

1 Israeli Legal History: Past and Present

RON HARRIS, ALEXANDRE (SANDY)
KEDAR, PNINA LAHAV, ASSAF LIKHOVSKI*

Spatial and Temporal Framework

This essay proposes to outline the major themes and works on Israeli legal history.¹ In order to do so, it is important to define our conception of “Israel” and of its “history.”² Such a categorization is inevitably subjective and complex. How are these terms delimited? The spatial categorization we adopted relies on what has come to be known as Mandatory Palestine: the territorial unit with the Mediterranean Sea on the west, the Jordan river on the east, contemporary Lebanon to the north and the Sinai desert and the present Egyptian border on the south. This is not the only possible spatial demarcation. During the late Ottoman period, the territory described did not constitute a single administrative region, but belonged to different administrative units. Only after the creation of the British Mandate did the territory become a single political unit. After 1948, Palestine was redivided and most of the territory became Israel, while Jordan and Egypt controlled the rest (the West Bank and Gaza). After their conquest by Israel in 1967, the West Bank and Gaza remained under separate legal and administrative control. In spite of all these transformations, we believe that Palestine, or “*Eretz Yisrael*” as it is called by Jews, was, and still is, a useful spatial demarcation.

Likewise, the time frame of the book is not self-evident. Because the legal history of this region goes back thousands of years, any periodization is artificial. Indeed, as Peter Novick argues, “the most universal of the ‘regulative fictions’ which historians employ to make some order out of a chaotic past is ‘periodization,’ by which we cut the continuous thread of time into manageable lengths, and then do our best to present such division as natural rather than contrived.”³

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And indeed, this book cannot avoid using a periodization scheme. The formal periodization of the book begins in 1917, the date of the conquest of Palestine by the British from the Ottoman Empire, leading to the establishment of the British Mandate in 1922, which remained in force until the creation of Israel in 1948. It ends in 1967, the date of the conquest of the West Bank and Gaza by Israeli forces. Nevertheless, some of the authors, such as Harris, Kedar and Shamir, also address the late Ottoman period, and some, including Harris, Holzman-Gazit, Mautner and Shachar, discuss the period after 1967.

The Emergence of the Field

In his article “American Legal History: Past and Present,” Lawrence Friedman characterized American legal history.⁴ Writing in 1984, he states that in 1950 the “field, practically speaking, did not exist. More than 95% of the significant work in American legal history probably has been done in the last twenty years or so.” Friedman divides American legal historiography into three periods. He views the period before 1950 as “the period of doctrinal history. . . . The stress was on the history of legal doctrines – their beginning, their development, their growth. . . . [T]here was little attention to socioeconomic context. . . . The legal system . . . was treated as largely autonomous – as an entity in itself.”⁵ The second period constitutes what Friedman terms the “age of the Wisconsin School.” This school is closely linked to the Law and Society movement. It is not content with studying the “legal texts” produced by Supreme Courts, but, following Legal Realism, examines the action of the law in areas such as legislation, lower courts and administrative bodies, and lawyers’ activities. Finally, Friedman refers to the Critical School of legal history. This school, which emerged in the second half of the 1970s, views the history of law critically.⁶ There is no doubt, as many legal historians have noted, that legal history has tremendous critical potential.

Morton Horwitz, in an essay in this book, argues that the political history of new nations begins with self-justifying celebratory accounts, which evolve into a phase of critical demystification. Critical Legal history emerges as part of this process. Indeed, “the simple shift to a view of law as changing and changeable already introduces the delegitimizing possibility that law assumes multiple forms and meanings over time.”⁷ Likewise, Lawrence Friedman argues that “all legal history is, in a sense, critical; . . . it is directed against something, it revises something, it explores and criticizes something; and the question, in each period, is what exactly is it

aiming to refute or replace.”⁸

In the last two decades, Israeli academia has witnessed the emergence of critical voices challenging the established narratives. These critical voices, among them those often called “New Historians” and “Critical Sociologists,” argue that Israeli academic writing before the 1980s was heavily influenced by the Zionist, and especially the labor-Zionist, world view. This led to a fierce debate which is still raging.⁹ The emergence of Israeli legal history needs to be understood within two contexts: developments in American legal historiography and debates within Israeli academia.

When one examines Israeli legal historiography, one can offer a periodization scheme similar to that offered by Friedman. Academic writing on Israeli law in general, and specifically on Israeli legal history, can be schematically described as consisting of three waves.

For many years, the formalist paradigm ruled, in case law as well as in academic writing. This is not surprising, since in the period between independence and the 1980s, Israeli legal academia was heavily influenced by English and Continental formalist jurisprudence.¹⁰ Indeed, nearly all the literature on law focused on Supreme Court decisions and explicated them as the output of an apolitical institution authoritatively declaring and implementing the “Law.”

To a certain degree, this has also been the case in the few legal history works that were produced during this period. With the exception of Eliezer Malchi’s important book, *The History of the Law of Palestine*, published in 1950, which contains a number of non-formalist insights, for more than two decades little was published on Israeli legal history. The works that were published were “internalist” and formalist.¹¹ Another style of historical writing, “disciplinary histories,” has been defined by Peter Novick as “written by practitioners” and “usually of the celebratory (how we got so wonderful) variety; occasionally denunciatory. . . .” These included books and articles such as memoirs, biographies and autobiographies, and works in honor of a leading judge or jurist.¹²

Beginning in the late 1970s, with the gradual abandonment of the formalist style in the adjudication of the Israeli Supreme Court, Israeli legal academia began to be influenced by non-formalist approaches, originating in Legal Realism and Post-Realist schools. Concurrently, new approaches to the study of Israeli legal history began to emerge. Of special interest were the works of Pnina Lahav and Yoram Shachar who devoted much of their academic research and writing to Israeli legal history. Also noteworthy was Elyakim Rubinstein’s book on the Israeli Supreme Court.¹³

During the 1990s, a third wave emerged and historical work significantly expanded. Friedman's 1984 assessment of American Legal history can be applied to Israel: "Perhaps the best and most accurate way to begin a report about the state of . . . legal history is to report that it is booming."¹⁴ A glance at the bibliography appended to this volume shows that most of the works listed were published after 1990. Scholars such as Lahav and Shachar produced substantial additional works, which expanded the understanding of Israeli legal history.¹⁵ In addition, works were produced by legal academics who had not previously been active in the field, such as Manachem Mautner who, in 1993, wrote *The Decline of Formalism and the Rise of Values in Israeli Law*.¹⁶ A younger generation of scholars such as Harris, Holzman-Gazit, Nir Kedar, Sandy Kedar, Likhovski, and Shamir wrote dissertations with leading American legal historians. Other young Israeli scholars such as Barak-Erez, Bilsky, Kamir, Fania Oz-Salzberger, and Eli Salzberger devoted a substantial part of their academic research to legal history. Today, a growing number of Israeli graduate students are working on a variety of legal history topics both in Israel and abroad. Israeli scholars participate in international conferences of organizations such as the Law and Society Association, the American Society for Legal History and the Association for Israel Studies, and present papers on Israeli legal history. In addition, articles on Israeli legal history are being published not only in Israeli periodicals, but in leading international periodicals as well. Courses devoted to Israeli legal history are being taught in many of the leading Israeli law schools. Israeli legal history is becoming an established discipline.

Because it is an emerging field, Israeli legal history is not homogeneous. Some topics and issues have been researched in reasonable depth, while other issues and periods remain practically untouched. In addition, as this book testifies, no dialogue has as yet been established between Israeli and Palestinian or other Arab legal historians. However, considering that the field is young, much has already been accomplished. In the following paragraphs, we will highlight both the topics already explored and those which have not yet been studied.

The Historiography of the Late Ottoman and the Mandate Periods

Few legal history works deal with late Ottoman Palestine, though historians and geographers have devoted considerable attention to the period. Those legal sources that have been used, were utilized mainly for understanding

the political, social and economic history of the period, and not the functioning of the legal system.¹⁷

As we have noted, the territory that was to become Palestine under the British Mandate was not a single district in the Ottoman Empire, but rather, for most of the period, was divided among several administrative units. It was a sparsely populated area on the periphery of the Ottoman Empire. Yet for an understanding of the modern history of Israel/Palestine, the Ottoman period is extremely important. It witnessed the beginning of Zionist immigration, and was the locale for the development of Zionist and Palestinian identities and struggles. Unfortunately, little is known about how the legal system interacted with these issues.

Until the middle of the nineteenth century, the legal system of the Ottoman Empire was based on Islamic law. At that time, following a period of legal reform, the Ottoman Empire adopted a legal system in which Islamic, European (mainly French) and Ottoman norms mixed. This legal system was applied by a hierarchy of courts at whose apex was the French-like Court of Cassation in Istanbul. However, the Ottoman legal system administered by these courts was not the only legal system that existed in Palestine during the last decades of Ottoman rule. The various religious communities (Muslim, Jewish and Christian) had religious courts which applied religious law in matters of personal status and sometimes also in other civil matters. In addition, a number of European nations, which had been granted capitulations by the Ottoman government, established extra-territorial consular courts in Palestine. Disputes in rural areas of Palestine or among the nomadic Bedouin population of the Negev desert in the south were often settled by various non-official persons and bodies that applied customary law.¹⁸

Little is known about the working of the local civil courts of the period and how they interacted with the Ottoman central courts.¹⁹ The identity, background and education of the lawyers and judges functioning at the time is also little known. We know that the central Ottoman government initiated legal reforms, but we do not know to what extent these reforms reached and affected the area that would become Palestine.²⁰ We know little about the way Ottoman laws were applied in Palestine or how the local and central courts functioned or the amount of interaction between them. There was a Court of Appeals in Beirut and a Court of Cassation in Istanbul, but how often did litigants appeal? How long did it take? How effective were the judgments? According to the conventional view, the Ottoman legal system was corrupt, inefficient and suffered from a low level of compliance,²¹ but to what extent is this image historically grounded?

Does it stem from the Orientalist viewpoint developed by British and Zionist narratives? We have some information on the land laws of the period,²² but there is no detailed analysis of the role of local courts in land disputes. In short, for legal historians, the Ottoman period remains almost terra incognita.

