Dear Legal History Colloquium,

Thank you for reading this chapter of my dissertation-in-progress (tentatively entitled and always in search of a better one!), *The Making of a Postcolony: Law in Mandate Palestine and Israel, 1936-1967*.

My dissertation project is a history of the State of Israel’s efforts to both reject and embrace the legal system and culture of its British mandatory predecessor (1920-1948). The project tracks Israeli legal efforts to build upon British mandatory legislation and jurisprudence that enabled the state to control bodies and regulate market economies, while simultaneously trying to rid this foundation of its British colonial past. Having finally secured political independence as the formal British empire receded, how did Israelis use, reconstruct, and rationalize their British legal inheritance?

In placing Israel in the context of end of the British empire, decolonization, and the emergence of the postcolonial order, the dissertation seeks to make two overarching historiographic interventions. The first is directed toward the historiography of Israel/Palestine. To date, while scholarship has productively contextualized the legal history of Mandate Palestine within its many British imperial webs, this work almost always ends in 1948. Israeli nationalist scholarship has often fixated on an internal, often triumphant, narrative of the “state-in-the-making.” Critical histories focusing on Israel’s treatment of Palestinians cast 1948 as the moment in which British colonialism (nearly) seamlessly handed over the reins to its Zionist settler colonial heir. This latter assumption has also guided scholarship on the emergence of the postcolonial world: since Israel was quickly sidelined from—and, eventually, ostracized by—the most-visible international forums of the Afro-Asian bloc, the Third World, and the Global South, it must certainly lie outside of this history. Few scholars entertain the possibility that, having emerged with the termination of Mandate Palestine and as part of the broader dissolution of the British empire, Israel was as much a postcolonial state as a colonial (and national) one. My dissertation is thus a study of how Israel, and especially its legal system, developed in the shadows of empire. By looking at how Israelis wrestled with jurisdictional ideas, legislation and regulation, and legal doctrines that came of age during the mandatory era, my work traces Israelis’ efforts to make sense of law—and make it their own—as the tectonic plates of empire and post-empire collided.

The second intervention concerns the history of postcolonial legal orders writ large. A lot of recent scholarship elides the distinctions between national and indigenous resistance to colonial rule during the end of empire (anti-colonialism) with postcolonial statemaking—that is, with the formation of nascent state structures after formal colonial rule ended. A guiding assumption is that postcolonial states set out to break away from the inherited state and legal institutions given their previous anti-colonialism. Although it is often recognized that this did not occur—these nascent states often ended up adopting and adapting colonial institutions—this continuity is not central to many of these historical accounts. My dissertation seeks to bring the state—the colonial and postcolonial states—back into the center of the narrative. Israel, I believe, is especially useful in this regard. Particularly because the boundaries between the colonial and postcolonial state institutions and practices were so porous in Mandate Palestine and Israel, I use the case of Israel to elucidate the ways in which the end of the formal British empire did not spell the clear end to its legacies in postcolonial states.

The dissertation has three parts each with two chapters. I am still toying with the exact structure of the dissertation (whether to go entirely chronological or partially thematic and
partially chorological), but the chapter you are reading is in a part which focuses on questions of law, time, and jurisdiction. As you will see, this chapter looks at how Israeli legal actors understood their temporal relationship to the British Mandatory legal past. The second chapter in this part further examines this question by looking at Israeli debates about the fate of stare decisis. Another pair of chapters is focused on questions of territoriality, bodies, and liberty. That part examines British detention and expulsion policies and how Israel continued and altered these practices without ever having clear territorial boundaries. The third part focuses on questions of economic ordering and regulation, the market, and property. It studies British wartime economic regulation and confiscation and how Israel again adapted these policies as it charted its way toward a mixed economy.

Again, thank you so much for your time and comments!

Best,
Rafi Stern
Chapter 3
Constructing the Legal Past: Law in Mandate Palestine and Israel between Legal Continuity and Legal Reception

On May 19, 1948, the nascent Israeli Provisional State Council enacted its first piece of legislation, the 1948 Law and Administration Ordinance. Section 11 of the ordinance read:

The law which existed in Palestine on the 5th Iyar, 5708 (14th May, 1948) shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities.¹

Five days earlier, in the late afternoon of May 14, the Provisional State Council had issued a similar proclamation just after it had declared the establishment of the State of Israel.² Yet, given that the Declaration of the Establishment of the State of Israel announced that the Provisional State Council would begin its operations only several hours later at midnight between May 14 and 15—just as the British Mandate for Palestine expired—questions surrounded the legal force of this proclamation. Section 11 was thus partially intended to clear up any legal uncertainties.

New questions, however, immediately emerged. What exactly did the terms “the law” that “existed” in Palestine on May 14 “shall remain in force” mean? Did “law” equally apply to Mandate Palestine’s statutory laws and regulations, judicial decisions, and executive actions or did it only cover some? Even if these laws “existed” on May 14, did Section 11 have the power to keep them “in force”? Did they not disappear the moment the mandate expired leaving behind

no trace of their past existence or get packed up together with the rest of the British belongings and sent back to London or off to another colonial frontier? And, what of “remain in force”? Did Section 11 stitch together the seams of the legal past and present, rendering irrelevant any political change? Or did it breathe a new legal spirit into these laws at the instant that the mandatory one left them? Put another way, were Israeli laws on May 15 the same as those that existed the day before—given a legal continuity—or were they somehow different, notwithstanding that they shared the exact same text as their mandatory predecessors?

These were some of the questions that needed to be sorted through in the days and years after May 15. Elsewhere, I have shown that Israeli jurists were deeply concerned as to when Israel’s jurisdiction had commenced. Did the moment the clock struck midnight between May 14 and 15 bring a seamless transition from the mandatory period to that of Israeli statehood? On one view, expressed most emphatically in the first case heard by the newly constituted Israeli Supreme Court, the answer was yes. As the clock approached twelve, the “bare soul [*neshamah ‘artila’it*]” of the British administration in Palestine waited to “pass away” and be replaced by that of the Israeli sovereign. Concerns that there be no temporal vacuum separating the end of the British Mandate and the beginning of Israeli statehood informed this view. On a competing understanding, the end of May 14 was certainly important since it marked the end of the

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3 Rephael G. Stern, “Legal Liminalities: Conflicting Jurisdictional Claims in the Transition from British Mandate Palestine to the State of Israel,” *Comparative Studies in Society and History* 62, no. 2 (April 2020): 359–88. The current chapter rethinks part of the argument that I advanced in that article. There, I was satisfied with showing the paradoxical ways in which Israelis constructed a narrative about their jurisdiction. This chapter goes beyond that observation and takes seriously the differences between “legal continuity” and “legal reception” while also tracing how these two paradigms competed over time.


