ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 109, 2024

https://doi.org/10.18778/0208-6069.109.05

COPE Member since 2018 JM13714

*Natali Levin**

https://orcid.org/0009-0009-5364-1526

THE "DOCTRINE" OF LAW IN ISRAEL

Abstract. This article examines the doctrine of law in Israel, highlighting the integration of various legal influences, particularly the significant role of British legal traditions in shaping the legal framework. Despite the absence of a formal written constitution, Israel's Basic Laws serve as a constitutional foundation that guides governance and protects individual rights. The legal system reflects a unique blend of the Jewish law, the British common law, and modern statutory law, creating a dynamic and distinctive legal framework. The article provides a comparative analysis of Israel's legal system in relation to the British law and the Jewish law, emphasising the implications of not having a singular constitution and the importance of the Basic Laws in safeguarding rights. Overall, the article contributes valuable insights into the complexities of Israel's legal landscape, particularly the balance between secular and religious influences, making it relevant for scholars, practitioners, and those interested in the intersection of law and society.

Keywords: basic laws, British legal traditions, legal framework, Israeli constitutional system, legal doctrine

DOKTRYNA PRAWA W IZRAELU

Streszczenie. W artykule przeanalizowano doktrynę prawa w Izraelu, podkreślając integrację różnych wpływów prawnych, w szczególności znaczącą rolę tradycji prawnych brytyjskich w kształtowaniu ram prawnych. Pomimo braku formalnej, pisemnej konstytucji, podstawowe ustawy Izraela pełnią funkcję konstytucjonalną, która kieruje rządzeniem i chroni prawa jednostki. System prawny odzwierciedla unikalne połączenie prawa żydowskiego, brytyjskiego prawa zwyczajowego oraz nowoczesnego prawa ustawowego, tworząc dynamiczne i charakterystyczne ramy prawne. Artykuł dostarcza analizę porównawczą systemu prawnego Izraela w odniesieniu do prawa brytyjskiego i prawa żydowskiego, podkreślając konsekwencje braku jednolitej konstytucji oraz znaczenie podstawowych ustaw w ochronie praw. Ogólnie, artykuł wnosi cenne spostrzeżenia na temat złożoności krajobrazu prawnego Izraela, szczególnie równowagi między wpływami świeckimi a religijnymi, co sprawia, że jest ważny dla naukowców, praktyków oraz osób zainteresowanych skrzyżowaniem prawa i społeczeństwa.

Słowa kluczowe: Podstawowe ustawy, brytyjskie tradycje prawne, ramy prawne, izraelski system konstytucyjny, doktryna prawna

* Adam Mickiewicz University in Poznań, natalilaw50@gmail.com

Received: 27.07.2024. Verified: 25.08.2024. Revised: 30.08.2024. Accepted: 14.10.2024.

The legal doctrine in Israel embodies a fusion of legal influences, with British legal traditions playing a substantial role in the evolution of the legal framework. Despite the absence of a formal, singular written constitution, the Basic Laws have emerged as a constitutional framework guiding governance and safeguarding individual rights. This progression underscores the adaptability of the legal system in meeting the societal needs of Israel while drawing upon the historical foundations of British legal principles.

A blend of legal traditions refers to the incorporation of diverse legal influences, principles, and practices from different sources into a unified legal system. In the context of Israel, the legal system reflects a fusion of various legal traditions, including the Jewish law, British common law, and modern statutory law. This blending of legal traditions is evident in the development of legal institutions, principles, and doctrines that draw from multiple sources to create a unique and dynamic legal framework.

On the one hand, the following article seeks to present this diverse influence on the formation of the legal system in Israel and. On the other hand, it attempts to characterise the distinctiveness and specificity of the doctrine of the law in Israel.

The article offers valuable insights into the coexistence and influence of different legal traditions, making it relevant for those studying comparative law and legal pluralism. It enhances the understanding of the Israeli society by illustrating how the legal system reflects the country's unique cultural and historical context, particularly the balance between secular and religious influences. Additionally, the discussion on the Basic Laws highlights their significance in current debates about governance and human rights in Israel. Finally, the article's findings may have broader implications for other jurisdictions facing similar challenges related to legal integration and the effects of colonial legacies on modern legal systems.

The article presents a comparative analysis of Israel's legal system, particularly in relation to British legal traditions and the Jewish law. The central argument of the article is that Israel's legal framework is a unique fusion of various legal influences, primarily British common law, the Jewish law, and modern statutory law. This blending creates a distinctive legal doctrine that reflects the societal needs and historical context of Israel.

The key hypotheses presented in the article, which will be explored, are as follows:

1. **Comparative Legal Systems** – the article contrasts Israel's legal system with the British law, highlighting how British legal traditions have significantly influenced the development of legal institutions and principles in Israel. It also touches upon the differences between the Israeli law and other legal systems.

2. **The Absence of a Formal Constitution** – the article discusses the implications of Israel not having a singular written constitution, instead relying on the Basic Laws that function as a constitutional framework. This aspect is

crucial for understanding how governance and individual rights are safeguarded in Israel.

3. **Adaptability and Evolution** – the article emphasises the adaptability of the Israeli legal system in addressing contemporary societal challenges while drawing from its historical legal foundations. This adaptability is essential for readers to understand the dynamic nature of law in Israel.

In summary, the article is a significant contribution to the understanding of Israel’s legal landscape, offering a nuanced perspective that is beneficial to legal scholars, practitioners, and anyone interested in the intersection of law and society.

1. THE LEGAL SYSTEM IN ISRAEL – INTRODUCTION

The legal system in Israel draws extensively from the Western legal tradition, sharing the defining characteristic of the rule of law; namely, that all members of a society are considered equal before the law.