On the other hand, the Mandate period, as well as the genesis of Israeli law up to the 1950s have benefited from meaningful research. The British came to Palestine in 1917 and left in 1948. At first they ruled the country by virtue of military conquest, and beginning in 1922, as part of the League of Nations mandate system. During the 31 years of British rule in Palestine, the governmental legal system underwent a process of rapid change. The British retained some parts of the Ottoman legal system, but introduced a number of major changes, such as the adoption of the doctrine of precedent (*stare decisis*) or the adversarial system. In addition, the British introduced English and colonial legislation and imported case-law. The process of replacement (often called “Anglicization”) was more marked in certain legal fields than in others. Thus, during the three decades of British rule, the British replaced Ottoman commercial laws, the Ottoman code of criminal law, the Ottoman civil and criminal codes of procedure, and some Ottoman rules of evidence (most of which had been imported from France). They also began to gradually replace Ottoman civil law (which was codified in an Islamic-inspired code called the *Mejelle*). Some areas of Ottoman law were left almost untouched by the British; however, even these were often indirectly influenced. One example is the case of land law into which the British introduced several important, seemingly technical, changes with far-reaching implications that outlived the Mandatory period. These included the introduction of the Torrens settlement of title system, changes in rules concerning “Dead Land” (*Mawat*), as well as rules concerning the acquisition of property for public use, protection of tenants (rent control) and the use of emergency rules in ways that curtailed property rights.²³

In addition to changes in the governmental legal system effected by the British, Palestine witnessed the emergence of new, non-governmental systems created by the Jews in Palestine. One such system was the “Hebrew Courts of Arbitration” or “Hebrew Courts of Peace” (*mishpat ha-shalom ha-ivri*). This system was created during the last decade of Ottoman rule and flourished during the 1920s. Another legal system was the Comrades’ Courts (*mishpat ha-khaverim*; literally, “comrades law”), inspired by socialist conceptions of justice and established by the Histadrut (the General Federation of Jewish Labor in Palestine).²⁴

The Mandatory period has received significant attention in comparison to other periods of Israeli legal history. However, compared to the sizable body of scholarship on the political, diplomatic, cultural and economic history of Palestine during the three decades of British rule, the legal history of the Mandate era has been far less studied. There are a number of possible explanations for this. One has to do with the fact that major aspects of the Arab-Israeli conflict can be traced to the Mandatory period. Interest in this conflict has led many historians (Jews, Arabs, and others) to focus attention on the political and diplomatic aspects of the history of Mandatory Palestine while neglecting other aspects (including legal history). Another reason may be the “Ziono-centric” nature of much of the literature dealing with the period. As historian Derek Penslar noted, the historiography of the period (mainly written by Israelis) tended to focus on the story of the development of the Jewish community in Palestine (the *Yishuv*). Such history tends to neglect the role of the British in Palestine.²⁵ The legal history of Palestine, as a territory in which the British, rather than the Jews, were the major actors, suffers from this neglect.

This relative neglect is not justified. The legal history of Mandatory Palestine is not only interesting in itself, but also important because it can contribute to our understanding of wider issues that have occupied the attention of historians of Palestine throughout the twentieth century. For example, one of the main controversies among Israeli historians and social scientists is the question of the nature of Jewish settlement in Palestine in the twentieth century. Was Zionism a colonial movement similar to many other nineteenth century European colonial movements or was it a unique phenomenon?²⁶ Did the Jewish and Arab communities in Palestine develop separately (the “dual society” paradigm) or in tandem (the “relational” paradigm)?²⁷ The legal history of Mandatory Palestine can offer unique insights into these and similar questions.²⁸

The legal history of this period is also of interest to students of the history of European colonialism. Despite its small size, Palestine was one of the most heterogeneous territories of the British Empire in the first part of the twentieth century. It was populated by British rulers (of various sorts), Jews (immigrants and natives, Oriental and European, secular and orthodox) and Arabs (Muslims and Christian, nomadic Bedouins, rural and urban) and other cultural, ethnic and religious groups. It can therefore serve as an interesting case for students of European colonialism and the role of political, diplomatic, economic and cultural factors in the colonial quest. Scholars interested in the role of tradition vs. change in colonial policy, the nature of customary law (and its invention by the European colonizers), the

prevalence of colonial discourse in texts written by colonizers and natives, and similar issues, can find a rich field for study in the legal history of Palestine. Those aspects of Mandatory legal history that have been studied, as well as those that have not, will be described in the following paragraphs.

The general outlines of the structure of the governmental court system of Palestine and the various bodies involved in creating and applying state law in Palestine have been described by a number of scholars.²⁹ However, there is no “thick description” of their history, tracing the institutional, political, economic and personal factors that influenced the establishment of the various courts and their development. For example, we still do not know the reasons for the establishment of such diverse bodies as the High Court of Justice or the governmental customary law court of the Bedouins in the Beersheba region, and there is still no comprehensive, decade-by-decade description of the history of the Palestine Supreme Court or of the legislative activity of the High Commissioner. Although the British collected comprehensive statistics on the work of the governmental courts (especially in the 1920s and 1930s), this data has not as yet been utilized for a quantitative assessment of the work of the government courts and other law-making bodies, their relationship to other semi-official or non-official courts (such as the religious courts), trends in their use by various sectors of the Palestinian population and the penetration of government law into various regions of the country.

Turning from the structure of the governmental legal system to the life and careers of its officials reveals that, here too, our knowledge is incomplete. The lives of some of the major figures on the Palestinian legal scene have been described or studied. These include autobiographies by Gad Frumkin, the only Jewish judge on the Supreme Court of Palestine, whose autobiography contains a wealth of information on the Court and on his British and Arab colleagues; and by Norman Bentwich, the first Attorney-General of Palestine, the author of a major part of the Palestinian legislation of the 1920s and later professor of international law at the nascent Hebrew University of Jerusalem.³⁰ There is a book devoted to the history of the British administration in Palestine that examines the careers of Bentwich and a number of other high-ranking legal officials.³¹ Musa Alami, an official in the Attorney-General’s department, was also the subject of a biography which, however, deals almost exclusively with the political rather than legal aspects of Alami’s life.³² Another work attempts to utilize information on the origins, education and careers of the British Judges of the Supreme Court in order to explain certain aspects of the case-

law of the Court.³³ Still another describes the career of Simon Agranat, a magistrate in Haifa in the 1940s, and later Chief Justice of the Israeli Supreme Court.³⁴

Despite these studies, we still lack much information on the life and careers of most of the makers of Palestinian law. There are no biographies of the judges of the Palestine Supreme Court and we know very little about the background, education, ideologies and career paths of the judges of the lower courts and other officials of the governmental legal system.

One of the main processes which characterized the three decades of British rule was the Anglicization of the law of Palestine. A number of studies describe the general features of the process of Anglicization or with specific aspects, such as the role of the Supreme Court of Palestine in it. Some works are based on formalist notions of law and thus do not attempt to explain the process with reference to economic, social, cultural or personal factors,³⁵ while others have attempted to explain the process or certain aspects of it by linking it to such factors.³⁶ Some aspects of the process are less understood than others. For example, while we do know how certain officials of the British Government, like Norman Bentwich, viewed the process, Jewish and Arab reactions to the process are less studied.³⁷

Large gaps also exist in our knowledge of specific areas of Palestinian law, and some have not been studied at all. Thus, not a single study of the history of tax legislation and case-law exists, nor are there works on the history of intellectual property, corporate law or even contract or tort law in Palestine.³⁸

Other legal fields, such as constitutional law, have been, at least partially, studied. There are works that analyze the Palestine Order in Council, 1922, certain acts of legislation that have a bearing on constitutional questions, such as the Press Ordinance of 1933 or issues such as judicial review and civil rights discourse in the cases of the Supreme Court of Palestine.³⁹ There are also studies that deal with constitutional aspects of non-governmental institutions such as the elected Assembly and the National Council of the *Yishuv*, or Zionist bodies such as the Zionist Organization and the Jewish Agency.⁴⁰

Like constitutional law, Palestinian criminal law has received some attention. Two works examine the history of the Criminal Code Ordinance enacted by the British in 1936 and trace the legislative history of this ordinance from its nineteenth century origins in Australia to its enactment in Palestine.⁴¹ There are also brief discussions of the history of certain specific criminal law doctrines, such as the use of the “reasonable person”

standard by Mandatory courts.⁴² Issues relating to how the British maintained public order in Palestine, especially during the prolonged period of nationalist disturbances and terrorism in the 1930s and 1940s have also been studied.⁴³

However, there are major gaps in our knowledge of the history of criminal law. No works deal with the history of criminal law in Palestine before 1936. There is no history of the enactment and enforcement of the emergency regulations of the 1930s and 1940s or of other, more mundane, aspects of criminal law administration. Thus we do not know how criminal law was enforced during the three decades of British rule in the various parts of Palestine. No studies, quantitative or otherwise, have examined the way ethnicity, class, gender or age influenced the application of criminal law. We do not have a history of the various aspects of British punishment policy in Palestine: the use of flogging, collective punishment or the death penalty. There is no history of prisons in Mandatory Palestine, nor are there studies of specific aspects of criminal law such as the British attempt to regulate strikes or prostitution, even though these aspects are highly relevant to the history of non-legal fields such as labor and gender history.⁴⁴

One aspect of the law of Palestine that has received some attention is property law. A major aspect of Zionist activity in Palestine was the acquisition of land for Jewish settlements. The history of property law (as well as other laws that had a direct impact on the Zionist project such as immigration legislation) received the attention of scholars who do not necessarily define themselves as legal historians,⁴⁵ and a history of the cadastral survey of Palestine was written by a geographer.⁴⁶ Certain specific doctrines of property law, such as the law of adverse possession and the laws relating to the treatment of enemy property (Trading with the Enemy Ordinance), have also been studied.⁴⁷ Despite this, one can say that most of the doctrinal history of property law, as well as the history of its actual application, is still largely unexplored.

In most areas of law, existing Ottoman legislation was either retained or replaced by the British. There were, however, certain legal fields which the Ottomans left almost totally unregulated. One such field was labor legislation. The British, who were traditionally reluctant to enact labor legislation, were however, bound by international commitments to regulate labor relations in Palestine and therefore enacted a number of labor ordinances (although they failed to enforce these ordinances for most of the period of the Mandate). There are a number of brief histories of labor legislation, some of which also contain an examination of the policy considerations

which led to the enactment of labor ordinances.⁴⁸ Another aspect of labor law history, that of compulsory arbitration, has also been studied.⁴⁹

Finally, while the history of some aspects of substantive law in Palestine has been studied, the history of the law of procedure and evidence in Palestine has been largely neglected. The one major exception in this area is the history of the failed attempt to abolish imprisonment for debt in the 1930s.⁵⁰

Legal historians are interested in more than the history of legal institutions and norms; they are also interested in the history of the legal profession. Despite the fact that the Palestine Bar was quite small (there were only a few hundred lawyers in Mandatory Palestine), the history of the legal profession in Palestine is extremely rich. This richness is the result of the fact that Palestine was one of the few British colonies in the early part of the twentieth century which had a formal system of legal education including two competing law schools and a university which offered legal courses.⁵¹ The richness of the history of the legal profession also stems from the varied composition of the Palestine Bar, with members (many of whom were Jewish immigrants from Europe) who came from many different legal cultures. Thus, despite the small size of the country and its Bar, one can find in Palestine almost the entire gamut of early twentieth century legal thought and scholarship, from the most rigid forms of formalism, typical of English law at the time, to exotic forms of central European sociology of law, as manifested, for example, in the legal thought of the German Free Law movement. These schools of legal thought found expression not only in the legal education system but also in a range of legal periodicals published by Jews and Arabs in Palestine.