5 Moshe Sternberg, “Ha-normah ha-bsisit shel ha-mishpat be-yisrael,” *Ha-Praklit* 9 (1953), 129, 137.

6 In *Sylvester*, there was arguably such a temporal vacuum but the court did all that it could to retroactively read this out of existence. For the repeated significance that there not be any temporal vacuum see K. Vardi, “The Sources of Law in Israel,” *Ha-Praklit* vol. 7 no. 5 (May 1950), 392; S. Yehuda, “On the Theory of Professor Kelsen,” *Ha-Praklit* 11, no. 3 (June 1955), 272.
mandate. But Israeli sovereignty and jurisdiction might have commenced at an earlier date whether in the afternoon of May 14, on November 29, 1947, or at some even earlier point.⁷

Another chronologically-inflected legal question that accompanied this transition was whether Israel would assume the legal personality of Mandate Palestine. That is, in the realm of public international law, would Israel be recognized as the successor to Mandate Palestine with all of the accompanying obligations and rights? Here, Israelis unequivocally answered no.⁸ As the legal advisor to the Foreign Minister flatly stated, “The Government of Israel cannot accept ... that there has been a succession.”⁹ They did not see themselves as legally bound to the treaties, international commitments, and duties of the Mandatory state. If they were to accept any of these responsibilities, it would be through their own voluntary action and on their own terms.

But even if this was settled, what happened to the other sticks in the bundle of sovereignty and jurisdiction as Mandate Palestine came to an end and the State of Israel began its legal and political life? As this chapter shows, answering this question and making sense of Section 11 occupied political detainees languishing in makeshift cells, Palestinians fighting off the prospect of detainment and expulsion, and Israeli lawyers and judges in the chambers of their mandatory predecessors. Whether in fact they succeeded in coming up with a coherent understanding is questionable. Still, by observing how they grappled with these matters, we witness how the Israeli present conceived of the British mandatory past and its legacies.

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⁷ For the views that Israeli jurisdiction commenced on May 14 or November 29, 1947, see F. (Friedrich) Shlomo Perls “The Validity of Laws from the Mandate Period in the State of Israel,” Ha-Praklit vol. 6, no. 10-11-12 (Oct.-Nov.-Dec. 1949), 207. For May 15, see Moshe Sternberg, “Ha-normah ha-bsisit shel ha-mishpat be-yisrael,” Ha-Praklit 9, no. 2 (1953), 129, 137-38. For some earlier date, see Administrative Appeal (AdmA) 1/49, Zur Shipping Company Ltd. v. Attorney General, 4 PD 288 (1950).


⁹ Israel State Archive (henceforth ISA) G-12/5674, 23 May 1949, memo by Shabtai Rowson (Rosenne).
This chapter argues that between 1948 and the early 1960s there emerged two general understandings of the mandatory legal past and its relationship to the Israeli present. Moreover, divergent conceptualizations of the Israeli future often informed these two understandings.10

The first understanding will be referred to as legal continuity.11 This view saw the mandatory past and the Israeli present as distinct yet temporally adjoining political regimes—as contiguous. Running through these two contiguous entities was the legal system; the past and present of the law was uninterrupted. Yet, since the temporal boundaries between the regimes were, like their spatial counterparts, ever-shifting, it was never fully clear when the legal past ended and the legal present began. There was constant flux. The legal past tended to creep into the present, while the legal present could extend (backward) into the past.

That the mandatory past had not clearly passed was deeply unsettling to some. To be sure, some came to terms with this flux and even seemingly tried to use it to their benefit. Others, however, viewed it with great concern because they saw the mandatory past as constantly threatening to encroach on the Israeli legal present. It was as if Section 11 ensured that the laws of inertia applied: if mandate-era law would remain in force after May 15, so too would its accompanying vestiges of the past. It was thus necessary to halt the continued movement of the legal past into the present or at least cleanse the laws of the taint of their mandatory origins.

Here, the legal continuity created an opening for subduing the past. Israeli courts and legislators could re-examine and annul the mandatory legal past. At the very same time that they

10 This argument builds on Reinhart Koselleck’s notion that historical actors’ then-present expectations of the future (their “horizon of expectations”) influenced how they understood their present to relate to their past (their “space of experience”). Reinhart Koselleck, Futures Past: On the Semantics of Historical Time (New York: Columbia University Press, 2004); For a different application of Koselleck to Zionism and Israeli political thought see Eyal Chowers, The Political Philosophy of Zionism: Trading Jewish Words for an Hebraic Land (Cambridge; New York: Cambridge University Press, 2011).
11 This term (and the second term of legal reception) were used contemporaneously. I try to tease out their different temporal assumptions.
constructed May 14-15 as an important endpoint, they contended that May 14-15 did not unequivocally establish itself as a start date for the Israeli legal regime. That is, they argued that this transitional moment did not stop Israeli courts and legislators from re-examining the mandatory legal past. In order to ensure that the past not invade the present, a counteroffensive was needed whereby the present would infiltrate and undo the past.

Those who saw legal continuity as a weapon to use against the past often hoped that the Israeli present would quickly give way to a revolutionary future. The end goal was to create an Israeli legal system that reflected the national spirit—and to do so as quickly as possible. The obsession with the past was quite ironic. Divorcing the legal present from the past by undoing the latter’s effects complemented the attempts to accelerate the arrival of the future. The present could only move quickly into the future after it was unshackled from the past. Yet, in comparison to the other contending view of the legal present’s relationship with the mandatory past, those espousing legal continuity were far more engaged—even obsessed—with the past. Hastening the arrival of the legal future inadvertently required excavating and undermining the past.

The idea of legal continuity and its underlying concerns were prominent in the early years of the Israeli state. During this period, Israeli anti-British sentiments were at their height. What is more, legal continuity’s focus on which specific mandatory laws continued to be in force in Israel readily lent itself to this moment. Disputes that began in the mandatory period but remained unresolved further required engaging with particular moments from before May 15. The deep desire of some legal actors to excise despised vestiges of the mandatory past also fostered such an engagement. Finally, the yearning that a revolutionary legal future would

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promptly arrive saturated much of the legal and political discourse. Legal continuity’s grappling with specific aspects of the past was especially conducive to these impulses.