At the centre of the legal perception lies the individual – both their rights and duties. Israel, being a democratic sovereign state, with a mostly secular legal system (although one inspired by certain Jewish values) and a large religious population, albeit a minority, is faced with the challenge of balancing the need to enact laws which operate according to the needs of society at large while also acknowledging the Jewish ethos and character of the state.

Israel is a developed yet simultaneously evolving society. At the foundation of the legal culture lies the rational human being, as articulated by the Aristotelian philosophy, according to which this agent possesses the intellect necessary to make rational decisions and define goals. The law is a means that can assist rational agents to achieve such goals.

An illustrative example of the unique fusion of legal traditions in Israel is the active role of judges in shaping legal norms.

In Israel, judges are not only interpreters of the law but also creators of it, a practice influenced by the British common law tradition. This contrasts with many continental legal systems, where judges typically apply existing laws without significantly altering them (Mautner 2011, 267).

The Israeli Supreme Court exemplifies this judicial activism by expanding legal interpretations to protect individual rights and address social issues. Landmark rulings have tackled human rights, minority rights, and social justice, with the court often filling legislative gaps or challenging government actions (Hirschl 2004, 15–17).

This approach reflects a blend of legal influences: the common law tradition that allows judges to establish legal precedents and the Jewish legal tradition that prioritises justice and moral considerations. Consequently, the Israeli legal

culture demonstrates a dynamic interplay between these traditions, highlighting how diverse legal influences can coexist and shape the legal landscape (Rosen-Zvi 2004, 622).

As part of the Western legal tradition, the Israeli law has been significantly influenced by English common law, yet with time has adopted its own legal institutions, traditions, and principles. All the following derive from common law: the principles of trust, precedent, evidence, and legal prevention; and the adversarial system in criminal law, defined by two advocates representing their parties' position before an impartial person or group of people, typically a jury or judge who seeks to ascertain the truth based on the evidence presented before them and make a ruling accordingly. Moreover, Israel has adopted interpretative law (Barak 2005, 22), meaning the judicial process of determining the intended meaning of a written law or document, which thus empowers judges to make rulings accordingly. In this way, Israel has recognised the judge's status in the society as a figure authorised to interpret the law. Lastly, Israel has applied the principle of estoppel, according to which actors are prohibited from making statements that contradict what is implied by the previous actions or assertions made by the same individual (Barak 1992, 211).

The Israeli legal system's pyramidal structure (Cohen 1989, 287), influenced by common law, comprises three main courts: the Supreme Court, District Courts (organised by district), and Magistrates' Courts. The number of judges varies at each level, with 15 justices appointed to the Supreme Court by the President of Israel, following nomination by the Judicial Selection Committee and legislation by the Knesset. The system also includes national and regional labour courts. The israelisation of common law in Israel empowers judges not only to interpret and apply law but also to create it, diverging from the continental system's view of a judge's role. This approach, rooted in the British Mandate over Palestine, emphasises judges as active rule-makers, shaping the legal landscape in Israel (Barak 1992, 197–204; Shachar 1995, 217–219).

The 'israelisation of common law in Israel' is the process of adapting and integrating the British common law principles into the Israeli legal system, reflecting Israel's unique cultural, social, and historical context (Shetreet, Stark 2021, 362).

Judicial Activism – judges in Israel take an active role in interpreting and developing legal principles to tackle social issues and safeguard individual rights, which contrasts with the more conservative application of common law found in other jurisdictions (Bendor 2007, 1–30).

The Integration of the Jewish Law – the framework of common law in Israel incorporates the Jewish legal principles, recognising the Jewish identity of the state while also maintaining democratic values (Aharon 2018, 145–168).

Adaptation to the Local Context – common law doctrines are modified to align with Israel's unique cultural, social, and political contexts, resulting in the establishment of distinct legal norms and practices (Mautner 2017, 155–175).

Dynamic Legal Landscape – the legal system in Israel adapts and evolves in response to societal shifts and legal challenges, creating a vibrant and dynamic legal culture (Soffer 2021, 77–99).

2. THE APPLICATION OF THE ENGLISH LAW IN BRITISH COLONIES

The history of British Mandate law in the Land of Israel began with the British conquest of the Ottoman-controlled territory at the end of World War One. The British inherited the existing legal system that operated in the region at the time – the Ottoman law. For hundreds of years, the Ottoman law combined the Islamic *Sharia* law and original legislation enacted by the Ottoman sultans – the two existed side by side. However, during the course of the 19th century, the Ottoman law underwent a process of change. In the middle of that century, the Ottoman rulers concluded that the only way to preserve the diminishing power of their empire *vis-à-vis* the Western powers was to enact sweeping reform of the Ottoman regime; as part of those reforms, the sultans also changed the legal system applied throughout the empire. They adopted a list of codes based on the Western law (principally French) and repealed large swathes of the formerly applied laws – mainly the Islamic parts, which had been applied throughout the empire up until the mid-19th century (Ma'oz 1968, 189–199).

There were branches of law in which the sultans partially retained Islamic law precepts. The most important was civil law, which continued to be based on the Islamic religious law – *Sharia* – also after the reforms. However, even this field of law exhibited a certain Western influence, since the Ottoman regime gathered the civil rules of *Sharia* into a Western-style code – the *Mecelle*. The *Mecelle*'s written form was partially influenced by the structure of European civil codes, but the source of its norms was Islamic religious law. Other areas of pre-reform Ottoman law, for instance family law, remained almost unchanged. As a consequence of the reforms, a new legal system emerged, in which French, Islamic, and Ottoman norms are all intermingled. The impact exerted by the reforms on the daily life of the subjects at the periphery of the Ottoman Empire, such as Palestine, is unclear. It is possible that the impact was negligible. In the 19th century, a large proportion of the population living in Palestine did not use the Ottoman regime's legal systems, but regulated their affairs through non-governmental legal systems, such as the religious tribunals or the European Consular tribunals established under the Capitulation Treaties. In any event, when the British conquered the Land of Israel, they encountered the Ottoman legal system, which had undergone a partial process of "westernisation."