There are studies that deal with the history of legal education in Palestine and with aspects of legal thought and scholarship as manifested in the legal literature. Thus we have studies that examine the legal thought of a group of Jewish scholars who, influenced by the German Historical School and the German Free Law movement, were intent on creating an autonomous legal system based on a revived version of Jewish law which was to replace the Ottoman-British government legal system.⁵² Another study examines the legal thought of a group of Palestinian Arab lawyers who contributed to the only Arab legal periodical in Palestine in the 1920s.⁵³

Other aspects of the history of the legal profession are less well-known. An "official" history of the Jewish Bar Association exists; however, it is based almost exclusively on oral interviews and is mostly anecdotal.⁵⁴ There are also a number of works written by or about Jewish lawyers in Palestine that can serve as a source of the history of the Palestine

Bar.⁵⁵ However, a non-anecdotal, social-history examination of the history of the Bar is still lacking. Such a study would discuss the composition, social origins, economic, and institutional aspects of the Bar and the various organizations related to it (such as the Jewish Bar Association or the Legal Council of the Government of Palestine). There is a need to study the position of the Bar in relation to economic and civil rights issues, as well as to the Jewish-Arab conflict. We know that Jewish lawyers represented Arab citizens. How widespread was this practice and what can we learn from it on the strength of the wall dividing the two communities?

As has already been noted, the governmental legal system was not the only system that existed in Palestine. There were a number of non-governmental legal systems, such as the Hebrew Courts of Arbitration. This system, which has recently been the subject of a number of studies,⁵⁶ was established and used mainly by the members of the urban Jewish middle class, and was based on a cultural-nationalist conception of law. Some aspects of another Jewish legal system, the Comrades' Courts, established by the Jewish labor movement and used mainly by Jewish workers in the towns and in the collective settlements, have also been studied.⁵⁷ Other semi-governmental and non-governmental legal systems have received less attention. Thus, there is no history of the work of the religious courts of the various religious communities (e.g., Shari'a courts, rabbinical courts or the courts of the various Christian denominations). We know little about other non-official Jewish courts such as the courts of the anti-Zionist ultra-orthodox community in Jerusalem. We also know little about the customary law court set up by the British to settle disputes among the Bedouins of the Negev, nor do we know much about dispute-settling bodies in the Arab villages of Palestine.⁵⁸

To sum up this brief survey of Mandatory legal history, it can be said that while a number of aspects of this legal history have been discussed, there are still wide gaps in our knowledge. Perhaps the largest gap relates to the Arab role in the legal history of Palestine. Like other fields of Mandatory historiography, the legal history of Palestine suffers from an imbalance in the amount of work devoted to the Jews and the British in Palestine, compared to histories dealing with the Arabs. There are studies that examine various aspects of the legal thought of the Arabs of Palestine,⁵⁹ but, generally speaking, we know far less about the Arab side of the story. This situation is partly due to objective obstacles – the British and Jewish archival materials are richer (and far more accessible, certainly to Israeli scholars) than Arab ones. Perhaps there are also more Israeli historians interested in the legal history of Mandatory Palestine than

Palestinian or Arab legal historians.⁶⁰ Whatever the reasons, it is certainly the case that the story of the legal system of Palestine cannot be fully told until the Arab side is more thoroughly studied.

In addition, many other aspects of the legal history of Mandatory Palestine deserve more attention: issues of gender and class, quantitative studies of legislation and case-law, works dealing with the case-law of the lower government courts, studies of popular conceptions of law and justice in Palestine, works on the Zionist attitude toward law and lawyers, and many other issues. Only when most of these issues have been studied can a comprehensive synthesis of the legal history of mandatory Palestine, to replace Malchi's outdated book, be written.

Post-1948 Historiography

On November 29, 1947, the United Nations voted in favor of the partition of Palestine. The resolution was accepted by the Jews and rejected by the Arabs. On the date of the expiration of the British Mandate, May 14, 1948, the State of Israel was proclaimed.⁶¹ The next day, seven Arab countries declared war on the State of Israel, joining the war that was already in progress between Palestine's Jewish and Arab communities. The military conflict was concluded in a series of cease-fire agreements that divided Mandatory Palestine among Israel (holding most of the territory), Jordan and Egypt. During and immediately after the conflict, the area witnessed large-scale movements of population which have been the subject of intense historiographical debate. Whereas before the war, 800-900,000 Arabs had lived in the territory incorporated into the State of Israel, by the end of 1949, only about 160,000 remained. By three years after the war, Israel's Jewish population had doubled in size with the arrival of approximately 700,000 immigrants.⁶²

Lawyers and legal historians in new nations of colonial origin usually devote much attention to the colonial and other sources of the new state law. In Israel too, this issue has received attention. Many of the political, military and social institutions of the new State had been developing for decades prior to independence, within the Zionist movement and the Jewish community (*Yishuv*) of Palestine. Legal institutions were not. An attempt to speed up legal preparation in the last few months of the Mandate was not completely successful.⁶³ Thus, at its inception, Israel did not have a national-Zionist legal system.

Several alternatives were considered: the adoption of a ready-made continental system, through the importation of continental codes; the intro-

duction of traditional Jewish law – possibly with some supplements – as the law of the new State; or the continuation of the Mandatory legal system. The first two alternatives, the continental and the Jewish, were rejected for reasons that were studied for the first time only recently, and that justify further study.⁶⁴ The third alternative, that of legal continuity, was adopted, partly because the other alternatives were not viable, and partly because of the vested interest of the legal profession in the existing legal order. Continuity meant not only that Mandatory legislation and judge-made law remained in force, but also that a linkage was maintained between the local and the English system for the purpose of interpretation and filling gaps; and, more generally, that the basic features of the Israeli legal system retained their common-law characteristics.

Israeli law, therefore, has complex formal and informal links to many legal systems, including those of its colonial ancestors (the Ottoman Empire and the British Mandate); to religious law (Jewish and Muslim); and to contemporary legal cultures (German, English and American). Scholars have explored this formal statutory linkage between Israel's legal system and other historical and living laws.⁶⁵ They have also discussed the sources of specific fields of law and chunks of doctrine: tort law, company law, land law, contract law or the adversarial procedure.⁶⁶ Recently, two new methods of research have been explored, one viewing daily practices: the actual reference to foreign and colonial sources by the courts;⁶⁷ and the other viewing large cultural structures: jurisprudential and intellectual influences on the Israeli legal system.⁶⁸

The substance of Israeli civil and commercial law was therefore based on that of Mandatory law – British, Colonial and Ottoman – until the 1960s, after which it gradually departed from these origins. In the 1960s and 1970s, it was influenced by continental doctrines and codificatory conceptions, and in the 1980s and 1990s, by more varied and eclectic sources, among which American sources gained importance. While Jewish law has been declared to be a formal source of Israeli law, its actual impact has been questioned.⁶⁹

As we have seen, continuity was a conventional and resource-saving alternative as far as private law, and possibly criminal law, were concerned. But constitutional law was a totally different matter. The constitutional framework of Mandatory Palestine could not support the independent state. The new State of Israel differed in several important respects from the colony: it was declared a Jewish state; it was established as a representative democracy; its demography was altered dramatically with the deportation and flight of Arabs who became refugees, and with massive Jewish

immigration from Europe and Arab countries; it was involved in an armed conflict with its neighboring countries. These and other changes forced the new state to face crucial constitutional decisions during the first few years after its establishment.

It is therefore not surprising that constitutional history occupied the attention of many early Israeli legal scholars. This preoccupation is typical of new nations. However, whereas in other nations much of the historical scholarship deals with the original intention of the framers of the constitution, because of its relevance to contemporary interpretations, in Israel, which has no codified written constitution, the original-intention type of writing is inapplicable. Much of the discussion, therefore, was on the form of the constitutional arrangement rather than on constitutional substance. The first questions dealt with by scholars were why Israel doesn't have a written constitution and what substitute compensated for this lack. Much has been written on the early drafts of a proposed constitution; on the Knesset, acting as a constitutional convention, in its debates over these drafts; on the compromise that resulted in abandoning the idea of a written constitution and replaced it with piecemeal legislation of basic laws; and on the enactment of the various basic laws.⁷⁰

Interest gradually turned from form to content. When this happened, rights received much more attention than institutions. Both judges and scholars fueled the official linear and progressive narrative of the development of judge-made rights, mainly political rights, from the 1950s to the present. This narrative, which served primarily as a tool of legitimization, has been questioned in recent years, and today appears much more complex. One approach to problematizing the narrative criticizes the linear story. The progressive-linear narrative emerged due to a projection back from the present. When the 1950s were studied, the year 1953 emerged as an important turning point toward judicial independence and activism.⁷¹ When the 1960s and 1970s were studied by Lahav, the mid-1960s emerged as an important turning point from activism to restraint in some Supreme Court justices.⁷² Another approach to problematizing the narrative was by separating Jews and Arabs and suggesting distinct narratives for the constitutional protection that each group received. Some argue that the progression of civil rights jurisprudence in Israel diffused also to the Arab population, though not with the same force.⁷³ Other critics argue that while the progressive story may fit the Supreme Court's attitude towards Jews, it does not fit its attitude towards Arabs.⁷⁴ Some go even further and argue that the Arab minority in Israel was better protected in the 1950s when the Court still used formalistic reasoning, than in the 1980s and 1990s when it

laid open its considerations on policy and values. Behind a neutral and scientific facade, the Court could protect the rights of Arabs without exposing itself to criticism from the executive branch, the military establishment or public opinion. Attempts at offering periodization of the rulings of the Supreme Court are still preliminary and tentative at this stage.⁷⁵ One can expect more schemes of periodization and much disagreement with respect to the history of rights jurisprudence in Israel to emerge.

The development of constitutional institutions has received very little attention from legal scholars. The fascinating story of the ad-hoc formation of the Knesset, the electoral system, the Presidency, the court system, the Bank of Israel and other institutions has not yet been told by legal historians.⁷⁶ Ill-addressed as well is the grand puzzle: Was following the British model of Parliamentary government, but not the British electoral system, based on a conscious decision or on chance, ad-hoc decisions or absent-mindedness? Some of the institutional history has been dealt with by political scientists, but these use different methodologies and are interested in other questions.