Over time, a second understanding of the Israeli present’s relationship with the mandatory past emerged. Like some of those who espoused legal continuity, those who adopted this view accepted the fact that the mandatory legal past was the foundation of the Israeli legal present. Since this view put much weight on the idea that Israel “received” the mandatory past, we will refer to it as legal reception. The idea of legal reception was a longstanding orthodox paradigm through which the diffusion and transfer of the common law had occurred throughout the British empire, including in Mandate Palestine.13 Section 11, on this conception, was akin to a reception statute: it was a legal expression of the new Israeli sovereign regarding the nature of the nascent Israeli legal system. Although any given Israeli law might have been identical in form to one “which existed” on May 14, 1948, the two were distinct entities. This was because they had come into existence—and continued to operate—by dint of different sovereign forces: whereas mandate-era law derived its effect from British sovereignty (however understood), Israeli law acquired its force from Israeli sovereignty.

In contrast to advocates of legal continuity who sought to undo this past, those promoting legal reception strove to build on it. They, too, viewed the legal past as relevant and grappled with understanding which parts of mandate-era law and English common law and statutory law Israel had in fact been “received.” Yet, on their view, the past no longer needed to be overcome; it could be subsumed into the present. This understanding was first and foremost a result of the

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fact that the present had become increasingly distant from the past. Israel’s rapprochement with Britain in the mid-1950s—capped by their collaboration in the 1956 Suez War—also certainly lessened many of the earlier anxieties of those who embraced legal continuity.¹⁴

Complementing this more detached and static conception of the relationship between the legal past and present was a similarly stable idea of the future’s connection to the present. For adherents of legal reception, the Israeli legal present would gradually lead to an ideal future. The future would be brought about by evolution, not revolution. That this was a process that would take time lessened anxieties about the ostensible persistence of the past. It was not only that Section 11 demarcated the legal present off from the past, it was also that any persisting linkages and resemblances between the two systems could be gradually undone. Once the urgency of arriving at the future waned, the persistence of the past became less disconcerting.

In examining this legal discourse, this chapter takes up Robert Gordon’s call to take legal “internalism” seriously. At least for jurists, law provided a lens through which to understand the world. Or, as Gordon memorably put it, “the power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.”¹⁵ For Israeli jurists, this world was one that emerged in the wake of British Mandate Palestine. It was a post-mandatory world. Yet, exactly what this meant was not clear. More specifically, this chapter argues that existing accounts concerned with questions of continuities and discontinuities that marked the transition from Mandate Palestine to the State of

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Israel do not adequately capture how Israeli jurists grappled with their position in time and their relationship to the past. They did not simply seek to resolve the question of “continuity” or “discontinuity.” They accepted that the present was connected to the past, but they grappled with the nature and meaning of this connection. While both legal continuity and legal reception recognized this linkage, they parted ways when it came describing the texture of the present’s connection to the past. Ultimately, this chapter contributes to my dissertation’s larger aim of excavating what it meant for Israel and Israeli law to be products of the end of empire.

This chapter also complicates existing Israeli legal historiography’s emphasis on the Supreme Court’s formalism during its formative period. Operating from the assumption that law was an autonomous sphere insulated from political, normative, and distributive forces, goes the argument, the court stressed the legal system’s inner logic and its autonomy. Deductive reasoning, attentiveness to statutory and regulatory language, the judiciary’s self-declared inability to make law but only interpret it, an emphasis on adhering to precedent. These were some of the most salient features of Israeli jurisprudence at its outset. Whether this stemmed from English or German formalism, law’s suspect position in Zionist-cum-Israeli culture, the national and collectivist proclivities of the judges themselves, or the state’s broader efforts to

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17 This discussion parallels the general Zionist temporal struggles with the Jewish past. But, here, too there is a relative scholarly complacency when it comes to describing how Zionism related to its Jewish past. Too much stress has been placed on questions of “continuity” and “discontinuity,” while not enough attention has been given to how historical actors tried to mediate the present’s relationship to the past (and future). See, for instance, David Vital, “Zionism as Revolution? Zionism as Rebellion?,” Modern Judaism 18, no. 3 (1998): 205–15; Chowers, The Political Philosophy of Zionism; Amnon Raz-Krakotzkin, “Ha-Shiva El Ha-Historia Shel Ha-Geulah—o: Mahi ‘Ha-Historia’ She Aleha Mitbatzaat ‘Ha-Shiva,’ Be-Bitui ‘Ha-Shiva El Ha-Historia’?,” in Ha-Tzioniot ve-Hahazara Le-Historia: Ha-Aracha Me-Hadash, ed. Shmuel Noah Eisenstadt and Moshe Lissak (Jerusalem: Yad-Yitzhak Ben Zvi, 1999), 249–77; Michael Walzer, The Paradox of Liberation: Secular Revolutions and Religious Counterrevolutions (New Haven: Yale University Press, 2015).
transform the public into a citizenry are questions that have preoccupied historiography. While this chapter does not directly question this scholarship it emphasizes that formalism was never the whole story. It could not be. Grappling with the beforetimes of Israel and trying to delineate the temporal boundaries of Israeli statehood meant that, no matter how hard the judges tried, they needed to actively define the very contours of the autonomous sphere. It required them to construct a formalist system. And, even when they created such a system that ostensibly divorced law from politics, they needed to constantly engage with the mandatory past and the nature of its effect on the present. Even if formalism emerged as a dominant paradigm in Israeli jurisprudence, this chapter shows how it not only needed to be carved out and repeatedly protected, but also how it cemented the Israeli legal system as a post-mandatory creation.

