Interlude 1: Goals

Colonial India and Mandatory Palestine both belonged to the British Empire, but they were very different territories. India was a core colony of the Empire. It was huge territorially, and it contained hundreds of millions of people. The British presence in India began in the seventeenth century as a commercial endeavor, later morphing into political rule. The centuries-long British presence made a profound impact on the politics and culture of India. In contrast, British rulers came to Palestine, a small territory with a tiny population, only at the end of the First World War and left after just a few decades, in 1948. While here, too, their presence had a long-lasting impact in certain respects, their legacy was certainly weaker compared to the case of India. The two territories and their respective populations were not only different in scale; the diversity and characteristics of the two societies, and the previous legal structures out of which the legal systems of the two territories were composed, also differed in myriad ways. However, the history of Western-style legal education in both places displayed similar traits.

In India and Palestine, the British established institutions that provided a formal legal education mainly based on imported English law and English legal theories. In both places, British – and, later, local – teachers used examples taken from local law to critique imported English theories. Colonial legal scholars in India and Palestine were also far more willing to refer to Continental jurisprudential theories in their works compared to contemporary English legal theorists. Some

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local legal scholars showed a keen interest in the jurisprudential analysis of their respective religious legal systems: Hindu law (and to some extent also Islamic law) in the case of India and Jewish law in the case of Mandatory Palestine. These scholars argued that these ancient systems, viewed by Western thinkers as being on a low rung of the legal evolutionary ladder, were not only the historical source of Western jurisprudential ideas but also contained notions and values that were more advanced and progressive than those found in Western law.

The interest that both Indian and Jewish law scholars displayed in the theoretical discussion of their ancient religious systems was born of the same ideology, nationalism – itself a Western transplant. Indian and Jewish nationalism, like nationalism in many other countries, Western and non-Western alike, went through a stage in which intellectuals sought to create a unified national identity by studying ancient national culture.[1] Specifically in the legal realm, the theoretical approach to the study of law that was identified with the German Historical School and with English historical jurisprudence motivated this interest in religious law. It was also motivated by a more fundamental human emotion: pride in one's long and resilient cultural heritage. For example, Jogendra Chunder Ghose, who taught law at the University of Calcutta, asserted in 1917 that:

> . . . the history of Hindu Law is the most wonderful chapter of the history of the world and of human institutions. Egypt and Babylon, Assyria and Persia . . . have passed away without a vestige remaining of their ancient institutions and religions . . . [they] have completely discarded their old religion, law and social institutions and adopted those of the Arabian prophet Mahomed . . .. The Brahmins of India however, maintained the old religion and the old law, through the many vicissitudes of two thousand years, and succeeded in

[1] See, e.g., Miroslav Hroch, *Social Preconditions of National Revival in Europe: A Comparative Analysis of the Social Composition of Patriotic Groups among the Smaller European Nations* (Cambridge: Cambridge University Press, 1985). It is interesting to note that the desire by colonial subjects to study and develop their own legal system in reaction to an engagement with the law of an empire is not necessarily a modern phenomenon. For an interesting argument about this sentiment in antiquity, see Yair Furstenberg, "Imperialism and the Creation of Local Law: The Case of Rabbinic Law," in *Legal Engagement: The Reception of Roman Law and Tribunals by Jews and Other Inhabitants of the Empire*, eds. Katell Bertholet et al. (Rome: École française de Rome, 2021), 271.

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securing their ultimate victory ... [the] tenacity with which the [Hindus] have stuck to the old institutions and the old law is a wonderful phenomenon.[2]

Similarly, Rabbi Isaac Herzog, who served as a Chief Rabbi of Palestine in the 1930s and 1940s and had some affinity with the scholars of the Jewish legal revival movement, declared in 1936 that:

> Rome, mistress of the ancient world, mighty in war and great in peace, destroyed the Jewish state and drove the Jewish people out of its magic land ... [Rome] has been admired throughout the centuries for her juristic genius. Her victim, Judaea, on the other hand, has not yet received due appreciation for her achievement in the field of law, an achievement which so strikingly attests [to] the intellectual powers of the Jewish race as well as its noble passion for righteousness.[3]