In the realm of both public and private law, judge-made law and primarily the Supreme Court, has received the lion's share of attention. No significant work has as yet been written about the lower courts. But the Execution of Judgments offices and debt collection mechanisms have recently been discovered and are the subject of several historical studies.⁷⁷ Parallel court systems, such as labor courts, military courts, and Muslim Shari'a courts have received no historical attention and the rabbinical court system only recently began to attract historians.⁷⁸ As mentioned above, while interest in non-state legal systems and courts is emerging among legal historians of Mandatory Palestine, this interest has not reached the post-1948 period. It appears, so far, that in the eyes of historians the newly-established State eclipsed the non-governmental systems.

Legislation is another neglected field of study. In this area, civil law codification was the favored topic of research. Controversial questions such as "Were its sources German in disguise or non-German?" and "Was the codification project advancing satisfactorily?" have been dealt with.⁷⁹ However, non-codificatory statutes have been practically ignored by legal historians. There is some logic in giving more attention to the judiciary, and in particular to the courts of last resort, in the history of a common law system. But, in a way, the focus of legal scholars in general, and specifically of legal historians, on the Supreme Court has reconstituted the role of that Court in Israel's legal history and presented the Israeli legal system as more of a common-law system.

Institutions and players other than the courts and the judges have received very little attention. There is no academic history of the Bar Association in the period since statehood.⁸⁰ While legal education during the Mandate period has received much recent attention, the history of the law schools and of legal education in general in the post 1948 period is still unstudied.⁸¹

While Israel inherited the structure of the Mandatory court system, it did not inherit the Mandatory judiciary. Because British judges held many seats on the higher echelon of the bench and Arab judges were numerous throughout the system, particularly in Arab regions, when the war broke out in early 1948, the court system ceased to function. British judges left, many Arab judges became refugees and courthouses were virtually locked. After independence, a new judiciary had to be formed for the Jewish State. The period between 1948 and 1953 was a formative period in which the nucleus of the Supreme Court brethren was formed. These individuals dominated the court until the 1970s. In terms of their ethnic background and political identity they were quite homogenous, but in other ways they varied considerably. The heterogeneity which characterized the early justices could be the subject of many biographies, but these are almost entirely lacking. Only a few autobiographies, interviews with Justices and festschrifts exist.⁸² And only one intellectual biography of a Supreme Court justice, Simon Agranat, has so far been published.⁸³ It exposes the potential of this genre in the Israeli context.⁸⁴ However, until more biographies are written, we will not be able appreciate the relative role played by other leading Justices such as Smoira, Olshan, Cheshin, Landau, Cohn and Sussman who sat on the bench with Agranat.⁸⁵ Even less is known about the lives and opinions of other players within the legal system, such as Justice Ministers, senior ministry officials, Attorney-Generals, lower court judges, and eminent lawyers and scholars.⁸⁶

The history the relationship of church and state and the cleavage between orthodox and secular Jews is a mainstay of Israeli historiography. Their legal history aspects have received much attention by political historians and lawyers.⁸⁷ The Arab-Israeli conflict is another much-studied aspect. Nevertheless, legal and other historians have until recently ignored the legal outcomes of the Arab-Israeli conflict, whether of the 1948 war, the border clashes in later years, or the military governance to which most Arabs in Israel were subject between 1948 and 1966. Two manifestations of the conflict have recently been identified as topics worthy of legal history research: the Palestinian refugees, some of whom are trying to return and acquire residence and citizenship; and the land which was taken from

Arabs, transferred to the State and the Jewish National Fund, and partly and selectively distributed among Jews. A major project by Kedar and a pioneering article by Bracha placed these aspects in a central position within the emerging critical narrative of Israel's development and of the role played by the Supreme Court in the formation of the State, its constitution and its legal system.⁸⁸ These works demonstrate the potential contribution of legal history to the historiographical debate as well as the shortcomings of historians who entirely ignore legal aspects of their research.

The central position occupied by the Arab-Israeli conflict and the religious chasm have left many types of historical writing – social, economic, cultural and intellectual – in the shadows. The Israeli historiographical debate has not expanded its horizons as a result of the rise of the new critical historians. To a great extent, these new historians selected topics for study on the basis of their political agenda: the desire to deal with the Arab-Israeli conflict and advance peace in the region. This frequently conveys the impression that many of the new historians, like many of the old ones, are primarily interested in military, political and diplomatic history.

Legal history has been able to interact with social and economic history much less than with political history because little social and economic history has been written. Recently, however, sociologists, geographers and other social scientists have shown increased interest in Israeli history, investigating issues of class, gender, sexual orientation and ethnicity. Legal historians are moving in the same direction. In fact, legal historians were among the leaders of the process that widened and changed the agenda of historical research. This role of legal historians in expanding the horizons of Israeli history should not come as a surprise. While most Israeli historians acquired their education in Israel, most Israeli legal historians acquired theirs abroad. This directly exposed them to new historical trends, topics and methods, and enabled them to function more as trail-blazers in various areas. Thus, the treatment of female victims by Israeli courts, legislation for women's equality, and the legal status of women in the family and the household has drawn attention.⁸⁹ The influence of Israel's land regime on class stratification and on the inequality between Jews of European origin and those of Middle Eastern origin has been investigated.⁹⁰ Economic policy, bankruptcy and creditor-debtor law, and the origins of the Israeli welfare state as it affects weaker segments of the population and minority groups are being studied.⁹¹ These are pioneering works. The field is immense and is likely to attract more legal historians in the future.

One cannot end a discussion of Israeli historiography without recognizing the immense role of the Holocaust on the development of Israeli legal

culture. The history of the Law of Return, The Law Against the Nazis and their Collaborators, the Reparation Agreement with the Federal Republic of Germany and its legal administration and related topics will make fascinating studies. In addition, studies of specific trials such as the Kastner or the Eichmann Trials have added a dimension of depth to this inquiry.⁹²

Where does legal history end and the discourse over current law begin? The answer to this question is not clear. Much of the literature discussed above and the essays included in this volume deal with the period before the 1967 Six-Day war. Does the paucity of studies on the post-1967 years bespeak an attempt to avoid dealing with the occupation of Arab territories? This does not seem to be the case. There is some historical work on the 1970s and 1980s, but, on the whole, this period is more often viewed as part of the contemporary debate and is treated by legal scholars and social scientists rather than by historians. Most historians do not deal with the last two or three decades, not only because other scholars do, but also because they feel that they lack the historical perspective and distance. It is likely that legal historians will gradually turn their attention to this period. Historians tend to identify historical works whose end point is the present as not “real” history, and thus as not respectable. They are reluctant to write about events in which the actors who took part are still alive and are likely to claim that they “know better” than the historians who “were not even there”.

Another important factor that explains the scarcity of historical research with respect to the last three decades is the timing of the opening of official archives. In Israel, there is a moving screen of 30 years (and with respect to some types of documents, 40 or 50 years). This means that recent history, from the 1970s on, cannot be based on archival research. As a result, the distinction between history and journalism or political science blurs, since much modern history can only be based on anecdotal sources, an analysis of published Supreme Court decisions, the Statute Books, and the media. The opening of the archives undoubtedly influences the periods and topics studied. Because military and diplomatic records are classified for periods longer than 30 years, historians and legal historians dealing with the Arab-Israeli conflict have much more limited access to archival records than do historians of other issues. Historians working on the courts, particularly the Supreme Court, face another problem. Records of in-chamber dialogue between justices, memos, draft opinions, and the like, are not even filed. This means that even when the archival records of the court are opened to public access, they include mostly material of an administrative and not a judicial nature.

A number of the issues discussed above have been touched on in the chapters that follow. The contributions to this book are summarized below.

Summary of the Chapters in the Book

The present book is the first collection of essays devoted almost exclusively to Israeli legal history.⁹³ It includes work by most of the currently active Israeli legal historians, as well as contributions by leading American legal historians. Following this introductory chapter, the book is divided into five thematic or periodic sections.

The first part, *Law under British Rule*, deals with the period of the British Mandate. It includes four articles. In the first, **David De Vries** writes about the Comrades' Courts, the internal disciplinary tribunal system of the Histadrut, the Jewish General Labor Federation, which was one of the main organizational foci of Palestine's growing Jewish community in the decades leading to Israeli independence. He takes account of materialistic and relational interpretations, which discuss the Histadrut's organizing of the economically weak, urban Jewish working class in the contexts of the Jewish-Arab conflict and of Labor-Zionism's place within the Jewish state-building project, as well as of the material realities of inter-ethnic class stratification in British-ruled Palestine. He demonstrates how Jewish labor's segregationist orientation, which aimed at effecting the position of Jewish immigrants and workers in the labor market, entailed the construction of Jewish labor as a moral community.

The second article in this section is by **Assaf Likhovski** who examines the impact of colonialist interests and nationalist ideology on legal education in Mandatory Palestine in the first half of the twentieth century. He surveys the curriculum and the concept of law and legal education in the two competing law schools that existed in Palestine at that time: a British law school and a nationalist one, established by Zionist lawyers. In the specific context of Mandatory Palestine, he argues, the two models of legal education that were espoused by the two schools were used to support the conflicting political aims of British colonialism and Jewish nationalism. British legal education in Palestine propagated an image of law as neutral, practical, technical and autonomous, because this legitimized British colonial practices such as the dominance of British judges and legislators in the legal system of Palestine, as well as the gradual Anglicization of the law of Palestine. Jewish legal education, on the other hand, advocated an academic, historical-sociological approach to the study and teaching of law

because such an approach legitimized the demands of the founders of the Jewish school for the creation of a new legal system in Palestine based on a secular version of ancient Jewish law.

In the next article, **Yoram Shachar** examines the unresolved duality between Jewishness and Democracy that was embedded in the heart of the legal “granting” of Palestine by the international community since the beginning of the century. The British Mandate was founded on the double promise of creating a national home for the Jewish people in Palestine, and of safeguarding the civil and religious rights of all the inhabitants of Palestine. Shachar believes that the inherent conflict between the two promises became the basic norm for the legal system of all ensuing political entities in Palestine, later the State of Israel. In his view, while the British did choose between the two promises – choosing a commitment to Zionism over one to Democracy (either as rights or as equality) – they refused to stand up in open court and account for their choice. The State of Israel chose to inherit the legal system of the Mandate intact, and so chose to inherit the dual promise but took a stand against retrospective re-evaluation and did not commit itself to the obligation that “no law, regulation or official action shall conflict or interfere” with the principle of equality. It was only in 1992 that Israel committed itself to being Jewish and Democratic by a Basic Law. As a result, according to Shachar, within the next decade the legal debate between Jewishness and Democracy will begin in earnest.