Finally, this chapter uses the history of Israeli efforts to articulate the relationship between the legal past and present as a case study in the jurisprudence of regime change. New legal and constitutional systems have been perennially occupied by their relationship to their predecessors. Whether in fact a new regime enjoys legal or constitutional legitimacy or, at least, dominance has often revolved around the fate of its predecessor. But even in instances in which the past regime has undeniably given way to the new one, important questions about the legal and constitutional past persist. At times, new regimes have sought to paper over the question of the fate of the past legal system by engaging in wholesale denials of their predecessors’ legal and constitutional orders. On other occasions, they have been forced to grapple with their

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20 At the twilight of the Soviet Union, the Estonian legislature pronounced that all political acts emerging out of the 1940 Russian invasion and occupation of Estonia had been illegal and that, notwithstanding the passage of fifty years, the 1938 Estonian Constitution and the Republic of Estonia had continued to exist. See Kay and Colón-Ríos,
predecessors—and their relationship thereto. Jason Mazzone and Cem Tecimer have recently noted that this phenomenon is widespread in constitutional interpretation; courts interpreting new constitutions routinely look to antecedent ones as guides.\(^2\) Especially intriguing is their observation that this “interconstitutionalism” occurs not only in instances in which new constitutions are cast as merely amending their predecessors, but also in situations in which they are part and parcel of efforts to “repudiate[] prior regime[s,]” such as in post-Nazi West Germany and post-Apartheid South Africa.\(^2\) As this chapter shows, at least in Israel, this engagement with the legal past was not limited to interpretive questions; it forced jurists to continuously reckon with the meaning of constituting—founding—the Israeli polity.

In earlier and contemporaneous regime changes in common law jurisdictions there was far less uncertainty as to whether legal reception or legal continuity had occurred. It was generally understood that in most American colonies-cum-states legal reception carried the day. When the Virginia Convention enacted a law in 1776 stipulating that “the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of king James the first, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force…shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony,” contemporaries understood this to be an act of legal

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3; See also Benjamin Frommer, National Cleansing: Retribution against Nazi Collaborators in Postwar Czechoslovakia (Cambridge ; New York: Cambridge University Press, 2005), 79; Peter Novick, The Resistance Versus Vichy: The Purge of Collaborators in Liberated France (London: Chatto & Windus, 1968), chap. 8 See also post-WWI Poland and a case in which the Polish Supreme Court held that Poland had continued to exist since the third partition of 1795 and that the law of the land was Polish law rather than laws of Austria, Prussia, or Russia. Republic (Poland) v. Felsenstadt, 1 International Law Reports 33 (1922) (Pol.).


reception. Even as Virginian courts remained deeply loyal to the common law jurisprudence that had developed up until 1776, St. George Tucker argued that English legal principles “founded on the nature of regal government” and “inconsistent with the nature and principles of democratic governments” were to be “absolutely abrogated, repealed, and annulled.” The 1776 law, in other words, served as a barrier past which these laws did not continue. The advent of independence also unshackled Virginian courts from being bound by post-1776 English precedents. Although future English judicial decisions would undoubtedly “long continue to be respected in Virginia,” wrote Tucker, 1776 “separat[ed] us from Great Britain forever, [and] put an end to the authority of any future decisions or opinions of her judges and sages of the law in the courts of this Commonwealth.” A similar notion of legal reception occurred in other American jurisdiction which embraced the revisal-and-repeal method (in which new statutes based on and revising existing English statutes were passed and then the English ones were repealed). So too in Ireland in 1937, South Africa in , India, and Pakistan: all of these systems

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23 2 Stat. of May 1776, c. 5, § 6, in W. W. Hening, Statutes at Large of Virginia, vol. 9 (Richmond: Printed for the editor, 1819), 127.


25 St. George Tucker, Blackstone's Commentaries, vol. 5, p. 436, n. 1 quoted in J. Thomas Wren, “The Common Law of England in Virginia from 1776 to 1830,” in Ratio Decidendi: Guiding Principles of Judicial Decisions, eds. W. Hamilton Bryson and Serge Dauchy (Berlin: Duncker & Humblot, 2006), 156. The transformation in the understanding of the common law between the late eighteenth century and the mid-twentieth is an important difference that needs to be noted. The pre-positivist conception of law as existing independent of judicial pronouncements—what American Supreme Court Justice Oliver Wendell Holmes later derisively termed, as the view that the common law was a “brooding omnipresence in the sky”—certainly informed late eighteenth century discussions of common law. It was thus far less clear, even on a legal reception paradigm, that post-1776 British common law decisions should not be authoritative. After all, these common law decisions could be seen as transcending national boundaries. By the mid-twentieth century, positivist understandings of law made this view far less tenable.

achieved a form of legal and constitutional autochthony whereby they received colonial-era laws but broke their constitutional linkage and “legal continuity” with the British Crown.²⁷

By contrast, legal continuity was the norm in Australia, Canada, and New Zealand (at least initially). Even after attaining political independence, these “well-behaved” Dominions remained constitutionally subservient to the Westminster Parliament. They all remained connected to the constitutional umbilical cord of the metropole: their constitutions derived their legitimacy and supremacy over other laws from the fact that they were products of the British parliament. What is more, when these entities sought to attain formal constitutional independence, they all had to grapple with the question of how to break their linkage to the metropole and create a new *grundnorm*—they needed to engage in a “disguised revolution.”²⁸

Whether Israel’s linkage to its mandatory legal past fit the mold of legal continuity or legal reception was far less obvious. Unlike in the United States, Israel did not declare independence *from* the British empire. Given that the British Mandate for Palestine terminated at midnight between May 14 and 15, there was nothing for Israel to break away from.²⁹ Whereas Americans sought to retain colonial laws yet remove their British imprimatur, Israelis did not

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²⁷ For the quote see K. C. Wheare, *The Constitutional Structure of the Commonwealth* (Oxford: Clarendon Press, 1960), 94. See also 35-36 and chap. 4. The Irish case is of particular interest. British and Irish politicians and lawyers disagreed over whether the Irish Free State (1922-1937) had continued or received British law. British politicians argued that the Free State was an instance of legal continuity—and continued to be subordinate to British Parliament. Irish lawyers and politicians, on the other hand, framed the constitution as breaking British parliamentary sovereignty. These disagreements continued until the Constitution of Eire was passed in 1937. This constitution was universally understood to have “caused a break in Irish constitutional history” and constitute an act of legal reception. See Wheare, 89-94; A similar shift occurred in India (though arguably not in Pakistan). The constitution promulgated in 1947 (the Indian Independence Act of 1947 which determined that India should continue to be governed under the arrangements set forth in the 1935 Government of India Act) was seen as characterized by legal continuity, while that passed in 1950 (by the Constituent Assembly) was understood as defined by legal reception. See Wheare, 94-103; see also Shivprasad Swaminathan, “India’s Benign Constitutional Revolution,” *The Hindu*, January 25, 2013, https://www.thehindu.com/todays-paper/tp-opinion/indias-benign-constitutional-revolution/article4346617.ece.


clearly need to do so. The British had seemingly abdicated from Palestine; there was no need for an Israeli revolution. On the flipside, it was far from clear whether Section 11 was an act of legal continuity. In other cases of legal continuity, the Westminster Parliament was the body that granted political independence while retaining legal and constitutional supremacy. Section 11, however, was not a *British* pronouncement; it was an Israeli one. These ambiguities, in turn, created a jurisprudential space in which these different paradigms vied with one another.