While the institutional and intellectual histories of legal theory in colonial India and Mandatory Palestine shared many similarities, there were also significant differences. In the institutional realm, the law schools of India were British creations. The most important institution that was examined in Chapter 1, the University of Calcutta College of Law, was created at the initiative of an Indian nationalist scholar, Asutosh Mookerjee. Nevertheless, it was part of a university that was ultimately governed by the British. In Palestine, too, British officials shaped the curriculum of one of the legal education institutions discussed earlier, the Jerusalem Law Classes (created as a vocational school rather than a university-affiliated academic institution). However, the two other institutions providing legal education, the Hebrew University and the Tel Aviv School, were both Zionist and they were created and operated independently of British rule – indeed, in the case of the Tel Aviv school, in opposition to it.

[2] Jogendra Chunder Ghose, *The Principles of Hindu Law*, 1st ed. (Calcutta: S. B. Chatterjee & Sons 1917), Vol. 2, i–ii. Some Westerners shared this sentiment: see Albert Swindlehurst, "Hindu Law and its Influence," *Yale Law Journal* 27 (1918): 857 ("when Britons roamed their forests clad in garments of skin and Teutonic tribes were concerned with little save war and tumult, the East had its legal systems, which were at once the product and the proof of a high civilization. Of these the most notable was that of the Brahmins, which regulated a vast territory and, with later additions, still governs the family relations of over two hundred millions of people").

[3] Isaac Herzog, *The Main Institutions of Jewish Law* (London: Soncino Press, 1936), Vol. 1, xv.

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The colonial government's lack of involvement in law teaching at these two institutions had negative implications. The Hebrew University refrained from establishing a faculty of law, partly out of concern that doing so might antagonize the British authorities by competing with the Jerusalem Law Classes. The Tel Aviv School also suffered from the lack of government recognition. The law degree it conferred did not enable its graduates to take the Palestine Bar examinations, meaning they had to complete their studies abroad. However, the lack of British involvement also meant that the teaching of law at the Hebrew University and the Tel Aviv School placed a greater emphasis on studying Jewish law. This, together with many other factors, may have been one of the reasons that the effort to produce theoretical scholarship on the history and principles of (one of) the local religious legal systems seems to have been more sustained and broader in Mandatory Palestine than in colonial India, certainly relative to population size. In addition, unlike India, much of the scholarship in Palestine was produced by an unofficial organization, the Jewish Law Society, which had no Indian equivalent.

The institutional difference between law schools in India and Mandatory Palestine was related to a difference in the educational background and intellectual influences of the legal scholars in India and Palestine. In India, the authors I examined were mostly educated either in England or in the English-sponsored universities of India. Many were practicing lawyers who were in daily contact with India's court system, which applied anglicized Indian law. While some, such as Rattigan (who held a doctorate from a German university) and Basu (who wrote extensively on Continental legal theories), demonstrated an interest in Roman law and modern Continental jurisprudence, English legal theory remained the dominant influence in India.

This was not the case in Palestine. The legal system of Palestine and, more broadly, that of the Middle East was shaped by French law, which, in the nineteenth century, served as the primary European model for legal modernization in the Ottoman Empire and Egypt. As a result, even English authors such as Goadby had to be familiar with French law and French legal theories. In addition, most Jewish lawyers and legal scholars in Mandatory Palestine were immigrants who grew up and were educated in Central and Eastern Europe. Therefore, the primary source of influence on their ideas was not English thinkers

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such as Austin or Maine but the German Historical School, the Free Law Movement, and Russian scholars such as Petrażycki and Pokrovsky.