Finally, **Ronen Shamir** problematizes, through a Legal Pluralist perspective, the inevitability hypothesis regarding the adoption of British Colonial law by the independent State of Israel. He describes an attempt to construct a Zionist, community-based system of law in British-ruled Palestine, known as the Hebrew Law of Peace, that claimed to represent a viable alternative to British imposed state-law, asserted its authenticity as part of Jewish culture and Hebrew nationalism, and urged Zionists to resolve disputes without recourse to colonial law. Shamir describes how two social forces within the Jewish society of Mandatory Palestine, Zionist orthodoxy and the emerging Jewish legal profession of Palestine, came to oppose the Hebrew Law of Peace. Both played a role in legitimizing the law of the Colonial state and in turning the Hebrew Law of Peace into a forgotten episode in the history of Zionism in Palestine.

The second part of the book examines the *Israeli Supreme Court*. It consists of three articles. In her examination of the two ‘holocaust trials’ of early statehood, the trial of the victims (Kastner) and of the perpetrators (Eichmann), **Leora Bilsky** explains the role of the “acoustic wall” that was

constructed between them. She holds that the artificial separation between the trials obscured two important attempts to develop a new theory of judgment on the part of Justice Simon Agranat (in his Kastner decision) and German-American philosopher, Hannah Arendt (in her Eichmann report), that diverged in important respects from the prevailing views of their time. She compares their views about three central issues: method of judgment, objectivity in judgment, and interpretation of the law. Both believed that judgments must be situated in the relevant historical period, which Arendt referred to as “going visiting”. Forgoing the traditional view that judges can always judge objectively, both acknowledged the situatedness of the judge as an unavoidable element in reaching a fair judgment. And both viewed Eichmann’s crimes as ‘crimes against humanity’ rather than as ‘crimes against the Jewish people’. Bilsky holds that it is essential to read the two trials together in order to confront the difficult questions that the Holocaust poses.

In the next article, **Pnina Lahav** discusses her experience of writing the first judicial biography of an Israeli judge. Her book on the career of Chief Justice Simon Agranat, *Justice in Jerusalem* (Berkeley, 1997) was written before Israeli legal history gained recognition as an academic discipline and at a time when Israeli legal thought was dominated by formalism and positivism. Lahav discusses the interdisciplinary nature of biography writing and the rewards it offers to scholars interested in a contextual understanding of legal development. She then reviews the various primary sources she used in conducting research for her book, such as archives and interviews, and points to the benefits and pitfalls associated with each. Her essay concludes with reflection on two questions: First, whether it is at all possible for a biographer to “accurately” render the subject’s life, and secondly, whether one can resolve the tension inherent in biography writing, between sympathy and loyalty to the subject and the need to maintain a critical perspective.

Finally, **Menachem Mautner** examines the relationship between the culture of Israeli law, as embodied in the opinions of the Supreme Court of Israel, and the values of Israeli culture as a whole. He focuses on two crucial decades: the 1950s, the formative decade of Israeli law, and the 1980s, when the contents and style of the opinions of the Supreme Court underwent radical changes. During the earlier decade, the professional ideology of legal formalism and the style of legal reasoning that derived from it were crucial to the ability of the Supreme Court to make the political theory of liberalism the framework for the operation of Israel’s governmental branches and an important element in Israel’s political

culture. This was necessary in light of the hegemony of the Labor movement that was premised on control over the major institutions of the State and civil society, as well as over the central means of the production and propagation of culture. Mautner argues that the formalistic reasoning of the Court enabled it to conceal the liberal values underlying its opinions and rulings. In the 1980s, the Supreme Court adopted new, value-laden jurisprudence and activism. Mautner explains this change against the background of the cultural and political polarization of Israeli society following the disintegration of the hegemony of the Labor movement in the late 1970s and the opening up of the struggle over the shaping of Israeli culture. He associates the decline of the formalistic approach and the accentuation of the normative dimension of the law in the jurisprudence of the Court in the 1980s with the consolidation of support for the Court's liberal values in Israeli society and among its elite.

The next section, *Law and Power*, which includes three articles, views the interaction between class and ethnic interests, as well as between Zionist ideology and Israeli law. In the first article of this section, **Ron Harris** discusses the history of imprisonment for debt in Palestine and Israel throughout the twentieth century. While major Western legal systems had already abolished imprisonment for debt in the second half of the nineteenth century, in the Israeli system, it continued to be an important tool of the Execution of Judgment system until the end of the twentieth century. Through a close analysis of the history of this legal institution in Israel, Harris pursues themes of general importance in Israeli legal history, such as understanding the interaction between the Israeli legal system and other legal systems; how the discourse, views, interests and ways of thinking of the legal profession influenced the preservation of imprisonment for debt in Israeli law; the application of a class-based analysis to the development of the legal arrangement regarding the enforcement of obligations; and, finally, an understanding of the dialectical connection that exists between the law and the non-legal spheres, which situates the law in a position between functionalism and autonomy.

Yifat Holzman-Gazit addresses the Supreme Court's jurisprudence of land expropriation and the failure of the Court to intervene on behalf of private landowners in the 1950s. She argues that this judicial posture was shaped by social forces and perceived in terms of national security. She focuses on the paramount importance attributed to the issue of immigrant absorption in the public discourse that was reflected in the State's commitment to supply housing to all immigrants as well as the lack of ideological support for the institution of private land-ownership in the early

years of statehood. She comments on the land expropriation jurisprudence of the 1970s and points to the discrepancy between the Court's willingness to develop a 'judicial bill of rights' as regards non-property issues and its weak protection of property rights. Her explanation focuses on the social discourse of that period which was dominated by demands to provide housing to immigrants and to low-income groups.

Finally, as part of an investigation of how law shaped Israeli social and political space, **Sandy Kedar** analyzes land possession during the formative period of the Israeli land system from its creation after the Israeli War of Independence until its crystallization in the late 1960s. He analyzes the role played by the Israeli legal system in bringing about the transference and registration of ownership of land to the Jewish State, as part of the Zionist project of "redemption of the land." Against the background of the role of the legal system in the institutionalization of land regimes in ethnocratic settler societies, he gives an overview of land possession rules in the Ottoman and British Mandate periods, and a brief historical examination of ideological and legal aspects of the Jewish-Arab conflict over land in Palestine. In the context of land settlement in the northern Galilee, he describes how legal tools were crafted and used in ways that curtailed the likelihood of Arab possessors registering the land they possessed. Much of this curtailment was effectuated under the guise of modernizing antiquated law, of formalist jurisprudence, and of color-blind application of neutral legal norms. In addition, the gradual shifting of the burden of proof in settlement of title cases, and changes made to the law of adverse possession, successfully facilitated the transfer of land into the Jewish state. Kedar concludes by discussing the significance of these legal changes, and comparing them to the laws and administrative practices that evolved to address the needs of landholders in other sectors of Israeli society. Finally, he raises the question of whether the Israeli Supreme Court will take upon itself the difficult task of restructuring Israeli space in a more equal way in the future.

Part four, *A View from Within*, includes one article, by Professor **Aharon Barak**, Justice of the Supreme Court of Israel since 1978 and its Chief Justice since 1995. The article is based on the plenary address he gave at the opening session of the International Conference on Israeli Legal History, at which some of the essays collected in this volume were originally presented. Professor Barak discusses the challenges that face the budding discipline of Israeli legal history and the promise inherent in its subject-matter. He comments on the effects of legal history on the study of Israeli law, and suggests possible objects of study for Israeli legal historians.

The last section, *Perspectives from Abroad*, includes three articles, in which leading American legal historians comment on Israeli legal history and compare it to American legal history. In the first article, **William W. Fisher** chronicles the relationship, in the history of the United States, between property law and group power, as played out in the legal treatment of Native Americans, African slaves, and Mexican settlers in the American Southwest. He shows that this treatment was often clothed in self-justificatory arguments leavened with occasional self-critical statements; that these arguments sometimes had a restraining effect on the very institutionalized legal inequalities they were created to legitimate; that they have survived the projects for which they were first developed, and that they have subsequently helped shape American culture in ways that would have surprised their creators. Fisher concludes by raising the question of possible parallels between the American case and Israeli experience.

In the next article, **Lawrence Friedman** discusses similarities and differences between legal historical research in Israel and in the United States. He notes that Israeli legal history, though a young discipline, has joined the American legal history of most of the twentieth century in combating legal formalism, and in seeking to place law in its social and political context. He considers American legal history as it developed in the second half of the twentieth century, from Willard Hurst's demand that legal historians look at the living law, to the view that the ideological role of the law is legitimator of the status-quo. He then comments on the necessity for good legal historical work to be rigorous, noting that rigorous work in Israeli legal history, because it is so highly-charged politically, will inevitably go against the received wisdom of Israeli public opinion.

Finally, **Morton Horwitz** observes how political history and legal history of new nations pass through various evolutionary stages. Self-critical legal history emerges as part of critical and self-conscious political history and, by letting the facts speak for themselves, often highlights the empirical sources of legal and historical change. Horwitz shows how in Israel, the emergence of an anti-formalist jurisprudence appeared simultaneously with revisionist and post-Zionist political history critical of various founding myths and narratives. He defines anti-formalism as anti-internalist, anti-essentialist, dynamic, historicist and lacking objective causation and considers whether there is a uniform relationship between an anti-formalist ideology and movements for legal reform. Relating to Israel as a politicized society, he concludes that the formalist assumptions that are necessary to construct a rule of law ideology may be incompatible with modernist assumptions about the socially constructed character of law.

The book ends with a detailed bibliography which includes most of the significant work relating to different aspects of Israeli legal history.

Conclusion

Israeli legal history is a new and exciting field, which is gradually coming into its own. Some issues and periods are beginning to come into focus, while other topics remain practically untouched. We know little of the late Ottoman period, but we have a better sense of the Mandate period. We are beginning to have a sense of the formative period of Israel, the late 1940s and the 1950s, but the 1960s and 1970s are relatively untouched while the contemporary period is more thoroughly reported. The topics of research are also not uniformly covered. What characterizes the current state of writing is that many works critically examine various aspects of Israeli legal history. Some issues have taken precedence, such as questions concerning the history of constitutional law, the Jewish-Arab conflict, and the Holocaust. Other issues, such as the legal history of women, the religious and the ultra-orthodox, Oriental Jews, and sexual orientation, have scarcely been studied. Relatively little has been written on the history of civil law. Finally, while the Israeli Supreme Court and its justices have received some scrutiny, other courts and law agencies have remained relatively unexplored.

In spite of these as yet untouched areas, insights can be gained from the study of Israeli legal history which are important beyond Israel's borders. Israeli society is complex and culturally diverse. Like many other emerging post-colonial nations, it has undergone trials and tribulations in a short span of time. Law has played an important role in many of the pieces that together form the puzzle of Israeli history. We hope that those who read this book will benefit from the lessons that Israeli legal history has to offer.

Notes

¹ For other attempts to describe the historiography of Israeli legal history, see Pnina Lahav, "Israeli Legal Historiography: A Guide to the Curious," *Law and History* (2001); Pablo Lerner, "Legal History of Israel: Its Place in Law Studies," in *Israeli Reports to the XV International Congress of Comparative Law*, ed. A. M. Rabello (Jerusalem: Sacher Institute, 1999). See also Laura Kalman, "The Power of Biography," *Law and Social Inquiry* 23 (1998), 479-530.