The chapter is structured as follows. Part I examines the early manifestation of legal continuity and legal reception in the Israeli High Court of Justice’s first habeas case, *Kook v. Minister of Defense of the Provisional Government of the State of Israel*. In this highly scrutinized case, the court grappled with the question of the relationship between the legal past and present as it was asked to determine the legality of a much-reviled mandate-era regulation. Although the court rejected the habeas petition and affirmed the legality of the regulations by a 2-1 majority, each of the three judges put forth a different view of the meaning of Section 11 and the place of mandatory law in the nascent state. One of the majority views and the dissenting view both expressed variations on legal continuity. Whereas the former ostensibly accepted the continuity, the latter was deeply disturbed by it. Meanwhile, the other majority opinion put forth an early view of legal reception.

Part II details how legal continuity gained ground in the early years of Israeli statehood. It also explores the continuing tensions between those proponents of legal continuity who were less outwardly disturbed by the continuing influence of the mandatory past and those who were increasingly perturbed. It first looks at the habeas case of *Al-Karbutli v. Minister of Defense*. It then studies a number of non-habeas cases in the early 1950s, in which the Israeli Supreme Court
adopted a view of legal continuity and increasingly sought to tame and cleanse the past in order to create a clear—though perhaps never clear enough—break with the present.

Part III then looks at the rise of legal reception. It shows that as time passed and Israeli lawyers and jurists gained increasing distance from the mandatory period and 1948, the idea of legal reception began to gain prominence. Evolutionary thinking about legal change replaced the perceived urgent need to upend the past.

Part I

The mandatory past cast a long shadow over the Israeli High Court of Justice as it sat to hear its first case in the summer of 1948. But the contours of the shadow’s penumbras were far from clear. Continuities abounded: the three Jewish judges presiding over the case had all previously sat on the Tel Aviv District Court during the mandate period; the attorneys had all practiced during the mandate years; even one of the petitioners had previously been detained by state authorities under Regulation 111 of the Defence (Emergency) Regulations, the constitutionality of which would take center stage in the subsequent proceedings.

30 Chief Judge Natan Bardaky, Judge Shlomo Kassan, and Judge Shneor Zalman Cheshin were the three judges who heard the initial stage of the case. After Cheshin was elevated to the Supreme Court, Judge Max Kantrovich replaced him. Shani Shnitzer and Yoram Shachar, “Bagatz be-Tel Aviv: Metziut halufit amitit,” *Iyune Mishpat* 43 (2020), 137-69.

31 *Note to NYU Legal History Colloquium Readers:* I discuss these Regulations at length in another chapter. Here is the text of the provisions relevant to the present discussion:

111—(1) A Military Commander may by order direct that any person shall be detained for any period not exceeding one year in such place of detention as may be specified by the Military Commander in the order.

(2) ...

(3) Any person in respect of whom an order has been made by the Military Commander under subregulation (1) may be arrested by any member of His Majesty’s forces or of the Police Force and conveyed to the place of detention specified in such order.

(4) For the purposes of this regulation, there shall be one or more advisory committees consisting of persons appointed by the High Commissioner, and the chairman of any such committee shall be a person who holds or has held high judicial office or is or has been a senior officer of the Government. The functions of any such committee shall be to consider, and make recommendations to the Military Commander with respect to, any objections against any order under this regulation which are duly made to the committee by the person to whom the order relates.
Much had changed, however. Whereas in Mandate Palestine, it was the Jerusalem-based Supreme Court that sat as the High Court, now the Tel Aviv District Court housed the recently-(re)constituted High Court of Justice. What is more, as the court sat to hear its first case, Kook v. Minister of Defense of the Provisional Government of the State of Israel, it itself faced a present and future that were far different from those of its predecessor. In addition to the court’s lack of institutional independence—the Israeli judges could be removed at will (some were)—the ongoing “total war” weighed heavily in any judicial decision. As soldiers and civilian sacrificed their lives for the nascent state, it was almost inconceivable that the court would rule in a manner that would tie the hands of governmental and military authorities. This was especially the case in Kook since the defendants at the bar were Hillel Kook and Winirisky. Kook, also known as Peter Bergson, and Winirisky had been detained by the Israeli Defense Forces (IDF) in late June. The two, who had long been prominent members of the paramilitary organization Etzel, had been detained for their involvement in the notorious Altalena affair.

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32 It was only in late 1948 after much of the war’s fighting had slowed down and after much internal Israeli wrangling, that the Israeli Supreme Court was established and assumed the duties of the High Court of Justice. Yair Sagy, “ha-Samkhut ve-ha-reshut; ‘al hakamat bet ha-mishpat ha-‘elyon be-medina Yisra’el,” Mishpatim 44 (2018), 34-35; Shnitzer and Shachar.


35 Kook alleged that he had been detained on June 21, while the Court stated that it seems that he was detained the day after. Meridor was detained on June 22.

36 Note to NYU Legal History Colloquium Readers: The Altalena was a ship that along with some 900 Jewish immigrants was carrying munitions and arms intended for the paramilitary organization Etzel during the 1948 Israeli-Arab War. The nascent Israeli Defense Forces bombed this boat in June 1948 after the Etzel leadership refused to agree to handing over these weapons to the centralized Jewish military authorities. Nineteen people, all Jews, were killed in the bombing and related intra-Jewish combat. The incident became (and remains) a particularly controversial and painful event in Israeli national public memory. Three other members of the Etzel were also detained, but no habeas petitions were submitted on their behalf. See “I.Z.L Agreement Renewed,” Palestine Post, 7.5.1948, 1. Much has been written about the Altalena affair. For one work see Uri Brener, Altalenaḥ: mehkar medini ve-tsevai (Tel-Aviv: Makhon Tabenkin le-heker ve-limud ha-kibuts: ha-Kibuts ha-mehudah, 1978).
This perceived frontal challenge to the shaky sovereignty and supremacy of the nascent Israeli government and the IDF made it all the more unfathomable for the court to find in favor of the defendants. Even if the court ordered that the defendants be released from custody, it was not guaranteed that the government would comply. The court’s relative powerlessness from an institutional perspective counseled in favor of finding for the government.