What did the British do with this legal system they had encountered? Palestine was far from being the first place to be colonised by the British; it was, rather, one of the last places to join the British Empire, at a time when it was already in a process of decline. The British had, therefore, acquired experience of conquest and dealing with the local legal systems which had existed in the occupied colonies. They never formulated a uniform policy for dealing with the legal systems in the conquered lands, but one could say that there were certain elements that characterised the British legal policy throughout the empire.

The British policy at the end of the 19th century and the beginning of the 20th century aimed to preserve, as far as possible, the legal *status quo* in the colonies, in particular those colonies which had developed a local legal system preceding the British conquest.[1] The British authorities had no interest in antagonising the local population, which could potentially occur following the wholesale replacement of the existing legal system with a new one. However, one cannot say that the British entirely retained the legal systems which they encountered throughout their conquests. The longer a certain colony was subject to the British rule, the deeper the British law penetrated the occupied colony. This process of the penetration of the English law, referred to as "anglicisation", was at times the result of a concerted and planned effort on behalf of the British rulers of the colony, or that of the Colonial Office in London. The process, however, turned out to be the product of circumstance. Some local legal systems were more impervious to the penetration of the English law, and others less so.

In certain colonies, the English established a single governmental legal system, but in other parts (in particular throughout the African colonies), they created a "Dual Legal System." This system upheld an institutional distinction between the governmental legal system that applied the Western norms and the native legal system that applied local "customary" norms (or at least those perceived by the British as local customary norms). All these factors mattered for the process of differentiating legal systems within the various British colonies, as well as for the extent to which the English law penetrated the colonies. Some colonies, such as in the Caribbean Islands, had legal systems very similar to the legal system at the heart of the empire – England. In other colonies, such as those in Africa, the English law had very little impact, and certainly not in any practical way; the majority of disputes were adjudicated by means of custom-based courts, which received the blessing of the British rulers, or through the agency of extra-governmental native systems that had existed before the conquest (Elias 1962, 80–81; Morris 1972, 73; Zweigert, Kötz 1987, 233–245; Kirkby, Coleborn 2001, 106–123).

[1] For examples of different discussions of the British colonial legal policy in the various colonies of the Empire, see: Olawale (1962, 80–81); Morris (1972, 73); Zweigert, Kötz (1987, 233–245); Kirkby, Coleborne (2001).

The degree to which the English law was imported and thereafter imposed varied not only from one colony to the next, but also varied between the various branches of law within the law of any given colony. Two fundamental legal distinctions affected the extent to which the English law replaced local law: first, the distinction between substance and procedure; and second, the distinction between the private sphere and the public sphere.

I will first address the distinction between substance and procedure. The process of replacing the procedural aspect of the law (the laws of evidence, civil and criminal procedure) took place in place of replacing the substantive aspect of local law (such as property law, family law, or contract law). Replacing local laws of evidence and procedure with British laws of evidence and procedure was significant from the practical standpoint, since the governmental legal systems in the colonies were staffed by British judges and counsel, who were trained and specialised in the English procedure and English laws of evidence. Thus, one of the chief objectives standing behind the process of replacing the procedure was to exercise control over the law of a given colony, in particular over the application of law.

The other objective behind replacing the procedure was to increase the effectiveness of the colonial legal systems, at least as far as the British were concerned. Local legal systems, such as the Ottoman one, were often described by the British and other westerners as corrupt.[2] There were also British claims to the effect that their principal contribution to the law of the colonies was not in changing local substantive law, but mainly in the manner in which the local law was enforced. The British, according to the claim, gave the native population a legal system that enforced local norms; however, contrary to the local systems, it did so efficiently and in an incorrupt manner. Thus, in British texts, the claim is often found that the British "civilised" the local law throughout the colonies with ideas such as "the Rule of Law." For example,

> supremacy of law (…), which embodies three concepts: the absolute predominance of regular law, so that the government has no arbitrary authority over the citizen; the equal subjection of all (including officials) to the ordinary law administered by the ordinary courts; and the fact that the citizen's personal freedoms are formulated and protected by the ordinary law rather than by abstract constitutional declarations. (Dicey 1915, 189)

The notion of the rule of law was also at the heart of this judicial system. This idea can be roughly defined as "[t]he authority and influence of law in

[2] A similar (but not identical) example of that approach can be found in the manner in which Max Weber described the Islamic law as law that cannot ensure certainty. Max Weber's argument regarding the Islamic law, particularly in his comparative analysis of legal systems, primarily focuses on the intrinsic characteristics of the Islamic law that affect its ability to ensure legal certainty. Weber's analysis does not centre on corruption *per se* but, rather, on how the nature of the Islamic law influences its application and predictability (Rheinstein 1954, 213). For a critique of Weber's theory of the Islamic law, cf. Haim Gerber (1994).

society, especially when viewed as a constraint on individual and institutional behaviour; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes" (Oxford Reference 2023). This concept appeared in stark contrast to the native legal systems, where, it was claimed, judges would rule according to their discretion, which left the law susceptible to corruption and extortion, rather than operating according to hard and fast rules, where equality before the law was the chief principle.

