Interlude 2: Politics

Radhabinod Pal and Samuel Eisenstadt were born in the same year, 1886, in two imperial territories, colonial India and imperial Russia. As young adults, both witnessed the momentous, revolutionary events of 1905. Russia's defeat in the Russo-Japanese War inspired young Indian nationalists such as Pal. It was also one of the factors that spurred a revolutionary wave of unrest across the Russian Empire during 1905, ultimately setting the stage for the downfall of the Empire twelve years later, in 1917, and shaping the lives of a generation of Russian socialist revolutionaries, including Eisenstadt.

Pal and Eisenstadt also shared many additional biographical traits: both followed similar educational trajectories, studying law in Western or Western-style academic institutions; both were influenced by a blend of Western historical and sociological theories of law; both sought to use the legal past in the service of a modern cause – namely, anti-colonial nationalism; both – perhaps because of a personal motivation to prove their academic worth as legal scholars, perhaps as a result of their shared resentment toward European culture, or perhaps as a result of heartfelt pride in their particular legal heritage – wrote apologetic works on their respective religious legal systems; both attempted to show that the conventional evolutionary Western view of non-Western legal systems was mistaken; both sought to show the superiority of these systems, for example, by favorably juxtaposing their alleged peace-loving nature with imperialistic Western society and law; and both sought to downplay the non-egalitarian

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aspects of their respective religious systems – for example, by arguing that persons deemed by these systems as socially inferior such as slaves and women were actually treated humanely, or that modern democratic institutions had their ancient counterparts in Hindu and Jewish law; both emphasized the collectivist nature of their respective legal systems and contrasted this collectivism favorably with Western individualism; and both held non-mainstream political views (Hindu, as opposed to Indian, nationalism in Pal's case and communism in Eisenstadt's case), which, perhaps, impeded the widespread reception of their legal ideas.

Pal's life and ideas represented a larger group of Indian scholars trained in law who were interested in Hindu legal history and Hindu jurisprudence. Most of these scholars were associated with the University of Calcutta. The ideas found in Pal's works on Hindu law echoed similar ideas found in other works produced in India in the late colonial period. However, unlike these scholars, who all remained obscure, Pal achieved lasting international recognition thanks to his Tokyo Trial dissent. Eisenstadt, too, was, in some senses, representative of a cohort of Jewish law scholars who were active in the early and middle decades of the twentieth century. Eisenstadt's affiliation with communism was unique, but apart from his idiosyncratic political views, his life and ideas mirrored those of many of his fellow Jewish law scholars: his Eastern European origins and the educational path that he followed, combining traditional religious studies with a law degree obtained from a European university, were two characteristics that many other scholars belonging to the early twentieth-century movement for the revival of Jewish law shared. His legal ideas were not unique either. One can find other works produced by Jewish law scholars at the time that show the influence of the Historical School. The arguments about the superiority of Jewish law over Roman law, the apologetic defense of some of the more unsavory aspects of Jewish law, and the interest in the collectivist elements of this legal system – all could be found in the writings of various scholars.

There were also significant biographical and jurisprudential differences between the two men. Pal began his academic career as a mathematics teacher, later focusing exclusively on law. Eisenstadt was far more versatile. He was a legal scholar, linguist, publisher,

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librarian, and political activist. His works spanned many genres and included academic articles, monographs, textbooks, and translations.

Pal published his works in English and thus wrote not just for an Indian audience but also for non-Indian readers. His intended audience was primarily academic, rather than the general public. Eisenstadt also produced academic works (for example, his bibliography of works on Jewish law), but some of his works (such as his book on the prophets) were intended for a broader, lay audience. Because Eisenstadt's works were written in Hebrew, his readership, by definition, was narrower.

Like other Indian scholars, Pal's discussion of Hindu law was heavily influenced by English law and by the ideas of English-speaking thinkers. Two major imaginary interlocutors of his were the nineteenth-century English legal scholars John Austin and Henry Maine, both of whom were criticized by Pal in his attempt to defend Hindu law. Eisenstadt's work was primarily influenced by Continental law scholarship and especially by the nineteenth-century German scholars of Roman law. Nineteenth-century historical approaches to the study of law influenced both men. However, Pal was also influenced by Continental anti-formalist legal theories, and by American sociological jurisprudence, while Eisenstadt blended the ideas of the Historical School with Marxist theory.

Pal and Eisenstadt were legal historians of ancient religious legal systems, but the historical approaches that informed their works differed. While Pal's works summarized and analyzed the history of Hindu law, the history he offered was not deeply embedded in the economic and social context of ancient Indian society. In contrast, Eisenstadt, inspired by Marxism, contextualized the history of Jewish law by linking it to economy and society.