At the heart of the case was the question of whether Regulations 6(5) and 111 of the Defence (Emergency) Regulations, 1945 with which Kook and Winirisky had been detained were still legal in Israel. On July 8, a day after Kook’s brother submitted a habeas petition, the court issued an order nisi to the Ministers of Defense, Interior, and Police of the Provisional Israeli Government, the Inspector General of the Police, and the Chief-of-Staff and Chief Prosecutor of the Israeli Defense Forces asking why they should not bring Kook to the court and have him released. In a sworn affidavit, the Acting Chief-of-Staff of the IDF, Zvi Ayalon, stated that it was necessary to detain Kook and Winirisky since they had participated in activities that were “an attack on the sovereignty of the State of Israel, armed opposition to the Provisional Israeli government and to the forces of the Israeli Defense Forces, and an injury to the discipline and capacity of the IDF” and had previously engaged in violent and subversive activities. Detaining the two was an act of mercy. There was proof that they were guilty of “treason [begida ba-moledet],” but instead of charging them in criminal proceedings Ayalon decided to “relieve them” and order that they only be detained.

In an accompanying legal memorandum, Attorney General Yaacov Shapira argued that the detainment was legal since Section 11 of the 1948 Law and Administration Ordinance

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37 Kook, 311.
38 Ibid., 312.
provided for a mechanical form of legal continuity. It extended the validity of mandatory laws in
effect on May 14, including Regulations 6(5) and 111 of the Defence (Emergency) Regulation,
1945. So long as Ayalon adhered to the listed regulatory requirements he had the power to detain
any and all individuals. Seeing as Ayalon had gone above and beyond these requirements,
Shapira argued that the detainment under Regulation 111 was entirely legal.

Kook and his attorneys challenged the continued validity of the Defence (Emergency)
Regulations, 1945 in toto.40 There were at least two versions of this claim. In his brief recounting
of Kook’s claims, Tel Aviv District Court Chief Judge Natan Bardaky depicted the argument as
following the same basic mechanical script that Shapira had used. On this argument, prior to any
application of Section 11 to the mandate-era regulations, an inquiry was needed into whether the
regulations in fact “existed” on May 14, 1948. In Bardaky’s recounting, Kook argued that they
did not: since the regulations were ultra vires the League of Nations Mandate for Palestine they
did not legally “exist” on May 14 and Section 11 did not extend them into the post-May 15
period. A second version of this claim, expressed in a written statement by Kook, was far less
fixated on the constitutional (in)validity of the 1945 Regulations and more concerned with their
supposed ephemerality.41 The regulations did not exist on May 14 since “they were not part of
the Palestinian law.” It was less that they violated the terms of the mandate that was dispositive
and more that several characteristics of the regulations themselves mattered. Since the

40 They made a number of other claims as well. In addition to a slew of procedural defects in the detainment of
Kook, they argued that Ayalon, as the Commander-in-Chief of the Israeli Defense Forces, lacked powers to detain
individual under Regulation 111 of the Defence (Emergency) Regulation, 1945. On this line of argumentation, they
conceded the possibility that the Defense (Emergency) Regulation, 1945 were in fact legal valid in Israel by virtue
of Section 11 of the Law and Administration Ordinance, 1948. But, they stressed, the Commander-in-Chief of the
Israeli Defense Forces did not inherit the power to operate under Regulation 111 since the Law and Administration
Ordinance, 1948 did not confer upon him the powers previously in the hand of the British General Officer
Commanding (or any military commander). This omission in the Law and Administration Ordinance, 1948 was
intentional, they further argued, since other provisions in the Ordinance explicitly granted powers previously held by
other British officials to Israeli officeholders.
41 Jabotinsky Archives H13-3-47-7 “H. Hillel Kook’s Affidavit to the Court of High Justice”
regulations had been promulgated by the High Commissioner in his role as the General Commander of the military in the country—and not in his role as legislator—they could not be considered to be part of the law of Palestine. Rather, they were British imperial laws that had simply been used in Palestine. Moreover, given that they intended to deal with an emergency, they had a built-in temporariness and customized nature to them. As such, “they automatically lost their validity with the cancelation of the British emergency and the British military’s departure from the country” and did not qualify as law which “existed in Palestine” on May 14, 1948. Even if they were still “on the books” on May 14, they could not be brought back to life. Since they had been created to deal with the emergency that the British had declared in 1945, when that emergency expired they did as well. They could not be redeployed to deal with a separate emergency in 1948.

These contending understandings and imageries of law’s life and death animated the three opinions issued by the High Court of Justice. While Chief Judge Bardaky and Judge Kantrovich agreed on the legality of Kook’s detainment, they put forth different views on the underlying reasons for finding that the 1945 Regulations were still in effect in Israel. Their dissenting colleague, Judge Kassan, offered his own understanding of why the Regulations were invalid. Interestingly, it was Bardaky and Kassan who adopted early versions of the view of legal continuity. Both evinced the idea that Mandate Palestine and Israel were not simply temporally contiguous, but that their legal systems were one. By contrast, Kantrovich made a case for legal distinction. Although he did not use verbiage that would later be employed by those espousing the idea of legal reception, his description of the nature of law and Section 11 captured this idea.

For Bardaky, the law of Mandate Palestine, whether its statutory law or judicial pronouncements, passed into Israel in an authoritative and uninterrupted manner. Section 11 was
the keystone linking mandate-era law to Israeli law. Aside from those laws explicitly listed in Section 13 of the 1948 Law and Administration Ordinance, all law that existed on May 14 continued to operate in Israel by virtue of Section 11. The Israeli Provisional legislature had so decided. For this “simple reason,” the 1945 Regulations clearly continued to operate in Israel.