It is difficult to ascertain to what extent the British description of local systems as corrupt was an accurate one, and how far it was a description that was intended to justify British colonialism. (For a general discussion of comparative imaging of the English law versus the local law, see: Chanock 1985, 5). It is even more difficult to ascertain whether the British did, in fact, succeed in creating more efficient legal systems in the colonies, as compared with the systems in place prior to colonialisation. In this regard, it is interesting to note a story that appeared in one of Norman Bentwich's books, suggesting that it was precisely the (alleged) lack of corruption in the British system that actually caused crime to rise. Bentwich, a Jewish British jurist who served as the Attorney General to the British Mandatory Palestine's government (Breitman, McDonald, Hochberg 2007, 144)[3], relates that in the early days of the British Mandate, an Arab citizen of Haifa complained to him that because British judges could not be bribed, crime in the nation actually increased. The Arab's claim (as relayed by Bentwich) was that during the Ottoman times, "crime didn't pay", because criminals were forced to pay over all their criminal gains as bribes to the judges. Once the British conquered Palestine, the need for such bribes ended, and with it, crime began to pay off and, therefore, flourished (Bentwich 1961, 276).

The deterrent effect often depends on the cultural context and societal norms. Under the Ottoman rule, bribery may have created the perception of the law as flexible and negotiable, where criminals could calculate that the costs of illegal activities were offset by the ability to bribe judges. When the British removed this avenue, it may have led to a shift in how crime and its consequences were perceived. Yet, the removal of corruption might not have immediately built trust in the new legal system, particularly if the population remained sceptical of colonial rule (Miller 2022, 15).

Socioeconomic Factors – crime often stems from underlying issues such as poverty, the lack of opportunities, and social inequality. If the British legal system failed to address these root causes, simply removing bribery would not have been enough to deter crime. Without legitimate means to achieve their goals, some individuals may have turned to illegal activities (Barkey 2008, 67–83).

3

The Perception of Justice – the perception of justice and whether the legal system effectively handles crime can influence deterrence. If individuals believe they can evade punishment or feel the system is inefficient, they may be more inclined to engage in criminal behaviour.

Bentwich’s account suggests that when bribery was removed, crime became more profitable, as the risks of being caught and punished were not perceived as significant. Importing the English law was also the consequence of a lack of familiarity with the local law. Thus, for instance, Anton Bertram, an English jurist who was the Attorney General of the Bahamas, a judge in Cyprus, and the Chief Justice of Ceylon, stated in 1930 – drawing on his personal experience – that the “most surprising characteristic of our legal system is the diversity of legal rules which our courts apply. Judges in the various supreme courts [of the colonies] are promoted from one legal system to another, and immediately, once they arrive in the new colony, are required to operate a legal system (…) which is entirely foreign to them (Bertram 1930, 152).”

Furthermore, it is worth noting that importing the English law into the colonies was not always an intentional process. When new legal questions arose in the legal system of a certain colony, the English lawyers and judges in the colony naturally turned to the English law to resolve the problem; in this manner, the English law was imported into the colony in an inadvertent manner (Fisch 1992, 39).

Regardless of whether the British colonial legal system was intentional or unintentional, or whether it was more efficient and less corrupt than the local pre-conquest legal system, there can be no doubt that the British caused a massive change of procedure and evidence laws in a significant part of the territories they conquered.

Changing the norms of the substantive local law was more difficult than changing the native procedure; however, here too the process of anglicisation was witnessed. Branches of law perceived as “private” (or “religious”) – such as family law, inheritance law, and, to a certain extent, property law – did not undergo the process of anglicisation. Intermediate fields of law, such as contract and tort, were replaced by English rules, but this process took many years. Finally, the “public” spheres of law, criminal law, and commercial law, for the most part, did undergo the process of anglicisation (Zweigert, Kötz 1987, 235, 241–421; Liebesny 1975, 57; Friedman 1995, 253–254(.

3. THE APPLICATION OF THE ENGLISH LAW IN MANDATORY PALESTINE

The distinction between procedure and substance, and that between the public and private spheres, also influenced the process of the anglicisation of the law in Mandatory Palestine. The Land of Israel, or pre-Mandate Palestine, was

conquered by the British in 1917–1918. According to the rules of international law, the occupying power is required to maintain the legal *status quo* in the occupied territory; and indeed, in the early years of the British rule over Palestine, the British did not impose a great deal of new legislation. However, in 1922, the League of Nations granted Great Britain a mandate over Palestine. Under the terms of the mandate, the British were required to ensure "political, administrative, and economic conditions which would ensure the establishment of a Jewish homeland [in Palestine]" (Malachi 1952, 43–53). That provision allowed the British to effect far-reaching legal changes in the laws of Palestine. This was, therefore, a crucial moment in laying the groundwork for the future establishment of a Jewish state in British Mandate Palestine, as it essentially granted legal recognition from the international community and ensured that the future legal system would be based in part on the British method.

The changes to Palestine's international status caused the British to re-organise the legal system, which was reflected in the "King's Order in Council – 1922", i.e. a constitutional document that defined the structure of the various authorities of the British Mandatory regime. The King's Order in Council foresaw the establishment of a legislative assembly that should (at least partially) represent the local populace – both Arab and Jewish. However, owing to disagreements between Arabs and Jews concerning the composition of the assembly, it was never ultimately established, and both the legislative branch and executive authority were vested in the British High Commissioner. This was illustrative of the great challenges posed by the two communities residing in the land and the impact on the establishment of a coherent legal system.