² The term "legal" is also in need of definition: In this essay, we understand it in a wide, non-formalist sense which includes the working of courts and tribunals, legal culture, non-governmental and customary legal systems, etc.

- ³ Peter Novick, *That Noble Dream: The Objectivity Question and the American Historical Profession* (Cambridge Univ. Press, 1988), 16; Assaf Likhovski, "Between 'Mandate' and 'State': Rethinking the Periodization of Israeli Legal History," *Journal of Israeli History* 19 (1998): 5-34; Lerner, "Legal History of Israel".
- ⁴ Lawrence M. Friedman, "American Legal History: Past and Present," in *American Law and the Constitutional Order: Historical Perspectives*, ed. L. M. Friedman and H. N. Scheiber (Cambridge, MA: Harvard Univ. Press, 1978; enlarged ed. 1988), 464.
- ⁵ *Ibid.*, 2.
- ⁶ Robert Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984), 57.
- ⁷ Morton J. Horwitz, "Writing Legal History in a Post-Formalist World," this volume, 416.
- ⁸ Lawrence M. Friedman, "Legal History: Israel and the United States - Some Remarks," this volume, 407.
- ⁹ Lawrence J. Silberstein, *The Post-Zionism Debates: Knowledge and Power in Israeli Culture* (New York: Routledge, 1999); Uri Ram, *The Changing Agenda of Israeli Sociology: Theory, Ideology, and Identity* (Albany: SUNY, 1995); Benny Morris, "Refabricating 1948," *Journal of Palestine Studies* 27 (2): 84 (1998); Pinchas Ginossar and Avi Bareli, eds., *Zionism: A Contemporary Controversy* (Beer Sheva: Ben Gurion Univ. Press, 1996, Hebrew); Yoram Hazony, *The Jewish State: The Struggle for Israel's Soul* (New York: Basic Books, 2000); *History and Memory* 7 (Special issue, 1995). See also Lahav, "Israeli Legal Historiography".
- ¹⁰ Menachem Mautner, "Law and Culture in Israel: The 1950s and the 1980s," this volume. See also Assaf Likhovski, "Law Studies at the Hebrew University during the British Mandate Period," in *The History of the Hebrew University*, vol. 2, ed. H. Lavsky (Jerusalem: Magnes, 2001); Ronen Shamir, *The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine* (Cambridge Studies in Law and Society, Cambridge Univ. Press, 2000).
- ¹¹ See articles by Daniel Friedman, "The Effect of Foreign Law on the Law of Israel," *Israel Law Review* 10 (1975): 192; "Infusion of the Common Law into the Legal System of Israel," *Israel Law Review* 10 (1975): 324; "Independent Development of Israeli Law," *Israel Law Review* 10 (1975): 536-562. See also Shalev Ginossar, "Israel Law: Components and Trends," *Israel Law Review* 1 (1966): 380-395.
- ¹² Novick, *That Noble Dream*, 12. See, for example Gavriel Strasmann, *Wearing the Robes: A History of the Legal Profession until 1962* (Tel Aviv: The Israeli Bar Press, 1985, Hebrew); Alfred Witkon, "The Origins of Israeli Law," in *Law and Society* (Tel Aviv: Dvir, 1955, Hebrew); Paltiel Dickstein, *The History of the Hebrew Law of Peace* (Tel Aviv: Yavne, 1964, Hebrew). There is also a series of autobiographies of judges and practitioners; see, for example, Gad Frumkin, *The Way of a Judge in Jerusalem* (Tel Aviv: Dvir, 1954, Hebrew) and books in honor of distinguished judges and other jurists; for a list of these, see Bibliography, section 7 (Biography), this volume, 431.
- ¹³ See work by Pnina Lahav: "The Right to Know, Freedom to Publish and Official Secrets," *Mishpatim* 6 (1976): 562 (Hebrew); "Governmental Regulation of the Press: A Study of Israel's Press Ordinance," *Israel Law Review* 13 (1978) Part I: 230, Part II: 489; "American Influence on Israel's Jurisprudence of Free Speech," *Hastings Constitutional Law Quarterly* 9 (1981): 21; and "The Jurisprudence of Chief Justice Simon Agranat," in *Essays in Honor of Simon Agranat*, ed. R. Gavison and M. Kremnitzer (Jerusalem: n. p., 1986), 9 (Hebrew); as well as Yoram Shachar's, "The Sources of the Criminal Code Ordinance 1936," *Tel Aviv Univ. Law Review* 7 (1979):

- 75-113 (Hebrew); "Lawfully Raped?" *Tel Aviv Univ. Law Review* 8 (3): 649-694 (1982, Hebrew); "The Use of Deadly Force in Execution of the Law: Gold vs. The Attorney General in Historical Perspective," in *Essays in Honor of Simon Agranat*, ed. R. Gavison and M. Kremnitzer (Jerusalem: n. p., 1986, Hebrew); see also Elyakim Rubinstein, *Judges of the Land: On the Beginnings and Characteristics of the Supreme Court of Israel* (Jerusalem: Schocken, 1980, Hebrew).
- ¹⁴ Lawrence Friedman, "American Legal History: Past and Present," *Journal of Legal Education* 34 (1984): 564.
- ¹⁵ Pnina Lahav, "The Supreme Court of Israel: Formative Years, 1948-1955," *Studies in Zionism* 11 (1990): 45; also appeared in Hebrew in *Tel Aviv Univ. Law Review* 14 (1989): 479; Pnina Lahav, "The Intellectual Foundations of Civil Liberties in Israel," *Israel Law Review* 24 (1991), 1; also appeared in Hebrew in *Tel Aviv Univ. Law Review* 16 (1991): 475.
- ¹⁶ Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* (Tel Aviv: Ma'agalay Da'at, 1993, Hebrew). Menachem Mautner, "The Law School: Between the University, the Bar, and the Courts," in *Yearbook of Israeli Law 1992-1993* (Tel Aviv: The Israel Bar - Tel Aviv District, 1994), 1-46 (Hebrew). Others include Eli and Fania Salzberger, Orit Kamir, Asher Maoz and Leora Bilsky. See work by Leora Bilsky, "When Actor and Spectator Meet in the Courtroom: Reflections on Hanna Arendt's Concept of Judgment," *History and Memory* 8 (1996): 137-173; "The Kastner Trial," in *50 to 48: Critical Moments in the History of the State of Israel*, ed. A. Ophir (Jerusalem: The Van Leer Institute, 1999), 125-136 (Hebrew); "Breaking the Acoustic Wall between the Kastner and Eichmann Trials," this volume; "In a Different Voice: Nathan Alterman and Hannah Arendt on the Kastner and Eichmann Trials," *Theoretical Inquiries in Law* 1 (2000), 509-547; "Judging Evil in the Kastner Trial," *Law and History Review* 19 (forthcoming, 2001); "Performing the Past: The Politicization of the Holocaust in the Kastner Trial," in *Lethe's Law: Law, Ethics and Reconciliation* (forthcoming). See also Orit Kamir, "What's in a Woman's Name?" *Mishpatim* 27 (1996): 327-382 (Hebrew) and "The Declaration has Two Faces: The Interesting Story of the 'Zionist Declaration of Independence' and the 'Democratic Declaration of Independence,'" *Tel Aviv Univ. Law Review* 23 (2000): 473-539 (Hebrew); Asher Maoz, "Historical Adjudication: Courts of Law, Commissions of Inquiry, and 'Historical Truth,'" *Law and History Review* 18 (2000): 559-606; see also Eli Salzberger and Fania Oz-Salzberger, "The German Tradition of the Israeli Supreme Court," *Tel Aviv Univ. Law Review* 21 (1998): 259-294 (Hebrew); "The Hidden German Origins of the Israeli Supreme Court," in *Law and History*, ed. D. Gutwein and M. Mautner (Jerusalem: The Zalman Shazar Center for Jewish History, 1999), 357-394 (Hebrew); and "The Secret German Sources of the Israeli Supreme Court," *Israel Studies* 3 (2): 159-192 (1998).
- ¹⁷ See, e.g., Amnon Cohen and Elisheva Simon-Pikali, *Jews in the Moslem Religious Court: Society, Economy and Communal Organization in Sixteenth Century Documents from Ottoman Jerusalem* (Jerusalem: Yad Yitzhak Ben-Tzvi Press, 1993, Hebrew); Ya'acov Firestone, "The Land-Equalizing Musha Village: A Reassessment," in *Ottoman Palestine 1800-1914*, ed. G. Gilbar (Leiden: E. J. Brill, 1990), 91; Mahmoud Yazbak, "Jews Tried in the Muslim Court of Haifa in the Late Ottoman Period: A Study in Judicial Procedures and their Social Significance," in *Law and History*, ed. D. Gutwein and M. Mautner (Jerusalem: The Zalman Shazar Center for Jewish History, 1999), 147-163 (Hebrew).

