are inaccurate.

Historical narratives about the supposed "decline" of Jewish law and Hebrew language have direct implications for classifying Hebrew law and modern Hebrew. Because both Hebrew law and modern Hebrew are hybrid constructs, scholars debate how to categorize them. Although there are divergent views, some linguists contest the simple labeling of modern Hebrew. Shlomo Izre'el emphasizes that Israeli Hebrew is a new language, rather than a "revival" of a dead language.[31] Furthermore, many contemporary scholars argue that modern Hebrew is not a Semitic language because it "was created by those whose native tongues were Yiddish, Russian or Polish, and they grafted Hebrew words onto the syntax of those languages."[32] Yaakov Rabkin declares, "modern Hebrew is an artificial language created in order to give a vernacular to this imagined nation."[33] Paul Wexler argues that modern Hebrew "is a dialect of Yiddish" and "a Slavic language," rather than a "revival" of historical Hebrew (a Semitic language).[34] Ghil'ad Zuckermann insists that modern Hebrew should be identified as "Israeli."[35] Without taking a position on this linguistic debate, we can recognize that modern Hebrew is a hybrid language that appears to combine Hebrew vocabulary with a mixed or non-Hebrew syntax. Just as "modern Hebrew" is hybrid, so too is "Hebrew law."

Hebrew law, as previously noted, is Zionist law and therefore a fusion of the colonial, secular, and nationalist dimensions of Zionism; the reasons for this hybridization are both historical and structural. The history of Hebrew law – like that of modern Hebrew language – is intertwined with the Zionist movement in Europe. Assaf Likhovski describes Hebrew law as "born out of an affair between German professors and Zionist students."[36] Distinguishing between Jewish law and Hebrew law does not mean that the former is pure or authentic and the latter is impure or inauthentic. Instead, as Likhovski demonstrates, there is a divergence between the historical legal tradition of Jews and the legal system initiated by Zionist settlers.[37] I would extend this observation by emphasizing that "Hebrew law" refers not only to the movement that began in the late nineteenth century, but also to the application of Jewish law by the Israeli state. One significant divergence between the historical Jewish legal tradition and the Hebrew law project

Court", in: Julie Cooper / Samuel Hayim Brody (eds.), *The King Is in the Field: Essays in Modern Jewish Political Thought*, Philadelphia 2023, p. 54.

[31] Shlomo Izre'el, "The Emergence of Spoken Israeli Hebrew," in: Benjamin H. Hary (ed.), *Corpus Linguistics and Modern Hebrew: Towards the Compilation of the Corpus of Spoken Israeli Hebrew*, Tel Aviv 2003, pp. 189–219.

[32] Yakov M. Rabkin, "Language in Nationalism: Modern Hebrew in the Zionist Project," in: *Holy Land Studies* 9:2 (2010), pp. 129–145, 143.

[33] Ibid., p. 143.

[34] Paul Wexler, *The Schizoid Nature of Modern Hebrew: A Slavic Language in Search of a Semitic Past*, Wiesbaden 1990, p. 4.

[35] Ghil'ad Zuckermann, *Israeli – A Beautiful Language* [in Hebrew], Tel Aviv 2008.

[36] Likhovski, "The Invention of 'Hebrew Law'" (see note 26), p. 341.

[37] Ibid.

concerns the role of rabbis; Hebrew law limited and partially replaced rabbis with state-appointed judges and rabbinic functionaries.

In addition to its historical beginnings, Hebrew law is Zionist for structural reasons. I propose that "translation" can be a metonym for the process by which secularism transforms Jewish law into Hebrew law. Translation involves a complex relationship between a source text and a reception text that intertwines assumptions about "originality" and the past: the translated text is simultaneously a "new" text and a depiction of a historical or "original" text. A translated text is then a hybridization of a source text in a reception language. Accordingly, I propose that Hebrew law uses Jewish vocabulary in a secular legal sentence.[38] In Israel, we find secular law (Israeli civil law) and religious law (Hebrew law) primarily within the state and the Jewish legal tradition primarily outside the state. Translation is evident in how many secular legal terms and concepts are imposed on the Jewish legal tradition in contemporary scholarship. A significant example of secular translation is the misrepresentation of Jewish law as a set of legal doctrines, rather than a process based on legal reasoning. Edrei explains, "The basic claim of the *Mishpat Ivri* [Hebrew law] school was that parts of Jewish law […] can be isolated from its religious aspect, and should therefore be adopted and cultivated […]. The term *Mishpat Ivri* – which was coined upon the movement's founding in Moscow in 1918 – was in itself a revolutionary concept that reflected a desire to separate from the traditional *halakhah* [Jewish law]".[39] Nonetheless, there was no distinction between secular and religious in the premodern Jewish legal tradition. Thus, imposing a secular/religious distinction onto the premodern Jewish tradition is itself an act of secular transformation. Likhovski notes that proponents of Hebrew law "explain[ed] away those parts of [Jewish law] that did not fit neatly into [their] 'progressive' image."[40] In selecting particular aspects of Jewish law, the inventors of Hebrew law rejected the Jewish legal tradition's orientation towards the past and past authority.[41] Advocates of Hebrew law imposed secular legal concepts when they divided Jewish law into public and private, or substantive and procedural, or principles and rules.[42] Thus, "Hebrew law" is a secular translation of Jewish law.