The King's Order in Council of 1922 also dealt with the establishment of governmental courts and empowered the religious courts of the various congregations to adjudicate on certain matters of family law and inheritance law. Section 46 of the King's Order in Council laid out the rules according to which the government courts would have to adjudicate. Section 46 prescribed that the government courts would apply the Ottoman and the British Mandatory legislation; however, in the event that the legislation would not provide grounds for answering the legal question facing them, the government courts would use the "principles of common law and equity" from the English law, as long as they are suitable to the conditions of the land and its inhabitants (Tadeski 1977, 132–188; Yadin 1962, 59–61; Zweigert, Kötz 1987, 221–222, 234, 237–238).

What is evident from all this is that the Order in Council envisaged two central mechanisms to import the English law. The first one was the importation by the agency of legislative pronouncements issued by the High Commissioner; the second one was importing the English law through case law, under the guidance of Section 46, in cases in which the Ottoman and Mandatory legislation did not apply.

Over the course of the three decades of the British Mandatory rule over Palestine, the Mandatory legislator replaced some of Ottoman laws with the

Mandatory Ordinances, which were based on the British or British-Colonial legislation. The replacement process reflected the distinctions between substantive law and procedure, and between the public and private domains, as mentioned above. The British began the process by replacing the procedural and commercial aspects of the Ottoman law, and later turned their attention to more "private" aspects of law. In the 1920s, the British replaced the Ottoman Commercial Code, the Ottoman Criminal Procedure Code, as well as certain Ottoman rules in the laws of evidence. Over those years, a more orderly system of land registration was also put in place, and planning and building laws were enacted, as well as other laws designed to regulate the use of land by the indigenous population (Stein 1984, 1361; Scott 1953, 85).

The legislative processes of the 1920s were presided over by Norman Bentwich. As a fervent Zionist and delegate at the annual Zionist Congress (Bentwich 1962, 21–23), Bentwich was eager to aid the Jewish settlement of the land, and it appears that for this reason he focused his efforts on generating modern legislation in the field of commercial law which (so he assumed) would assist Jewish immigration and settlement (Bentwich 1932, 91, 148–151; Ashbee 1923, 234, 269–270; Levine 1998, 36; Shahar 1982, 649, 675; Shahar 1984, 204, 207–208). Bentwich's interest in commercial law, and relative neglect of other legal branches, was also the result of his desire to consider the differing needs of the two national communities in the Land of Israel, namely the Arabs and the Jews. Bentwich wrote in his papers that "similar to a circus performer who simultaneously rides two horses, one is slow [meaning the Arabs] and the other fast [meaning the Jews]" (Bentwich 1932, 273). The solution he found to this problem was to limit legislation to certain legal branches while retaining the local law in others. "The principal impulse to legislate in Palestine – Bentwich wrote in 1932 – was the demand for modern laws on behalf of the progressive population immigrating to Palestine … from Europe [meaning the Jews]" (Bentwich 1932, 273, 277). The Arabs, on the other hand, he stated, would be "permitted" to retain the legal rules controlling "contracts and other simple transactions [of theirs]" (Owen 1994, 115). Bentwich's perception again highlighted the challenges of importing, establishing, and implementing a coherent legal system in a country with two conflicting communities.

It is interesting to note that the legislation of the 1920s mainly brought about a replacement of the French segments of the Ottoman law. The Ottoman Civil Code (the *Mecelle*) and the Ottoman land law, as Bentwich said, "are perceived as belonging to the Eastern and Islamic tradition", and for those reasons it was decided "to leave them generally in force" (Eisenman 1978, 126–131). However, he added, "the same cannot be said of commercial law. No sanctity of religion or tradition enshrined the Ottoman Commercial Code, which was originally based on the French law, and the provisions of that Code, imported into the empire in 1860, did not at all suit a country in which, under the auspices of British

administration, the project of the people with the most developed commercial instincts [that is to say the Jews] was under development" (Bentwich 1932, 274–275).

The conscious use of legislation as a means of encouraging the development of the land and promoting the Zionist enterprise seems to have disappeared in the 1930s. One reason was likely Bentwich's resignation in the early 1930s as a result of pressure from both the Arab residents and the Colonial Office. That, however, did not mean the end of the Mandatory legislative project. The British, during the 1930s, replaced the Ottoman Criminal Code and the Ottoman Civil Procedure with legislation based on the English law. Moreover, several other laws of a commercial nature were also enacted, such as the Mandatory Bankruptcy Ordinance. However, the legislative fervour did lessen in the 1930s. The majority of legislation in the late 1930s and early 1940s was introduced to "put out fires" – emergency legislation that responded to the 1936–1939 Great Arab Revolt as well as the operation of the Jewish Underground, or legislation in which the regime had a clear interest, such as the Mandatory Income Tax Ordinance of 1941, enacted to add sources of revenue for the operation of the Mandatory government. Only at the end of the 1940s, when the British rule was nearing its end, did a new wave of legislative initiatives begin, which mainly dealt with regulating branches of law which the British rulers had rather neglected until then, such as tort (Likhovski 1995, 291).

Legislation was one way in which the English law penetrated Mandatory Palestine. Another was anglicisation through case law. These measures were expressed in several ways. Some of the Mandatory Ordinances had interpretation clauses that referred the judiciary expressly to the English law to interpret them; some Mandatory Ordinances contained a provision that guided the judges not only to interpret the ordinance by means of the English law, but also to fill in any lacunae in the particular branch of law that was the subject of the ordinance, by reference to the English law. However, even where there was no such provision, the Mandatory judges naturally inclined towards the English law to interpret the ordinances (Friedmann 1975, 192). There are several reasons for this.