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- ¹⁹ But see Haim Gerber, "A New Look at the Tanzimat: The Case of the Province of Jerusalem," in *Palestine in the Late Ottoman Period*, ed. D. Kushner (Jerusalem: Yad Yitzhak Ben Tzvi, 1986), 30.
- ²⁰ See, generally, Moshe Maoz, *Ottoman Reform in Syria and Palestine: The Impact of the Tanzimat on Politics and Society* (Oxford: Clarendon Press, 1968).
- ²¹ See Malchi, *The History of the Law*.
- ²² See Alexandre (Sandy) Kedar, "The Jewish State and the Arab Possessor, 1948-1967," this volume. In addition, there are a number of works written by lawyers that survey various aspects of Ottoman land law in Palestine. See, e.g., Moses Douchan, *The Land Laws in Israel* (Jerusalem, 1952, Hebrew); Leah Douchan-Landau, *The Zionist Companies for Land Purchase in Palestine 1897-1914* (Jerusalem: Yad Yitzhak Ben-Tzvi, 1979, Hebrew); Avraham Granot, *The Land System in Palestine: History and Structure* (London: Eyre & Spottiswoode, 1952); Aharon Ben Shemesh, *The Land Laws in the State of Israel* (Tel Aviv: Masada, 1953, Hebrew); Richard C. Tute, *The Ottoman Laws with a Commentary* (Jerusalem, 1927).
- ²³ See Kedar, "The Jewish State"; Alexandre (Sandy) Kedar, "Israeli Law and the Redemption of Arab Land, 1948-1969" (SJD, Harvard Univ. Law School, 1996); Mark Levine, "Conquest through Town-planning: the Case of Tel Aviv, 1921-48," *Journal of Palestine Studies* 27 (1998): 36.
- ²⁴ See David De Vries, "The National Construction of a Workers' Moral Community: Labor's Informal Justice in Early Mandate Palestine," this volume; Ronen Shamir, "The Hebrew Law of Peace: The Demise of Law-as-Culture in Early Mandate Palestine," this volume.
- ²⁵ Derek Jonathan Penslar, "Innovation and Revisionism in Israeli Historiography," *History and Memory* 7 (1995): 125, 126-131.
- ²⁶ See, e.g., Baruch Kimmerling, *Zionism and Territory: The Socio-Territorial Dimensions of Zionist Politics* (Berkeley: Univ. of California Press, 1983); Gershon Shafir, *Land, Labor and the Origins of the Israeli-Palestinian Conflict 1882-1914* (Cambridge Univ. Press, 1989); Uri Ram, *Israeli Society: Critical Perspectives* (Tel Aviv: Breyrot, 1993, Hebrew); Oren Yiftachel and Alexandre (Sandy) Kedar, "Landed Power: The Making of the Israeli Land Regime," *Theory and Criticism* 16 (2000): 67-100 (Hebrew); and the articles collected in Pinchas Ginossar and Avi Bareli, eds., *Zionism: A Contemporary Controversy* (Beer Sheva: Ben Gurion Univ. Press, 1996, Hebrew), especially the articles by Moshe Lissak, Ilan Pappé and Ran Aaronsohn. See, generally, Silberstein, *The Post-Zionism Debates*.
- ²⁷ See, e.g., Zachary Lockman, *Comrades and Enemies: Arab and Jewish Workers in Palestine, 1906-1948* (Berkeley: Univ. of California Press, 1996), 3-15; Baruch Kimmerling, "Academic History Caught in the Cross-Fire: The Case of Israeli-Jewish Historiography," *History and Memory* 7 (1995): 41, 53; David De Vries, *Idealism and Bureaucracy in 1920s Palestine: The Origins of 'Red Haifa'* (Tel Aviv: Hakibbutz Hameuchad, 1999, Hebrew); Jacob Metzger, *The Divided Economy of Mandatory Palestine*, vol. 11 (Cambridge Middle East Studies, Cambridge Univ. Press, 1998).

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- 28 See, e.g., Assaf Likhovski, "In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine," *Israel Law Review* 29 (1995): 291; Shamir, *The Colonies of Law*; Kedar, "The Jewish State"; Yiftachel and Kedar, "Landed Power"; Likhovski, "Between 'Mandate' and 'State'".
- 29 See, e.g. Malchi, *History of the Law*; Rachela Makover, *Government and Administration of Palestine 1917-1925* (Jerusalem: Yad Ben Tzvi, 1988).
- 30 See autobiographical works by Norman Bentwich, *A Wanderer in the Promised Land* (London: Soncino, 1932); *My Seventy-Seven Years: An Account of My Life and Times, 1883-1960* (London: Routledge and Paul Kegan, 1962); *Mandate Memories: 1918-1948* (Hogarth Press, London, 1965).
- 31 Bernard Wasserstein, *The British in Palestine: The Mandatory Government and the Arab Jewish Conflict 1917-1929*, 2nd ed. (Oxford: Blackwell, 1991).
- 32 Geoffrey Warren Furlonge, *Palestine is My Country: The Story of Musa Alami* (London: Murray, 1969).
- 33 Likhovski, "In Our Image".
- 34 Pnina Lahav, *Judgement in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (Berkeley: Univ. of California Press, 1997), 40-75.
- 35 See articles by Friedman, "The Effect of Foreign Law"; "Infusion of the Common Law"; "Independent Development". See also Ginossar, "Israel Law: Components and Trends".
- 36 Malchi, *History of the Law*; Eisenman, *Islamic Law*; Likhovski, "In Our Image".
- 37 For some discussion, see work by Assaf Likhovski, "The Invention of 'Hebrew Law' in Mandatory Palestine," *The American Journal of Comparative Law* 46 (1998): 339; "Law as a Site of Anglo-French Cultural Conflict in Mandatory Palestine" in *La France, l'Europe occidentale et la Palestine, 1917-1948*, ed. D. Trimbou (Paris: Mélanges du CRFJ, CNRS Éditions, forthcoming); Shamir, *The Colonies of Law*.
- 38 Of course, there are brief discussions of some of these areas in economic histories of the period. See, e.g., Abraham Mandel, *The History of Taxation in Palestine and Israel* (Jerusalem: The Tax Museum Press, 1968); Metzger, *The Divided Economy*.
- 39 Malchi, *History of the Law* (a description of the main constitutional texts of the Mandate period and a survey of some of the constitutional cases of the Supreme Court); Lahav, "Governmental Regulation of the Press"; Yoram Shachar, "The Dialectics of Zionism and Democracy in the Law of Mandatory Palestine," this volume (discusses the democratic and Jewish facets of the promises made in the Mandate for Palestine and in judicial review); Likhovski, "Between 'Mandate' and 'State'" (civil rights discourse in the case law of the Palestine Supreme Court in the 1940s).
- 40 Moshe Burstein, *Self-Government of the Jews in Palestine Since 1900* (Westport, CO: Hyperion Press, reprint edition, 1976) discusses the constitutional history of the elected assembly and the national council; Eliahu S. Likhovski, *Israel's Parliament: The Law of the Knesset* (Oxford: The Clarendon Press, 1971) relates to the constitutional history of the Zionist Organization and the Jewish Agency.
- 41 Norman Abrams, "Interpreting the Criminal Code Ordinance, 1936: The Untapped Well," *Israel Law Review* 7 (1972): 25-64; Shachar, "Sources of the Criminal Code Ordinance".
- 42 See, e.g., works by Yoram Shachar, "Lawfully Raped?"; "The Intention of the Legislator in Intentional Manslaughter," *Bar Ilan Univ. Law Review* 2 (1984): 204; "The Reasonable Person in Criminal Law," *Israel Bar Association Journal* 39 (1989): 78 (Hebrew).

- ⁴³ Martin Kolinsky, *Law, Order and Riots in Mandatory Palestine, 1928-35* (New York, St. Martin's Press, 1993).
- ⁴⁴ But see Likhovski "Between 'Mandate' and 'State'" (brief discussion of legislation regulating labor picketing); Mordechai Meroni, "Compulsory Arbitration: Eighty Years of Debate," *Yearbook of Labor Law* 1 (1989): 117-142; 2 (1991): 127-152 (Hebrew).
- ⁴⁵ Kenneth W. Stein, *The Land Question in Palestine, 1917-1939* (Chapel Hill, NC: Univ. of North Carolina Press, 1984) discusses property law; Naomi Shepherd, *Ploughing Sand: British Rule in Palestine 1917-1948* (London: John Murray, 1999), chapter 3 discusses both property and immigration law; Levine, "Conquest through Town-planning", 36; Martin Bunton, "The Role of Private Property in the British Administration of Palestine, 1917-36" (Ph.D. diss., Oxford Univ., 1998).
- ⁴⁶ Dov Gavish, *Land and Map: The Survey of Palestine 1920-1948* (Jerusalem: Yad Yizhak Ben Zvi, 1991).
- ⁴⁷ Kedar, "The Jewish State"; Kedar, "Israeli Law and the Redemption of Arab Land".
- ⁴⁸ Likhovski, "Between 'Mandate' and 'State'".
- ⁴⁹ Meroni, "Compulsory Arbitration".
- ⁵⁰ Ron Harris, "Legitimizing Imprisonment for Debt: Lawyers, Judges and Legislators," this volume.
- ⁵¹ Assaf Likhovski, "Colonialism, Nationalism and Legal Education: The Case of Mandatory Palestine," this volume; Likhovski, "Law Studies at the Hebrew University".
- ⁵² Likhovski, "The Invention of 'Hebrew Law'"; Likhovski, "Colonialism, Nationalism and Legal Education"; Shamir, *The Colonies of Law*.
- ⁵³ Likhovski, "Law as a Site of Anglo-French Conflict".
- ⁵⁴ Strasmann, *Wearing the Robes*. See also Shamir, *The Colonies of Law*.
- ⁵⁵ Horace Samuel, *Unholy Memories of the Holy Land* (London: L. & V. Woolf and the Hogarth Press, 1930); Yizhak Olshan, *Law and Reflection: A Memoir* (Jerusalem: Schocken, 1978, Hebrew); Aharon Barak and Chaim Berinson, eds., *The Berinson Book*, 2 vols. (Jerusalem: Nevo Publishers, 1997-2000, Hebrew); Ruth Bondi, *Felix: Pinchas Rosen and His Time* (Tel Aviv: Zmora-Bitan, 1990, Hebrew); Ari Enkorian, *Chapters of My Life, 1908-1986* (Tel Aviv: The Israeli Labor Movement Archive Press, 1986, Hebrew); Nathan Feinberg, *Chapters of My Life: Memoirs* (Jerusalem: Keter, 1985, Hebrew); Pinchas Rabinovitch, *Truth and Lies in Court: The Memoir of a Lawyer* (Jerusalem: Shashar, 1992, Hebrew); Tehila Ofer, *A Man of Vision and Action: The Life and Achievements of Prof. Shmuel Eisenstadt* (Petah Tikva: Havazelet, 1999, Hebrew).
- ⁵⁶ Shamir, *The Colonies of Law*; Likhovski, "The Invention of 'Hebrew Law'".
- ⁵⁷ De Vries, "The National Construction".
- ⁵⁸ On the administration of Arab villages in rural Palestine, see, generally, Ylana N. Miller, *Government and Society in Rural Palestine, 1920-1948* (Austin: Univ. of Texas Press, 1985).
- ⁵⁹ Likhovski, "Law as a Site of Anglo-French Conflict". See also Uri M. Kupferschmidt, *The Supreme Muslim Council: Islam Under the British Mandate for Palestine* (Leiden: E. J. Brill, 1987), a discussion of the supreme Muslim council which contains some information on the interaction of this body with the legislative mechanism of the Mandatory Government.
- ⁶⁰ For a general discussion of the reasons why the Palestinian side of the story has been less studied, see Beshara Doumani, "Rediscovering Ottoman Palestine: Writing Palestinians into History," *Journal of Palestine Studies* 21 (1992): 5, 18.