Kook’s claims regarding the unconstitutionality of the 1945 Regulations (given that they violated the terms of the mandate) could not be accepted. Seeing that the mandatory High Court had “decided on different occasions that these regulations are legal (*intra vires*),” it was incumbent upon the Israeli judiciary to accept these determinations. “We are bound [*kfutot*] to the interpretation that the then-highest court in the country gave them,” wrote Bardaky. The mandatory legal past—and the tag team of statutory and regulatory provisions and judicial interpretations—unequivocally dictated the terms of the present.42

Bardaky conceded that this view was unlikely to appeal to many. But there was no viable alternative. Here his views of the relationship between the past and present and present and future came through most clearly. The *Yishuv* (the Jewish community in Palestine), he recognized, had despised the 1945 Regulations. Many had decried the regulations as not only precluding temporal progress, but leading to a regression in time—as “returning us to a medieval regime.”43 It was certainly upsetting that the High Court of Justice would not stop the Provisional State Council from adopting these regulations. But doing otherwise, he underscored, would bring about even more backwardness. Aside from elevating the rule of emotion over the rule of law, giving into present impulses would destroy the separation of powers, “the primary and vital cornerstone of the modern concept of governance—even before the dissemination of

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42 Kook, 317.
43 Ibid., 316.
Montesquieu’s theory.” This would result in a “disastrous and unpredictable” regime of judicial caprice. It was necessary for the Israeli High Court to remain bound to the interpretation that the mandatory High Court had given to the 1945 Regulations. No matter how repugnant the past was at the moment, it needed to have a grip on the present lest lawlessness ensue. For Bardaky, even if quickly bringing about a radically different legal future was not plausible at the moment, it was crucial to ensure that the present not be engulfed by the distant past.

One can only speculate as to why Bardaky arrived at this argument. Perhaps his personal experience of political and governmental change swayed him to accept legal continuity. Like many other urban middle- and upper-class Palestinian Jews, Bardaky by all indications had once embraced his political identity as an Ottoman citizen. Born in 1895 in Ottoman Jerusalem to a prominent Ashkenazi family, he moved to Istanbul in 1910 to study law only to pause his studies and enlist in the Ottoman military during World War One. While the war brought about the formal end of the Ottoman empire, its legacy—not the least its legal one—persisted in the years after 1918. Bardaky for one returned to Istanbul after the war to complete his studies. When he moved back to Palestine in 1925, the British Mandate was already three years old. Since the mandatory government decline to replace Ottoman law in one fell swoop and instead retained the vast majority of the existent legal system, Bardaky’s knowledge of the Mejelle (the Ottoman Civil Code issued in the late nineteenth century) proved expedient. After a stint as a prosecutor in the Tel-Aviv District, he was appointed a magistrate judge and then elevated to the district

44 Ibid., 314.
46 Michelle Campos, etc.
47 “Natan Bar-Zakai Z”L: The First Chief Judge of the Tel-Aviv District Court,” Ma’ariv, 11.11.1990.
court in Jerusalem. In late 1947, he was made the acting chief judge of the Tel Aviv district court, the position he continued to hold when he heard Kook.\(^49\) Having lived through one transition marked by nominal legal continuity, it was likely quite natural to Bardaky that a similar dynamic would shape the present moment. His perceived Anglophilia—at least within certain governmental circles—and the fact that his professional fate as a mandatory judge well-versed in Ottoman law hinged on legal continuity also certainly informed his views.\(^50\)

While Bardaky cast his determination that he was bound to the mandatory legal past as all but inevitable, he actually elided at least two important matters in reaching this conclusion. These, in turn, offer a glimpse of his reaction to the legal continuity that defined the temporal relationship between Mandate Palestine and Israel.

For one, his claim that the mandatory High Court had settled the questions surrounding the constitutionality of Regulation 111 of the 1945 Regulations was misleading. None of the mandatory cases that he cited actually dealt with whether the 1945 Regulations were constitutional under the terms of the League of Nations mandate. That there were no cases was unsurprising: Mandatory courts had longed ignored the League of Nations mandate unless its provisions had been incorporated into the 1922 Palestine Order-in-Council or its amendments.\(^51\) All of the precedents that he cited simply showed that the 1945 Regulations were \textit{intra vires} the 1937 Order-in-Council.\(^52\) But this begged the question—and avoided addressing Kook’s

\(^{49}\) Brun, \textit{Mishpat, yetsarim u-folitikah: shoftim u-mishpetanim be-sof ha-mandat uve-reshit ha-medinah [Law, Passions and Politics: Judges and Lawyers Between the British Mandate and the State of Israel]}, 150.

\(^{50}\) In a secret memo evaluating Jewish judges who served in the mandatory judiciary issued on the eve of independence, the following was written about Bardaky: “Suspected of being susceptible to influences. Also negative from a jurisprudential perspective.” What these terms meant was not stated. Brun, 325.


\(^{52}\) HC 24/46 Sakai v. District Commissioner, Galilee District 13 PLR 216 (1946); HC 47/46 Salah v. Acting District Commissioner, Samaria District 13 PLR 317 (1946); HC 147/46 Funt v. Chief Secretary and others 13 PLR 594 (1946); HC 24/47 Funt v. Chief Secretary and others 14 PLR 76 (1947). He also cited HC 43/46 El Farra v. Chairman and Members of the Electoral Committee of Khan Yunis 13 PLR 336 (1946), but this case did not even deal the 1945 Regulations, let alone the League of Nations Mandate.
argument—of whether the 1937 Order-in-Council was constitutional under the League of Nations mandate. Bardaky was thus either misleading the litigants or affirming the previously widely-contested mandatory view that the League of Nations mandate was not of constitutional significance on its own.

That Bardaky was selective in drawing on the mandatory legal past—and claiming that he was bound thereto—was even clearer when it came to his discussion of Regulation 111(4). Regulation 111(4) required detaining authorities to afford a detainee the opportunity to appear before an advisory committee. Ayalon conceded that he had failed to do so since an advisory committee had not yet been convened at the time. Bardaky excused this failure. But in so doing, he disregarded the Palestine High Court’s previous ruling on the matter. In Steindler (discussed in a previous chapter of the dissertation), the Palestine High Court held that the failure to afford a detainee an opportunity to appear before an advisory committee was grounds for issuing a writ.53 Even while Steindler concerned the 1939 Regulations, there was little room to argue that a failure to grant a detainee the chance to stand before an advisory committee was not fatal to the 1945 Regulations. The language of Regulation 111 of the Defence (Emergency) Regulations, 1945 made this even clearer: “For the purposes of this regulation, there shall be one or more advisory committees consisting of persons appointed by the High Commissioner….“ By reading out the obligatory “shall” from the regulatory language, Bardaky not only failed to remain faithful to the text of the regulation, he also effectively departed from mandatory precedent.