The deference to the English law was a result of problems that emerged in the provision of compensation in tort law. The judges recognised that there was a problem, namely that the Ottoman law does not provide compensation for bodily harm. This is illustrated by the PSAD Khoury CA 88/30 Municipality of Haifa v Khoury, 4 Rotenberg 1343 (1932). The case pertained to a pit that was dug by the Municipality of Haifa. The municipality did not cover the ditch or mark it with a warning sign. Mr. Khoury fell into the ditch and was injured. He sued the municipality for damages. The court ruled that the Ottoman law did not allow him to receive compensation for the bodily injuries caused to him due to the negligence of the municipality. The court refrained from making use of Section 46 of the King's Order in Council and deferring to the English law and deriving from it the authority to grant the compensation to the injured party.

At the end of the 1930s, and especially in the 1940s, this trend in rulings reversed. In the ruling on the case of CA 29/47 London Society for Promoting Christianity Among the Jews v. Orr, 14 PLR 218 (1947), which also dealt with a tort claim for negligence, the Supreme Court ruled that it was indeed possible to import English tort law into Israel by virtue of Section 46. This was also the case, for example, in the verdict in the Raphael case, CA 70/44 Raphael v. Rachamim, 11 PLR 367 (1944). In this ruling, it was a question of the pre-emptive right given by the Ottoman law to a partner to purchase his partner's assets. The court ruled that this right is an archaic right that does not fit the conditions of the country, and that the provisions of the Ottoman law must be interpreted taking into account the social changes that had taken place in the country during the mandate period. The willingness of Mandatory Courts to import the English law was combined with their willingness to reinterpret the provisions of the Ottoman law and create an independent law in the Land of Israel (Likhovski 1995, 291).

In addition, the English law entered Mandatory Palestine by virtue of the above-mentioned Section 46 of the King's Order in Council. This section instructed the Mandatory judges to turn to the English law when the Ottoman and/or Mandatory legislation did not apply. In the early years of the British Mandate, the courts did not make much use of that section; however, from the mid-1930s onwards, the Mandatory courts began to make significant use of it to import the rules of the English law, especially in civil law, but also in other branches, such as administrative law. This happened, because the Ottoman law deprived the residents of the possibility of receiving compensation for bodily harm and it was necessary to resort to importing the English law in order to allow the population to receive compensation for damages.

The outcome, therefore, was that the Mandatory judiciary, like the Mandatory legislature, actively worked to anglicise the legal system in Palestine; however, that activity did not bring about a complete replacement of the local law. For that reason, when the British left Palestine in 1948, they left behind them a mixed governmental legal system, i.e. one based partially on the English law and partially still Ottoman. As mentioned above, the process of replacing the Ottoman law with the English law was partly by design and partly the outcome of random events and special circumstances. In any event, it did not take place instantly, but spanned a period of more than 30 years.

4. POST-MANDATORY PALESTINE AND THE LEGACY OF MANDATORY LAW

What happened to the English / Ottoman legal system (which could be referred to as the "Mandatory System"), which the British bequeathed to the State of Israel after its foundation?

The Israeli law in its current form is evidently not the same as the Mandatory Law from 1948. Since 1948, and mainly since the 1960s, the Israeli law gradually disengaged from the Mandate's legacy, and mostly from the Ottoman part of it. However, this manifested as a part of a gradual transformation rather than an overnight revolution. To illustrate the gradual nature of this legal transition, Israel did not formulate a written legal constitution. Israel has a founding charter, its Declaration of Independence, which lays out the vision, character, ethos, and *raison d'être* of the nascent state, yet it does not suffice to constitute a written constitution. Suzie Navot described the Declaration of Independence as a "ceremonial document (…) [which] purported to present the credo of the new state while establishing legal facts to suit a state created *ex nihilo*" (Navot 2014, 5). Thus, it carries great weight, but falls short of being a constitution.

Moreover, in the subsequent years, Israel adopted a series of Basic Laws, which have a special status, but a legal constitution which would generate an entirely new legal system did not materialise.

The legal system since 1948 has borne witness to several changes and has been subject to the influence of numerous legal cultures. In the 1960s and 1970s, there was an attempt, which was only partially successful, to transform Israeli civil law in the spirit of the Continent. In the 1980s and 1990s, continental influences in the Israeli law became strongly supplemented by American legal influence, most particularly apparent in the Supreme Court's case. Indeed, since 1948, the Israeli legislature and courts have been striving, in some way or another, to create an original Israeli legal system, without foreign influence.

The quest for an original Israeli legal system since 1948 reflects a complex interplay of historical, cultural, and legal influences. When discussing what an "original Israeli legal system" might entail, it is important to consider several dimensions:

The Historical Context – after the establishment of the State of Israel in 1948, there was a strong desire to create a legal framework that reflected the unique identity of the new state. This involved navigating the legacies of Ottoman, British, and local legal traditions (Gavison 1997, 36).

The Jewish Law (Halacha) – one significant element of the Israeli legal identity is its connection to the Jewish law. While Halacha has influenced certain aspects of family law, property law, and personal status issues, it has not formed the sole basis of the legal system. The challenge has been in integrating these principles into a modern legal framework that accommodates a diverse society (Silberg 1965, 347).

The Israeli Context – the legal system has also evolved from the social, political, and economic realities of Israel. Issues such as the relationship between Jewish and Arab populations, security concerns, and democratic values have shaped legal developments. This context has led to a distinctive blend of laws

and principles that address the needs of a multifaceted society (Rubinstein 2004, 14–15).

The Influence of Other Legal Cultures – the incorporation of continental and American legal principles highlights the pragmatic approach of Israeli lawmakers and judges. This blending aims to enhance the effectiveness of the legal system, ensure human rights, and promote justice while trying to retain a uniquely Israeli character (Dotan 2014, 21).