The different biographical trajectories of Indian and Jewish scholars also led to a difference in substantive ideas. Scholars in India rejected Austinian positivism and, more generally, nineteenth-century legal science, which saw the law as entirely autonomous. They also recognized the need to study law in anti-formalist ways, connecting legal research to society. However, because the leading anti-formalist jurisprudential theory they espoused was Maine's evolutionary approach, their scholarship on Hindu law was mainly historical and focused on the ancient history of this legal system. Their works were motivated by a desire to counter Western views of ancient Hindu law as backward and primitive and to show the past contribution of Indians to global jurisprudence.

Scholars in Palestine, too, espoused anti-formalism, but their version of it was more modern. It was sociological and sought to use a social sciences approach to study Jewish law. It was also more practical. While a historical perspective was undoubtedly present in works on Jewish law published in Palestine, these works also had a contemporary and applied edge. This, for example, was the case with Dikshtein's use of Free Law ideas to justify the anti-formalist approach that characterized judicial decision-making among the lay judges of the Hebrew Courts of Arbitration.

I would now like to focus on a comparison in the context of one specific topic: the goals of the theoretical scholarship in the two places. Here, too, one can point to both similarities and differences. In both India and Palestine, jurisprudential works shared the same pedagogical objective: to introduce students to the nature and history of law. In both places, works by local scholars also had an ideological, nationalist, goal: to foster pride in the national culture. However, in the case of Palestine only, another goal of the scholarship had to do with the idea of legal revival. The study of Jewish law was seen as a practical endeavor ultimately meant to lead to the use of the norms of Jewish law (belonging to legal fields such as contract or tort that could also be found in modern legal systems) as the basis of the legal system of the future independent state to be established once British colonial rule ended. In India, legal scholars did not argue that the anglicized

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contract law of India should be replaced by norms taken from Hindu contract law. Why was there a difference? The idea of Jewish legal revival originated in the scholarly and political program of the nineteenth-century German Historical School, which sought to use the national legal traditions of the German people as a source of norms of the new German civil code, the BGB. This program inspired the Jewish scholars but had less influence on the Indian ones. Jewish legal revival was also inspired by the successful revival of the Hebrew language, a major goal of cultural Zionism. In India, the desire to "revive" Sanskrit was far less influential.[4]

In colonial India, therefore, there were almost no calls to replace British-colonial law with Hindu law. This was not only the result of jurisprudential theories. Judaism, unlike Hinduism, has combined religious and national identity for three millennia, and Jewish law has been a central pillar of Jewish identity since antiquity. It was thus seen as amenable, despite the fact that it was a non-state legal system, to serve as the foundation of the legal system of a future Jewish nation-state, just like the revived Hebrew language. Hinduism is considerably more diverse than Judaism. Its numerous traditions, practices, and vast corpus of scriptures give rise to a broader spectrum of beliefs and practices compared to Judaism. Thus, Hindu law is more difficult to "revive" than Jewish law. The sources of Hindu law are also far less accessible to non-specialists than those of Jewish law. In addition, Hinduism generally, and Hindu law specifically, are also, in some sense, a modern British-colonial construct, which is not the case with Jewish law.

[4] On the revival of the Hebrew language see, e.g., Arieh B. Saposnik, *Becoming Hebrew: The Creation of a Jewish National Culture in Ottoman Palestine* (New York: Oxford University Press, 2008), 65–92. On Sanskrit, cf. Sheldon Pollock, "The Death of Sanskrit," *Comparative Studies in Society and History* 43 (2001): 392, 392–3; K. S. Kannan, ed., *Western Indology & Its Quest for Power: Proceedings of Swadeshi Indology Conference Series* (Chennai: Infinity Foundation India, 2017). See also Madhav M. Deshpande, "Efforts to Vernacularize Sanskrit: Degree of Success and Failure," in *Handbook of Languages and Ethnic Identity*, eds. Joshua A. Fishman and Ofelia García (Oxford: Oxford University Press, 2011), Vol. 2, 218. On the complexity to the notion of "revival" generally see, e.g., Tapan Raychaudhuri, *Europe Reconsidered: Perceptions of the West in Nineteenth-Century Bengal* (Delhi: Oxford University Press, 1988), 8–9 (discussing the problematic nature of using the term to "revival" to describe nineteenth-century Hindu revivalism in Bengal).