Identifying Hebrew law as a secular translation is not a merely theoretical interpretation. The historical actors involved in the Hebrew law movement differentiated between historical Jewish law and their Hebrew law project. Indeed,

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[38] On Islamic vocabularies in secular legal sentences, see Lena Salaymeh, "Comparing Islamic and International Laws of War: Orthodoxy, Heresy, and Secularization in the Category of Civilians," in: *American Journal of Comparative Law* 69:1 (2021), pp. 136–167; Salaymeh, "Secular translations" (see note 2).

[39] Edrei, "*Halakhah* from the Bench?" (see note 30), p. 55.

[40] Likhovski, "The Invention of 'Hebrew Law'" (see note 26), p. 366.

[41] Likhovski explains, "In the past, Jewish legal norms were created by Rabbinical scholars (and to a lesser extent by communal regulations), but the secular revivers of Hebrew law in Palestine were loathe to recognize the unenlightened non-Zionist Rabbis of Palestine as sources of authority. The Rabbis, they said, were conservatives who slavishly followed frozen tradition." Likhovski, "The Invention of 'Hebrew Law'" (see note 26), p. 352. See also Radzyner, "Between Scholar and Jurist" (see note 27), p. 238.

[42] Likhovski, "The Invention of 'Hebrew Law'" (see note 26), pp. 353–354.

some orthodox Jews during the early twentieth century viewed Hebrew law as "the secularization of Jewish law."[43] By way of example, Rabbi Yitzchak Breuer (d. 1946; Palestine) described Hebrew law as "the anatomy of a body detached from its soul."[44] Breuer's perspective suggests that by marginalizing rabbis and the rabbinic tradition, Hebrew law is a body lacking the soul of Jewish law. Izhak England, formerly a judge on the Israeli Supreme Court, asserted that since legislation is necessary in order for the Israeli state to adopt Jewish law, the state secularizes Jewish law.[45] Ultimately, the Israeli Supreme Court determines the legality of the state rabbinate based on secular law, rather than Jewish law. It is an open and unresolved question if the application of Jewish law within the Israeli legal system will, in the future, be considered "Jewish" or "secular." There are Jewish groups that continue to identify the Jewish tradition in opposition to secularism; based on their understanding of the Jewish tradition, they oppose the Israeli state's rabbinic authority. Thus, there continues to be significant resistance to Hebrew law replacing Jewish law. As they fashion and refashion their tradition, Jewish people will determine if Hebrew law will dominate the Jewish legal tradition because, ultimately, social groups define law.[46]

3. Hebrew Law and Israeli Law

When a secular state makes use of the Jewish legal tradition, it cherry picks specific Jewish legal doctrines that conform to the state's secular objectives. The state thereby converts specific Jewish laws into Hebrew law. I concur with Edrei's claim that "the use of Jewish law in Israeli law impacts not only Israeli law, but might also have significance for Jewish law itself".[47] I want to propose, however, a different interpretation of that significance. I would qualify Edrei's assertion by specifying that Israeli law contributes to the secularization of Jewish law and its (partial) transformation into Hebrew law. Israel's rabbinic courts enforce Hebrew law, which is Jewish law within the confines of Israeli law. Although Edrei argues, "Elon contributes to the development of" Jewish law, I would specify that Elon, as an Israeli judge, furthers the secularization of Jewish law as Hebrew law.[48] By way of example, the Israeli state's legal definition of "Jew" is secularized, despite the involvement of the state rabbinate.[49]

The state of Israel promotes a secular version of Jewish law (i.e. Hebrew law) that sometimes contradicts premodern Jewish traditions. This dynamic is evident when we examine the case of Israel's regulation of kosher certification.[50] In the

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43 Ibid., p. 359. See also Radzyner, "Between Scholar and Jurist" (see note 27), p. 194.