Judicial Activism – the Israeli Supreme Court has played a pivotal role in interpreting laws and rights, often infusing international legal norms into the domestic framework. This has further complicated the notion of an "original" system by incorporating external influences while striving for local relevance (Rosen-Zvi 2001, (53.

That being said, the legacy of the Mandate affected the shaping of many aspects of the Israeli law. The Israeli legal system inherited the principle of precedent from the Mandatory system as well as the idea that judges have an important and active role to play in shaping norms; the centrality of lawyers in conducting legal proceedings; the uniform structure of the court system; and many other characteristics. Even when a branch, or several branches, of the Israeli law underwent partial codification processes (for instance, civil law has been in the thrust of a decades-long process of codification on the basis of models imported from Europe), the Israeli legislature retained the English notion from the Mandatory era, namely that judges actively create norms. However, this assumption regarding the function of the judiciary is not accepted on the Continent. The connection between the Israeli law and the Mandatory law is present not only on the more abstract planes of the Israeli legal system, but also in the details.

Today, a truly unique Israeli legal system has materialised, which is difficult to categorise. It is a mixed jurisdiction – a system with its own style amidst Western legal traditions – based primarily on the common law.

The uniqueness of the Israeli legal system can be effectively argued by comparing it to other legal systems and highlighting specific distinguishing aspects:

The Influence of the Jewish Law – a defining characteristic of the Israeli law is the active integration of the Jewish law (Halacha) into legal reasoning and interpretation, particularly in family law and personal status issues. This contrasts with many legal systems that may only reference religious principles (Silberg 1965, 242).

The Basic Laws as Constitutional Framework – instead of a formal written constitution, Israel operates under a series of Basic Laws that serve a constitutional function, reflecting the values of a Jewish and democratic state. This framework is distinct from other democracies that rely on a single, codified constitution (Friedmann 2016, 67–88).

Judicial Activism and the Role of Courts – the Israeli judiciary, especially the Supreme Court, plays an active role in shaping public policy and interpreting laws, often balancing individual rights against state interests. This level of judicial activism is more pronounced than in many other legal systems (Dotan 2014, 25).

Added to these layers of complexity is the fact that the State of Israel is not a simple democracy; it is both a democratic state and a Jewish one, and this is its uniqueness. Thus, alongside inheriting numerous legal traditions, which have subsequently evolved, Israel has attempted to synthesise Western legal principles with Jewish values and some elements of the Jewish law.

The influence of the Jewish law (Halacha) on the Israeli law, especially in family law and personal status matters, is a defining feature of the Israeli legal system. Halacha governs key areas such as marriage, divorce, and burial for Jewish citizens, with rabbinical courts holding exclusive authority over these matters. This integration contrasts with many secular legal systems that separate religion and law, and it creates complex legal and social implications, particularly for individuals who may not meet Halachic requirements or prefer civil solutions. While civil law in Israel remains largely secular, religious law's influence in personal status cases highlights the tension between Israel's dual identity as both a Jewish and democratic state (Menachem 1994, 287).

This balancing act has led to ongoing debates, as secular Israelis push for civil marriage and divorce options, while religious communities defend the role of Halacha as essential to Israel's Jewish character. Unlike many Western countries where religious law has limited legal standing, Halacha is actively integrated into the Israeli legal reasoning in these specific areas, leading to conflicts between religious obligations and civil liberties. The Israeli Supreme Court has occasionally intervened to limit religious rulings that infringe on individual rights, reflecting the broader challenge of reconciling religious traditions with modern democratic values (Halperin-Kaddari 2004, 17).

This presents several challenges, all of which have recurred throughout the history of the State.

5. CONCLUSION

The legal system in Mandatory Palestine was a mix of English and Ottoman laws. The British Mandate introduced the English law through legislation and case law, gradually replacing some Ottoman laws with Mandatory Ordinances based on the British or the British-Colonial legislation. Section 46 of the King's Order in Council instructed judges to turn to the English law when the Ottoman or the Mandatory legislation did not apply, leading to the importation of English legal principles, especially in civil and administrative law.

After the British left Palestine in 1948, they left behind a mixed legal system, based partially on the English law and partially on the Ottoman law. The Israeli law disengaged from the Mandate's legacy over time, transitioning away from Ottoman influences and gradually transforming into a unique legal system. While influenced by various legal cultures, including continental and American legal systems, Israel has strived to create an original legal system.

The Israeli legal system inherited principles from the Mandatory era, such as the role of judges in shaping norms and the importance of precedent. Despite undergoing partial codification processes based on European models, the Israeli law retains elements from the Mandatory period, reflecting a mix of legal traditions and values, including the Jewish law. Israel's legal system is a mixed jurisdiction with its own style, blending Western legal principles with Jewish values, presenting unique challenges and complexities.

BIBLIOGRAPHY

Aharon, Gidon. 2018. "Jewish Law and the Israeli Legal System: Between Tradition and Modernity." *Journal of Legal Pluralism and Unofficial Law* 197–204.

Barak, Aharon. 2005. *Interpretation in Law:* Volume I. *The General Theory.* London: Weidenfeld & Nicolson. https://doi.org/10.1515/9781400841264

Barkey, Karen. 2008. *Empire of Difference: The Ottomans in Comparative Perspective.* Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9780511790645

Bendor, Ariel. 2007. "Judicial Activism and the Role of the Judiciary in Israel." *Israel Law Review* 40(1): 607–612.

Bentwich, Norman. 1932. *England in Palestine.* London: Allen & Unwin.