The comparative legal taxonomies used by the two scholars were also different.[1] Pal sought to incorporate ancient Hindu law within a broader shared framework, that of the Aryan legal family. According to him, Hindu law was an early (and superior) Aryan legal system. Eisenstadt, meanwhile, focused not on similarity but on difference. He

[1] On the changing taxonomies used by comparative law scholars to classify both ancient and modern legal systems, see, generally, Mariana Pargendler, "The Rise and Decline of Legal Families," *American Journal of Comparative Law* 60 (2012): 1043; Balázs Fekete, *Paradigms in Modern European Comparative Law: A History* (Oxford: Hart, 2021).

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sometimes referred to Jewish law as part of a larger, oriental, legal family.[2] However, perhaps because the two major legal systems he taught were Roman and Jewish law, Eisenstadt's comparative vision was often starkly binary. He talked about two major legal systems competing for dominance in global legal history: Roman and Jewish law, which represented different sets of values and jurisprudential ideas.

Like the scholars of Hindu and Jewish jurisprudence that I discussed in Part I of this book, the goals that underlay Pal's and Eisenstadt's interest in their respective ancient legal systems differed. Pal, like most other Indian scholars of his time, was largely interested in Hindu law not because he saw it as a possible source of norms for the future legal system of India but because he regarded its study as a way to bolster pride in the Hindu past. Eisenstadt, by contrast, like many other Jewish law scholars of his generation, was not interested in Jewish law merely for its historical significance. Rather, he approached it as a possible source for the law of the future Jewish State.

Pal was no proponent of the actual use of Hindu law to replace the legal system created by the British in India during the colonial era. When discussing the possible use of modern legal categories to analyze ancient law, he remarked that asking whether "an ancient institution was adequate for modern conditions" was misguided. Legal institutions should be judged with reference to the "peculiar social needs of their times" and not to the present, he reasoned.[3]

The fact that "legal revival" also meant, in the specific Indian context, modernization and unification of the law through codification may have led to Pal's rejection of this notion. This is evident in his reaction to the post-independence codification of Hindu personal law. In the

[2] For examples of the discussion of Jewish law within an "Oriental" legal family, see Samuel Eisenstadt, "Le-Korot ha-Mishpat ha-'Ivri (Skirah Klalit)," *He-'Atid: Me'asef Sifruti Mada'i* 3 (1909–11): 194, 207–8. Eisenstadt also attempted to compile a "Corpus Iuris Orientalis" that would compare the laws of ancient Near East societies. See Central Zionist Archives, A212/46. The "Oriental law" comparative framework informed the work of the German scholar Josef Kohler, and Eisenstadt may have borrowed this framework from him. See Josef Kohler and Leopold Wenger, *Allgemeine Rechtsgeschichte*, Vol. 1: *Orientalisches Recht und Recht der Griechen und Römer* (Leipzig: Teubner, 1914).

[3] Radhabinod Pal, *The History of Hindu Law in the Vedic Age and in Post-Vedic Times down to the Institutes of Manu* (Calcutta: University of Calcutta Press, 1958), 279 [hereinafter "Pal, *History*"].

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mid-1950s, the newly independent Indian State enacted four Hindu Code Bills meant to reform and codify Hindu personal law (the Hindu Marriage Act, Hindu Succession Act, Hindu Minority and Guardianship Act, and Hindu Adoptions and Maintenance Act).[4] A month before the enactment of the Hindu Marriage Act of 1955, Pal participated in an all-India convention on the Hindu Code Bills, where he attacked both the reform of the Hindu law of succession and the Hindu law of marriage. Regarding the desire to introduce divorce in Hindu law, Pal said that the indissolubility of marriage "was the binding force that cemented it" and that "we must not shut our eyes to the evils of divorce." Other participants expressed similar sentiments, stating that "we should not blindly imitate the West."[5] One can conclude that Pal's works on Hindu law were not motivated by a desire for its actual use, because such use also entailed its modernization. Instead, Pal's works were meant to counter condescending Western portrayals of this legal system and to instill pride in ancient Indian history.