44 Radzyner, "Between Scholar and Jurist" (see note 27), p. 203.

45 Izhak England, "The Problem of Jewish Law in a Jewish State," in: *Israel Law Review* 3:2 (1968), pp. 254–278, 260.

46 Brian Z. Tamanaha, *A Realistic Theory of Law*, Cambridge, UK 2017.

47 Edrei, "Halakhah from the Bench?" (see note 30), p. 54.

48 Ibid., p. 57.

49 Aaron R. Petty, "The Concept of Religion in the Supreme Court of Israel," in: *Yale Journal of Law & Humanities* 26:2 (2014), pp. 211–268.

50 Fuchs, David, "Kosher Sovereignty," seminar paper on file with author, 15 July 2018.

premodern world, the determination of kosher status was based on a set of criteria articulated within the rabbinic tradition. The Israeli state secularizes Jewish traditions concerning kosher certification by rendering it a state bureaucratic function. Up until recently, Israel had redefined kosher certification to be a solely state function, whereas historically it had been under the purview of learned rabbis. Israel prohibited non-state groups from participating in kosher certification, which contradicts Jewish traditions. Several groups protested the state rabbinate's monopoly on kosher certification as being a direct contradiction of historical Jewish practice. Because of this controversy, the Israeli state rabbinate recently authorized alternative kosher certifications.[51] Although the law changed of late, this case is an important example of why and how certain Israelis are challenging the Israeli state's application of Hebrew law from the perspective of the Jewish tradition. The Jewish legal tradition is not dead. Rabbis inside and beyond Israel continue to develop Jewish law and sometimes they do so in ways that are against or critical of the Israeli state.

Because Israel is a settler-colonial, secular state for Jews, its structure is based on secularism, rather than the Jewish tradition. In his contribution to this workshop, Edrei discussed two cases – criticizing the terrorist Meir Kahane – in which judge Menachem Elon wrote opinions that were based on Jewish legal sources. Contrary to the picture that Edrei presents, Israeli judges rarely engage with the Jewish legal tradition. Israeli judges draw upon a variety of legal traditions, with Jewish law being only one of many.[52] Indeed, Israeli law cites to Western state legal systems far more frequently than to Jewish law.[53] Moreover, when the Israeli Supreme Court cites to Jewish law, it often decontextualizes or misunderstands Jewish legal ideas.[54] In line with the secular legal structure of the state, Israeli law is primarily secular and it produces an artefact of Jewish religious law, i.e. Hebrew law.

[51] אילן שניג, מהפכת הכשרות: הרבנות תאפשר הוצאת תעודה של השגחה אלטרנטיבית *ice* (1 September 2020). http://www.ice.co.il/finance/news/article/785220 (accessed 7 December 2022).

[52] Suzie Navot, "Israel: Creating a Constitution – The Use of Foreign Precedents by the Supreme Court (1994–2010)," in: Tania Groppi / Marie-Claire Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Oxford 2013, pp. 129–153; Iddo Porat, "The Use of Foreign Law in Israeli Constitutional Adjudication," in: Gideon Sapir / Daphne Barak-Erez / Aharon Barak (eds.), *Israeli Constitutional Law in the Making*, Oxford 2013, pp. 151–172.

[53] Isaac Roszler notes that "between 1994 and 2006, the Israeli Supreme Court utilized Mishpat Ivri approximately 5.7 %, of the time: 36.27 % of which were cited in passing, and Mishpat Ivri only accounted for 14.29 % of all comparative foreign citations." Isaac Roszler, "Law as a Prism Into National Identity: The Case of Mishpat Ivri Comment," in: *U. Pa. J. Int'l L.* 38:2 (2017), pp. 715–760, 750.

[54] Steven F. Friedell, "Some Observations about Jewish law in Israel's Supreme Court," in: *Washington University Global Studies Law Review* 8:4 (2009), pp. 659–700.

4. Conclusion

I began this essay with reference to a common concern among scholars of Jewish law. I have suggested that this concern might be resolved by recognizing that Jewish law is a non-state legal tradition, that Jewish law is not a "religious law," and that Hebrew law is a "religious law," which is a fusion of secularism and the Jewish legal tradition. In order to have conversations about Jewish law and Hebrew law without perpetuating mythologies of secularism (and Zionism), it is necessary to refine and redefine the terms and concepts we use. In this article, I demarcated a set of terms for discussing Hebrew law and offered historicist and critical definitions of those terms. Jewish law is a non-state legal tradition. Secularism transforms (parts of) the Jewish legal tradition into "religious law." Israeli law includes both secular law and religious law (Hebrew law). Arguably, the Jewish tradition plays an ornamental role in the hybridity of "Hebrew law." Nevertheless, secular ideology's obfuscation of the Jewish legal tradition has not annihilated it. For many Jews, Jewish law's history of being a non-state legal tradition is the basis for resistance to its complete transformation into Hebrew law.