Bentwich, Norman. 1962. *My Seventy Seven Years.* London: Routledge & Kegan Paul.

Bertram, Anton. 1930. *The Colonial Service.* Cambridge: Cambridge University Press.

Breitman, Richard. Barbara McDonald Stewart. Severin Hochberg. Eds. 2007. *Advocate for the Doomed: The Diaries and Papers of James G. McDonald*. Bloomington: Indiana University Press.

Chanock, Martin. 1985. *Law, Custom and Social Order.* Cambridge: Cambridge University Press.

Dicey, Albert Venn. 1915. *Introduction to the Study of the Law of the Constitution.* London: Macmillan.

Dotan, Yoav. 2014. *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel*. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9781139856027

Eisenman, Robert H. 1978. *Islamic Law in Palestine and Israel: A History of the Survival of Tanzimat and Shari'a in the British Mandate and the Jewish State.* Leiden: Brill. https://doi.org/10.1163/9789004491427

Elias, Olawale. 1962. *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies*. London: Stevens.

Elon, Menachem. 1994. *Jewish Law: History, Sources, Principles*. Philadelphia: Jewish Publication Society.

Fisch, Jorg. 1992. "Law as a Means and as an End: Some Remarks on the Function of European and Non-European Law in the Process of European Expansion." In *European Expansion and Law:*

The Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia. Edited by Wolfgang J. Mommsen, Jaap de Moor. 1. Oxford, U.K.; New York: BERG.

Friedman, Lawrence M. 1995. "Law and Social Change: Culture, Nationalism and Identity." In *Collected Courses of the Academy of European Law.* Edited by the Academy of European Law. N.d.: Kluwer Law International.

Friedmann, Daniel. 1975. "The Effect of Foreign Law on the Law of Israel." *Israel Law Review* 10: 192–206. https://doi.org/10.1017/S0021223700005161

Friedmann, Daniel. 2016. *The Purse and the Sword: The Trials of Israel's Legal Revolution*. New York: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780190278502.001.0001

Gavison, Ruth. 1997. *The Quest for a Jewish Legal Identity: Foundations of Israeli Law*. Jerusalem: Hebrew University Press.

Gerber, Haim. 1994. *State, Society and Law in Islam: Ottoman Law in Comparative Perspective.* Albany: State University of New York Press.

Hirschl, Ran. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism.* Cambridge, MA: Harvard University Press.

Kahan, Y. 1989. *In Memory of Yitzhak Kahan, President of the Supreme Court*. Tel Aviv: Papyrus (1989): 9–10.

Liebesny, Herbert J. 1975. *The Law of the Near and Middle East: Readings, Cases and Materials.* Albany: State University of New York Press.

Likhovski, Assaf. 1995. "In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine." *Israel Law Review* 24: 294–310. https://doi.org/10.1017/S0021223700014692

Ma'oz, Moshe. 1968. *Ottoman Reform in Syria and Palestine 1840–1861: The Impact of the Tanzimat on Politics and Society.* Oxford: Clarendon Press.

Malachi, E. 1952. *The History of the Legal System in the Land of Israel.* Tel Aviv–Yafo: n.d.

Mautner, Menachem. 2011. *Law and the Culture of Israel.* New York: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199600564.001.0001

Miller, Rory. 2010. *Britain, Palestine, and Empire: The Mandate Years.* Farnham: Ashgate Publishing.

Mommsen, Wolfgang J. Jaap de Moor. 1992. *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia.* Oxford, U.K.; New York: BERG.

Morris, Henry Francis. 1972. "English Law in East Africa: A Hardy Plant in an Alien Soil." In *Indirect Rule and the Search for Justice: Essays in East African Legal History.* Edited by Henry Francis Morris, James S. Read. 73. Oxford: Clarendon Press.

Navot, Suzie. 2014. *Israel's Constitutional History.* Oxford: Hart Publishing.

Owen, Roger. 1994. "Defining Tradition: Some Implications of the Use of Ottoman Law in Mandatory Palestine." *Harvard Middle Eastern and Islamic Review* 1: 190–203. https://doi.org/10.1163/221129895X00182

Rosen-Zvi, Issachar. 2001. "Judicial Review of Politics: The Israeli Case." *Israel Law Revie*w 760.

Rosen-Zvi, Issachar. 2004. *Taking Space Seriously: Law, Space, and Society in Contemporary Israel.* Farnham: Ashgate Publishing.

Rubinstein, Amnon. 2004. *Israel and the Middle Eastern Challenge: A Legal Perspective.* Jerusalem: The Israel Democracy Institute.

Rule of Law. Oxford Reference. 2023. https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100433129 (accessed: 22.01.2023).

Samuel, Horace B. 1920. "From the Palestinian Bench." *The Nineteenth Century* 88: 498–500.

Shachar, Yoram. 1995. "History and Sources of Israeli Law." In *Introduction to the Law of Israel.* Edited by Amos Shapira, Keren DeWitt-Arar. 1. N.d.: Kluwer Law International.

Silberg, Moshe. 1965. *Talmud and Law: The Influence of Jewish Law on Israeli Law*. Jerusalem: Magnes Press.

Stein, Kenneth W. 1984. *The Land Question in Palestine 1917–1939.* N.d.: University of North Carolina Press.

Tadeski, Gad. 1979. “The Problem of Lacunae and Clause 46 to the King’s Council Rules.” *Studies in Our Country’s Law* 132: 160–161.

Weber, Max. 1954. *Max Weber on Law in Economy and Society*. Cambridge: Harvard University Press.

Zweigert, Konrad. Hein Kötz. 1987. *Introduction to Comparative Law.* Oxford: Oxford University Press.