Pal's reluctance to use Hindu law was also applicable to Hindu jurisprudence. As we saw, a major characteristic of Hindu jurisprudence was its affinity with natural law theory. However, when the time came to apply the latter in practice, Pal could have easily based his Tokyo Trial opinion on natural law theory, but he declined to use the opportunity. Instead, Pal's dissent in Tokyo affirmed the positivist approach to international law.[6] In this context, it is interesting that

[4] See Rina Verma Williams, "Hindu Law as Personal Law: State and Identity in the Hindu Code Bills Debates, 1952–1956," in Timothy Lubin, Donald R. Davis Jr., and Jayanth K. Krishnan, *Hinduism and Law: An Introduction* (Cambridge and New York: Cambridge University Press, 2010), 105, 105–19; Werner Menski, "Hindu Law in Modern Times: How Hindu Law Continues in Modern India," in *The Oxford History of Hinduism: Modern Hinduism*, ed. Torkel Brekke (Oxford: Oxford University Press, 2019), 244, 255.

[5] See "Delhi Convention Attacks Hindu Code Changes," *Times of India*, April 11, 1955, 5. See also Nariaki Nakazato, *Neonationalist Mythology in Postwar Japan: Pal's Dissenting Judgment at the Tokyo War Crimes Tribunal* (Lanham, MD: Lexington Books, 2016), 105, 218.

[6] See, e.g., Nakazato, *Neonationalist Mythology*, xxvii; Gary J. Bass, *Judgment at Tokyo: World War II on Trial and the Making of Modern Asia* (New York: Knopf, 2023), 585–9. Milinda Banerjee argues that Pal's Tokyo Trial dissent was not positivist. While, in his jurisprudential writings, he embraced a conception of law similar to the Western conception of natural law, in Tokyo, Pal rejected natural law – but this rejection was the result of his regarding it as a pretext for Western imperialism. See

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Pal's extremely lengthy Tokyo dissent does not mention Hindu law or Hindu jurisprudence.[7]

Meanwhile, the use of Jewish law as a foundational element of the legal system governing the lives of the Jews of Palestine (and later, the State of Israel) was a central concern for many early twentieth-century Jewish legal scholars, including Eisenstadt.[8] In Eisenstadt's view, the academic study of Jewish law was a prerequisite for the revival of Jewish law as the law of the Jewish community in Palestine and of the future Jewish State. In this, he was following the scholars of the German Historical School, who argued that the academic study of Roman and Germanic law should precede the creation of a civil code for Germany. The study of Jewish law, Eisenstadt believed, would thus serve to provide a basis for the law of a reborn Jewish polity.[9]

The difference between Pal's and Eisenstadt's attitudes to legal revival may have been partly the result of differences in their biographies. Eisenstadt studied law in a Central European university and was thus influenced by the idea (typical of Continental legal systems) that law professors play an important role in creating new legal norms. More specifically, the research agenda of the German Historical School, which gave legal scholars a major role in

Milinda Banerjee, "Does International Criminal Justice Require a Sovereign? Historicising Radhabinod Pal's Tokyo Judgment in Light of His 'Indian' Legal Philosophy," in *Historical Origins of International Criminal Law*, eds. Morten Bergsmo, Wui Ling Cheah, and Ping Yi (Brussels: Torkel Opsahl Academic EPublisher, 2014), Vol. 2, 69–70, 92–108; Milinda Banerjee, *The Mortal God: Imagining the Sovereign in Colonial India* (Cambridge: Cambridge University Press, 2018), 262; Milinda Banerjee, "Sovereignty as a Motor of Global Conceptual Travel: Sanskritic Equivalents of 'Law' in Bengali Discursive Production," *Modern Intellectual History* 17 (2020): 487, 501–2. See also Ashis Nandy, "The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability," *New Literary History* 23 (1992): 45, 77–80; Partha Chatterjee, *I Am the People: Reflections of Popular Sovereignty Today* (New York: Columbia University Press, 2020), 154 n13 (arguing that Pal's Tokyo dissent echoed the idea found in the *Mahabharata* that war is the fault of both sides).

[7] See Radhabinod Pal, *International Military Tribunal for the Far East: Dissentient Judgement of Justice Pal* (Tokyo: Kokusho Kankokai, 1999).

[8] See, generally, Assaf Likhovski, *Law and Identity in Mandate Palestine* (Chapel Hill, NC: University of North Carolina Press, 2006), 127–53.

[9] For some examples of his lifelong interest in legal revival, see Samuel Eisenstadt, "Le-Heker Mishpatenu ha-Pumbi," *Ha-Mishpat ha-'Ivri: Riv'on Mada'i* (1918): 8, 24–5; Samuel Eisenstadt, "Likrat ha-'Atsma'ut ha-Mishpatit [part I]," *Ha-'Olam*, April 14, 1938, 5; Samuel Eisenstadt, "Medinah u-Mishpat," *Ha-Praklit* 5 (1948): 113.