- ⁶¹ The definitive history of the proclamation is in progress: Yoram Shachar, *History of the Proclamation* (in progress). See also Kamir, "The Declaration has Two Faces"; Ruth Gavison, *Can Israel be both Jewish and Democratic? Tensions and Prospects* (Tel Aviv: The Van Leer Institute, Hakibbutz Hameuchad, 1999).
- ⁶² For a review of the population movements and the historiographical debate surrounding them, see Kedar, "The Jewish State," this volume, and references therein; and Lawrence Silberstein, "Reading Perspectives and Perspectives on Reading: An Introduction," in *New Perspectives on Israeli History: The Early Years of the State*, ed. L. Silberstein (New York Univ. Press, 1991), 3.
- ⁶³ Yehudit Karp, "The Legal Council: A Legislative Genesis," in *In Memoriam Uri Yadin*, vol. 2, ed. A. Barak and T. Spanic (Jerusalem: Bursi, 1990), 209-256 (Hebrew); Ron Harris, "Absent-Minded Misses and Historical Opportunities: Jewish Law, Israeli Law and the Establishment of the State of Israel," in *State and Religion in Israel, 1948-1967*, ed. M. Bar-On (forthcoming 2001, Hebrew).
- ⁶⁴ Likhovski, "Between 'Mandate' and 'State'"; Harris, "Absent-Minded Misses".
- ⁶⁵ See Friedman, "The Effect of Foreign Law", 192.
- ⁶⁶ See, for example, several of the articles in "Israel Law: Forty Years," *Israel Law Review* 24 (Special Issue, 1988).
- ⁶⁷ Yoram Shachar, Ron Harris, and Miron Gross, "Citation Practices of the Supreme Court: Quantitative Analyses," *Mishpatim* 27 (1996): 119-217 (Hebrew).
- ⁶⁸ Salzberger and Oz-Salzberger, "The German Tradition"; Lahav, "American Influence on Israel's Jurisprudence".
- ⁶⁹ For a recent discussion of the impact of Jewish law on Israeli law in recent decades, see Lerner, "Legal History of Israel," 21-26 and the references cited therein.
- ⁷⁰ Rubinstein and Medina, *The Constitutional Law*; Benjamin Akzin, *Political Regimes* (Jerusalem: Academon, 1977, Hebrew); Philippa Strum, "The Road Not Taken: Constitutional Non-Decision Making in 1948-1950, and its Impact on Civil Liberties in Israel," in *Israel: The First Decade of Independence*, ed. S. I. Troen and N. Lucas (Albany: SUNY, 1995), 83-104; Ruth Gavison, "The Controversy over Israel's Bill of Rights," *Israel Yearbook on Human Rights* 15 (1985): 113-154.
- ⁷¹ Lahav, "The Supreme Court of Israel: Formative Years".
- ⁷² Lahav, *Judgment in Jerusalem*.
- ⁷³ See Ilan Saban, "The Impact of Supreme Court on the Status of the Arabs in Israel," *Mishpat U Mimshal* 3 (1996): 541-569 (Hebrew).
- ⁷⁴ Kedar, *The Israeli State*; Kedar, "Israeli Law and the Redemption of Arab Land"; Oren Bracha, "Unfortunate or Perilous: The Infiltrators, the Law and the Supreme Court, 1948-1954," *Tel Aviv Univ. Law Review* 21 (1998): 333-385 (Hebrew); Lahav, *Judgment in Jerusalem*, 181-195.
- ⁷⁵ See David Kretzmer and Yitzhak Zamir, "Public Law," in *Israel Law Review* 24 (Special Issue, 1988): 341-367; Mautner, *The Decline of Formalism*; Ronen Shamir, "'Landmark Cases' and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice," *Law and Society Review* 24 (1990): 781-805; Ron Harris, "Israeli Law," in *The First Decade: 1948-1958*, ed. Z. Zameret and H. Yablonka (Jerusalem: Yad Yitzhak Ben-Tzvi, 1998), 243-262 (Hebrew).
- ⁷⁶ See Eliahu S. Likhovski, *Israel's Parliament*.
- ⁷⁷ Rafi Efrat, "The Evolution of Fresh-Start Policy in Israeli Bankruptcy Law," *Vanderbilt Journal of Transnational Law* 32 (1999): 49-114; Ron Harris, "The Fall and

- Rise of Imprisonment for Debt,” *Tel Aviv Univ. Law Review* 20 (1997): 439-503 (Hebrew); Lerner, “Legal History of Israel”.
- ⁷⁸ See works by Elimelech Westreich, “Medicine and Natural Science in the Rabbinical Courts of Israel,” *Mishpatim* 26 (1996): 425-493 (Hebrew); “The Jewish Woman’s Marital Status in Israel: Interactions among Various Traditions,” *Plilim* 7 (1998): 273-347 (Hebrew).
- ⁷⁹ Uri Yadin, “Toward the Codification of Civil Law in Israel,” *Tel Aviv Univ. Law Review* 6 (1979): 506-512 (Hebrew); Aharon Barak, “40 Years of Israeli Law: Torts and the Codification of Private Law,” *Israel Law Review* (Special Issue) 24 (1990): 628-650, also published in Hebrew in *Mishpatim* 19 (1990): 631-646; Menachem Mautner, “Standards in the New Civil Legislation,” *Mishpatim* 17 (1987): 321-352 (Hebrew); Miguel Deutsch, “The Structure of the New Israeli Civil Code: A Proposal,” *Mishpatim* 29 (1999): 587-622 (Hebrew); Daphne Barak-Erez, “Israeli Codification in the Perspective of Contract Law,” *Tel Aviv Univ. Law Review* 22 (1999): 793-818 (Hebrew).
- ⁸⁰ For a non-academic history of the legal profession, see Strasmann, *Wearing the Robes*.
- ⁸¹ One important exception that deals with more recent trends is Mautner, “Law and Culture in Israel,” this volume.
- ⁸² Michael Shashar, *Haim H. Cohn, Supreme Court Judge: Talks with Michael Shashar* (Jerusalem: Keter, 1989, Hebrew); Michal Smoira Cohn, *Personal Memoir* (Tel Aviv: Dvir, 1997); Alfred Witkon, *Justice and the Judiciary* (Jerusalem: Schocken, 1988, Hebrew); Olshan, *Law and Reflection*; Barak and Berinson, *The Berinson Book*.
- ⁸³ Lahav, *Judgment in Jerusalem*.
- ⁸⁴ See Pnina Lahav, “The Pains and Gains of Writing Biography: Reflections on Writing the Biography of Chief Justice Simon Agranat” and references therein, this volume; Laura Kalman, “The Power of Biography,” *Law and Social Inquiry* 23 (1998): 479-530.
- ⁸⁵ There is a collective biography of the first generation justices which mentions these justices, but it is more of a by-product of a book that focuses on the early history of the institution, and a starting point for biographical research. See Rubinstein, *Judges of the Land*.
- ⁸⁶ A non-academic biography of the first Minister of Justice is Bondi, *Felix: Pinchas Rosen and His Time*. A collection of essays and a diary of the head of the legislation department can be found in Barak and Spanic, *In Memoriam Uri Yadin*, and Yoram Shachar, “The Diary of Uri Yadin,” *Tel Aviv Univ. Law Review* 16 (1991): 537-558 (Hebrew). A book on the Attorney Generals: Yechiel Gutman, *A Storm in the General Secret Service: The Attorney General vs. the Government* (Tel Aviv Yedioth Achronot, 1995, Hebrew). Michael Keren, *Amnon Zichroni: A Different Lawyer* (Or Yehuda: Hed Arzi, 1999, Hebrew).
- ⁸⁷ Eliezer Don-Yehiya, *The Politics of Accommodation: Settling Conflicts of State and Religion in Israel* (Jerusalem: The Floersheimer Institute for Policy Studies, 1997, Hebrew); Menachem Friedman, “The Chronicle of the Status-Quo: Religion and State in Israel,” in *Transition from ‘Yishuv’ to State 1947-1949: Continuity and Change*, ed. V. Pilovsky (Haifa: The Herzl Institute for Research in Zionism, 1990), 47-80 (Hebrew).
- ⁸⁸ Yiftachel and Kedar, “Landed Power”; Kedar, “The Jewish State”; Bracha, “Unfortunate or Perilous”.

- ⁸⁹ See, for example: Pnina Lahav, "Conceptions of Sex Equality in the Debate over the Women's Rights Law," *Zmanim, Journal of History* 46-47 (1993): 149-159 (Hebrew); Kamir, "What's in a Woman's Name"; Leora Bilsky, "Battered Women, From 'Self Defense' to 'Defense of the Self'," *Plilim* 6 (1997): 5-64 (Hebrew).
- ⁹⁰ Kedar, "The Jewish State"; Yiftachel and Kedar, "Landed Power".
- ⁹¹ Ron Harris, 'Why was Imprisonment for Debt not Abolished during the Era of Labor Dominance?', in *Law and History*, ed. D. Gutwein and M. Mautner (Jerusalem: The Zalman Shazar Center for Jewish History, 1999), 423-440 (Hebrew).
- ⁹² Bilsky, "Breaking the Acoustic Wall"; Maoz, "Historical Adjudication"; Leora Bilsky, guest ed., *Theoretical Inquiries in Law* 2, Judging the Holocaust (2000); Lahav, "Israeli Legal Historiography".
- ⁹³ See Daniel Gutwein and Menachem Mautner, eds., *Law and History* (Jerusalem: The Zalman Shazar Center for Jewish History, 1999, Hebrew), a collection which is partly devoted to articles on Israeli legal history and partly to articles in other areas of legal history.

Historic first Israeli flight to Gulf kingdom. Israeli delegation heads to Bahrain to establish formal diplomatic relations. "For Bahrain, this is a historic day," Israeli official says ahead of departure of special El Al Flight 973; Jerusalem and Manama won't sign bilateral treaty but a Joint Communiqué. "This text is not a formal treaty in the legal sense, but rather a framework agreement," according to a senior Israeli official familiar with the details of the matter. "This is the way the Bahrainis go about establishing bilateral ties in recent years. As of Sunday's signing ceremony, Israel and Bahrain will have established formal diplomatic relations. It is currently unclear whether this document will be brought to the Israeli cabinet and/or the Knesset for approval.

"Israeli Legal History: Past and Present" in Ron Harris, Sandy Kedar, Pnina Lahav, Assaf Likhovski Eds. *The History of Law in a Multi-Cultural Society: Israel, 1917-1967* 1 " 34 (2002) with Alexandre (Sandy) Kedar, Assaf Likhovski and Pnina Lahav. This path-breaking collection of essays on the history of Israel from a legal perspective, brings together the work of many distinguished Israeli legal historians. It focuses primarily on the impact of colonialism, nationalism and socialism on the law of Palestine and Israel between 1917 and 1967 and the topics examined in detail include: the role of law in the shaping of mandatory society, law and the Israeli-Palestinian conflict, Israeli courts, the holocaust and the interaction of law and class in mandatory Palestine and Israel. 11 Furthermore, comparing India and Israel is important for methodological reasons. With respect to the first two issues, evidence indicates that the qadis have encouraged the curtailing of dower and promoted equitable maintenance payments to divorced women. With respect to the last two issues, evidence suggests that the qadis have been unwilling to abolish completely the practice of talaq and that women have yet to be given the same rights to inherit as men.