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The idea of legal revival espoused by Jewish scholars was rooted in Continental notions of law being the product of the work of scholars rather than legislators or judges. While ancient Hindu law was also a product of scholars, modern English jurisprudential notions that connected the law to the state and its officials dominated Indian legal education during the colonial period and, it seems, also dominated the imagination of Indian scholars. The influence of English jurisprudential traditions made it more difficult for Indians to accept the idea of legal revival by actors unconnected to the state.

Differences in the nature of Hindu and Jewish religion and law were accompanied by differences in the social and political context in which Indian and Jewish scholars worked. Hindu law, and certainly its text-based, British-influenced colonial version, was associated with upper-caste, Brahmin, "high-culture," urban elites.[5] Unlike Jewish law, it was therefore identified only with specific segments of the society it was supposed to govern. The fact that Hindu law was based on and identified with the notion of caste division was anathema to the egalitarian promises of the Indian Nationalist Movement, especially once it moved to its mass mobilization phase. Furthermore, reviving those parts of Hindu law that were outside the realm of personal law would have undermined the vision that independent India would be a secular state based on Hindu–Muslim unity. Finally, the legal profession's power in India, committed as it was to anglicized Indian law, also impeded calls for the revival of Hindu law.[6]

[5] See, e.g., Upendra Baxi, "People's Law in India – the Hindu Society," in *Asian Indigenous Law: In Interaction with Received Law*, ed. Masaji Chiba (London: KPI, 1986), 216, 223–30.

[6] See, generally, Marc Galanter, "The Displacement of Traditional Law in Modern India," *Journal of Social Issues* 24 (1968): 65, 69–76; Marc Galanter, "The Aborted Restoration of 'Indigenous' Law in India," in *Law and Society in Modern India* (Delhi: Oxford University Press, 1997), 37. It is interesting to note that in his 1968 article Galanter compared the Indian experience with that of Israel, Pakistan, and Ireland. See Galanter, "Displacement," 35. See also 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), 244–5. Of course, it is possible to find, even in India, some exceptions. See, e.g., K. S. Ramaswami Sastri, "The Evolution of Law as a Science and as a Profession in India," *Hindu Law Journal* 5(10) (April 1923): 1, 16–18 (an article by a South Indian judge stating that it was the national duty of Indian lawyers "to incorporate in our substantive and adjective law the best elements of the ancient Indian system of jurisprudence," rather than applying Western law wholesale, since Hindu law was

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The notion of Jewish legal revival faced political opposition from various quarters, too: conservative Orthodox rabbis unwilling to agree to any tampering with, or modernization of, Jewish law; secular Zionists who argued that, unlike the Hebrew language, which could be (and was indeed) secularized, Jewish law was too tightly bound to Jewish religion; and also anglicized lawyers who feared that Jewish law would undermine their livelihood, which was based on their familiarity with the British-colonial system. This combined opposition ultimately led to the failure of the movement for Jewish legal revival and to the adoption of the British-colonial law of Mandatory Palestine as the basis of the postcolonial Israeli State.[7] However, the relative robustness of the demands for legal revival in Mandatory Palestine, compared to colonial India, meant that the scholarly interest in the theoretical study of the jurisprudence and history of religious law was more substantial among Jewish scholars in Palestine than it was among Hindu scholars in India.

These differences, and others, between Indian and Jewish scholars will also be evident in the next part of the book, which is devoted to a description and comparison of the life and thought of two legal scholars, Radhabinod Pal and Samuel Eisenstadt, who were both significant actors in their respective scholarly communities.

"as enlightened and humane and refined as the Roman law and is nearer to our hearts and lives").

[7] On the failure of the Jewish legal revival movement, see, e.g., Assaf Likhovski, *Law and Identity in Mandate Palestine* (Chapel Hill, NC: University of North Carolina Press, 2006), 152–3. See also Ronen Shamir, *The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine* (Cambridge: Cambridge University Press, 2000).

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