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producing law codes based on historical materials they collected, inspired Eisenstadt's academic activities. In contrast, Pal, trained in an anglicized university in India, may have been less influenced by the Continental vision of the role of law professors (and, specifically, legal historians) as major producers of legal norms.[10] In addition, Pal was a legal scholar but also a practicing lawyer trained in anglicized Indian law. On the other hand, Eisenstadt was a scholar and law teacher, but not a legal practitioner. His legal training in Switzerland did not expose him to English law. When he moved to Palestine, he attempted to work as a consultant on Jewish family law, but he never formally practiced law, either in Mandatory Palestine or post-independence Israel. Thus, he was far less committed than Pal to the existing anglicized legal system within which he was working.

I would now like to focus on one specific topic, the political motivations of the two scholars. Both Pal and Eisenstadt espoused radical political ideologies. However, their political views were to be found at the two opposite ends of the spectrum. Pal was a right-wing nationalist, while Eisenstadt was a socialist and later a communist. How did their radical politics influence their scholarship?

The difference between right-wing and left-wing ideology led Pal and Eisenstadt to depict Hindu and Jewish law in different ways. Pal argued that the main goal of Hindu law was to preserve social stability. Law was supposed to reflect an immutable, harmonious cosmic order, and this order was reflected in a stable society characterized by integration and coordination, a society in which every person knew and accepted their place within the social hierarchy. On the other hand, Eisenstadt described Jewish law as a revolutionary rather than a conservative force, constantly striving toward social justice and endeavoring to protect the weak against the strong.

Despite being on both sides of the political spectrum, Pal and Eisenstadt's radical political views had a similar underlying utopian basis. They looked to their respective legal systems for alternative values to those of Western liberal law. Propelled by a utopian motivation, Pal and Eisenstadt mined the texts of their respective

[10] For a general discussion of the impact (or lack thereof) of English legal scholars on the creation of English legal norms in the nineteenth and twentieth centuries, see Neil Duxbury, *Jurists and Judges: An Essay on Influence* (Oxford: Hart, 2001), 61–115.

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religious legal system to find a new legal and social vision that could replace the existing colonial order, and, more broadly, the liberal ideology that dominated their legal education. Yet their pursuit of an idealized past left them unable to confront the flaws within these systems. Pal, under the influence of pan-Asian, Indian, and perhaps also Hindu nationalism, could only see the dark side of the West: British colonial oppression in India and later (after the Second World War) American global imperialism, exemplified by the use of the atomic bomb against Japan. He downplayed the evils of his own inegalitarian caste-based legal system (as well as the evils of the heroes of his pan-Asian ideology, the Japanese). Eisenstadt, meanwhile, was tempted by a romantic infatuation with the biblical prophets and their modern-day emulators, communist intellectuals. He, therefore, sought to downplay the more problematic aspects of Jewish law (such as its attitude toward slaves and women) and also ignored the suffering and death of millions of persons killed by communism in the Soviet Union and elsewhere before, during, and after the reign of his hero, Joseph Stalin, whose biography, it will be recalled, he translated in the 1940s. This utopian romantic infatuation with the legal past was, it seems, a poor guide to the present and future, fostering idealized visions that provided enticing alternatives to the existing legal order but, ultimately, proved to be problematic.

Pal and Eisenstadt did not know of each other and knew little about each other's legal systems. Pal did not seem to know much about (post-biblical) Jewish law. This legal system was seldom mentioned in his scholarship, and in the few times he did mention it, he used secondary sources that portrayed it in an unflattering manner.[11] There were also

[11] See, e.g., Pal, *History*, 61 (citing Arnold Toynbee on rabbinical interpretation); ibid., 116 (on the "whimsical and despotic" Semitic God); ibid., 267 (citing Nietzsche's statement that the Manusmriti is "incomparably superior and more intellectual" than the Bible"). For another example from the same period of negative attitude to Jewish law, see Nagendra Nath Mukerjee, "Indo-Aryan Penal Jurisprudence," *Calcutta Law Journal* 14 (1911): 29n, 31n (claiming that Moses was influenced by Manu, but that Moses' penal laws were more barbaric than those of Manu because Egyptian slavery turned the Jews into "little better than wild, scalp-hunting savages, perpetually engaged in enacting among themselves ... duels or blood feuds"). A less radical comparison of ancient Hindu and Jewish criminal law is found in Sitaram Banerjee, "Principles of Criminology," *Calcutta Law Journal* 31 (1920): 1n.

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hints of Holocaust denial in his works.[12] India and its laws were mentioned in some early articles by Eisenstadt.[13] However, apart from these brief allusions, there is no indication that he knew anything of any significance about Hindu law, let alone about Pal's scholarship.

There was one place in which Pal and Eisenstadt could have met but did not. In December 1954, an "Asian Conference of Lawyers" convened in Calcutta. This event was sponsored by the International Association of Democratic Lawyers (IADL), a progressive association that was, in fact, a Soviet-sponsored communist front organization.[14] Eisenstadt sent a telegram to the participants to support their struggle "for human rights, democratic freedoms, [and] coexistence in peace of free and sovereign nations."[15] Pal was an anti-communist.[16] However, curiously, he agreed to inaugurate this conference – perhaps the result of the anti-imperialist and anti-Western stance of the IADL.[17]

The communist ideology that lurked behind the IADL façade has long since lost its power, at least in most countries of the world. Now, with hindsight, we can see this ideology in all of its complexity: A movement

[12] See Radhabinod Pal, *Crimes in International Relations* [the Tagore Law Lectures, 1938] (Calcutta: University of Calcutta, 1955), 128–31 (where Pal juxtaposed a discussion of the Holocaust and a discussion of English anti-German propaganda during the First World War). It should be noted that, in the postwar era, Pal condemned Western racial theories. See Pal, *History*, 271–2. See also Nakazato, *Neonationalist Mythology*, 133; Bass, *Judgment at Tokyo*, 636–7.

[13] Samuel Eisenstadt, "Di Arbayter un di Arbayter-Frage in der Alter Yidisher Geshikhte," *Di Tsukunft* 8 (1908): 762, 763, 766–7; Eisenstadt, "Le-Korot," 208; Eisenstadt, "Le-Heker Mishpatenu ha-Pumbi," 17n1. Fleeting references to Hindu law are also found in the works of Eisenstadt's colleague Paltiel Dikshtein. See Paltiel Dikshtein, "Mehir Tsedek ve-Ona'ah," *Ha-Mishpat Ha-'Ivri* 1 (1925/26): 15, 20, 23 (mentioning examples of price regulation in ancient Indian law based on Kohler and Wenger, *Orientalisches Recht*).

[14] See Gene D. Overstreet and Marshall Windmiller, *Communism in India* (Berkeley, CA: University of California Press, 1959), 438. On the IADL, see, generally, International Commission of Jurists, *Under False Colours: A Report on the Character of the International Association of Democratic Lawyers* (The Hague: n.p., 1955); Howard B. Tolley Jr., *The International Commission of Jurists: Global Advocates for Human Rights* (Philadelphia, PA: University of Pennsylvania Press, 2010), 28–9.

[15] "Mahar be-Kalkuta – Ve'idat Anshey ha-Mishpat shel Artsot Asiah," *Kol Ha-'Am*, December 22, 1954.

[16] See Nakazato, *Neonationalist Mythology*, 51.

[17] Danial Latifi, "[Letter to the Editor]: Democratic Lawyers," *Times of India*, March 21, 1955.

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born out of laudable concerns for the oppressed that morphed into a monstrous and evil dogma responsible for the murder of millions of people during the twentieth century. The same complexity is also the hallmark of nationalism, the ideology that inspired Pal and Eisenstadt. It, too, is emancipatory and oppressive, empowering and bloody simultaneously. The same ambivalence underlies any reflection on the life and ideas of Pal and Eisenstadt. The lives of both scholars are inspiring. Both came from oppressed groups and modest backgrounds. Both became highly educated legal scholars, producing an impressive array of interesting and sometimes even innovative works on their respective religious legal systems. However, both, in hindsight, made morally questionable political choices ultimately born out of their romantic infatuation with nationalist ideas and with their respective ancient religious legal systems.

Sometimes, however, romantic utopian infatuation with the past is not only negative but has a positive, hopeful side. In the next part of this book, I will focus on scholars writing not on law generally but on a specific legal subfield – public law. I will examine Indian and Jewish scholars belonging to the academic milieu that I described in Parts I and II of the book who wrote works on ancient Indian and Jewish public law under the influence of historicist jurisprudential theories. I will show how these scholars sought to prove that the institutions and values of ancient Indian and Jewish political thought and public law were compatible with modern Western democratic institutions and liberal values. This attempt had little impact on the actual constitutional law of post-independence India and Israel. However, as I shall ultimately argue in the Epilogue, it is relevant and important today because of its potential positive use in mitigating some of the anti-democratic and anti-liberal sentiments that have appeared in recent decades in Israel, India, and other countries.

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