Bardaky’s selective representations of the legal past belied his contention that the Israeli judiciary needed to mechanically apply established law to the present case. Although he professed to set aside his “own personal views of these regulations,” he clearly viewed the

mandatory legal past as a reservoir from which he could selectively draw on to make expedient present decisions. One such decision was finding for the Minister of Defense in the present case. Put another way, rather than being *obliged* by a mechanical jurisprudence to find that Kook’s detention was legal, Bardaky *used* the law to reach this desired conclusion. That he would side with the government in this case is unsurprising. As mentioned above, the ongoing war and the lack of judiciary’s institutional power made such a conclusion all but inevitable.

What is more interesting, however, is that he explicitly predicated his reasoning on the purportedly binding decisions of the Palestine High Court. Doing so was certainly appealing insofar as it removed part of the burden of upholding the legality of these widely-reviled regulations from the Israeli court. It was the Palestine Supreme Court and the Israeli Provisional legislature, via Section 11, that did the legal footwork. The Israeli High Court was, on this view, unable to nullify the laws—or even re-examine whether they were *ultra vires* the Mandate.

Attributing the current decision to the Palestine Supreme Court’s jurisprudence also had the potential benefit of gaining institutional power—and not just avoiding a further blow to the current absence thereof. On this reading, Bardaky adopted a longstanding judicial strategy of accruing power in the face of the more powerful legislative and executive branches. The early American case of *Madison v. Marbury*, in which Chief Justice Marshall found for the executive yet also espoused the principle of judicial (constitutional) review of federal law, is the most famous of such instances.54 Bardaky’s opinion could be read as trying to smuggle in the judicial powers of the mandatory courts into Israel in the same way. By specifically siding with the government and rejecting Kook’s habeas petition—a strategy of “judicial deferral” whereby he ensured that the government would have no way of contesting his decision and reasoning at the

54 5 US 137 (1803).
present moment—Bardaky created the space to extend his recognition of the mandatory 
judiciary’s power to make constitutional pronouncements to the Israeli judiciary. That is, he 
swapped a minor preference (the question of the legality of Kook’s detainment) for a major one 
(the court’s institutional power). Even if this move did not work in the long-run, it highlighted 
how Bardaky viewed the past as a basin from which to draw on in construing the legal present. 
Whether it was regulatory language or judicial opinions, Bardaky saw these past legal 
pronouncements as directly relevant to the present. If there was a line dividing the mandatory 
legal past from the Israeli legal present, it was not a clear one. The past continued into the 
present.

In dissent, Judge Kassan also put forth an idea of legal continuity. Whereas Bardaky saw legal continuity as potentially offering cover for—if not, empowering—an otherwise weak 
judiciary, Kassan approached it with a deep anxiety and sense of urgency. Born in 1902 in 
Ottoman Jerusalem, Kassan (formerly Kazarnovsky) graduated from the British-run Law Classes 
in the city in 1928. After a stint studying law at the University of Chicago and working in 
private practice in Jerusalem, he was appointed a magistrate judge in Haifa. In an early decision, 
he departed from the Palestine Supreme Court’s precedent of refusing to grant damages for 
personal injuries on the grounds that they were not provided for in the Mejelle. Instead, and 
relying on two recent precedents of the Privy Council whose legal pronouncements superseded 
those of the Palestine Supreme Court, he ruled that English tort principles should “enrich” the 
law of Palestine. This willingness to depart from Palestine Supreme Court decisions—as well

57 “Damages for Personal Injuries,” The Palestine Post, 4.11.1937.
as his readiness to turn to Privy Council judgements—also came through clearly in his decision in Kook.

For Kassan, the 1945 Regulations were flatly unconstitutional and Kook’s detainment was illegal. The 1945 Regulations, he emphatically stated, violated the terms of the League of Nations mandate and were thus unconstitutional. Recall that Bardaky had marshalled cases that built on the Palestine Supreme Court’s determination that the League of Nations mandate was only binding insofar as it had been incorporated into the 1922 Palestine Order-in-Council. Kassan contested this premise: The Privy Council had determined that the League of Nations mandate was legally binding irrespective of whether it was incorporated into the Order-in-Council. In its landmark 1925 Urtas Spring decision, it had held that “it was not simply the right of the court in Palestine to assess the extent to which legislation in question was in conformance with the mandate or in contradiction to it, but it was also its duty.” Bardaky’s reliance on the Palestine Supreme Court’s subsequent abdication of this responsibility was beside the point. Seeing as the Palestine courts had evaded their responsibility, Kassan viewed it as his “his duty” to correct the past and examine whether the emergency regulations “were in the spirit of the mandate or not.” Without any equivocation, he determined that they were not. The regulations had “one sole goal”: “to freeze the construction of a national home.” This was in clear violation of Article 2 of the League of Nations mandate, which made the British Mandate for Palestine responsible for placing Palestine “under such political, administrative and economic conditions as will secure the establishment of the Jewish national home.” Striking down the regulations, Kassan concluded, was thus necessary as a matter of internal mandate-era law.

58 PCA 98/25 District Governor, Jerusalem-Jaffa District v Murra, 1 PLR 71 (1926).
59 Kook, 323.
The Israeli legal present also required doing so. In addition to directing attention to the fact that the *Yishuv* had reacted with such vitriol to these regulations—and that maintaining them would be nothing less than hypocritical—Kassan argued that Section 11 required the court to invalidate the regulations. The period in which questioning mandatory legal decisions was considered heretical “passed and is no longer.” But this, by no means, meant that the past was settled. On the contrary, given Section 11’s instructions, it was necessary to excavate the past to determine whether these regulations in fact “existed” on May 14 in order to remain in force thereafter. For Kassan, the answer was no: they could not be said to have “existed.” In order to “exist” these laws had to be “valid and in existence [*sharir ve-kayam*].” Even if the 1945 Regulations existed in a platonic sense, they were not substantive law since they violated the mandate and were unconstitutional. It was, thus, “the duty of honor for this court in Israel to erase and uproot them.” Only by reaching back into the past and uprooting the 1945 Regulations would the Israeli courts be able to retrieve the honor of the judiciary that the mandatory courts had failed to protect.

Uprooting the 1945 Regulations was also needed in order to bring about a desired legal future. For all of Bardaky’s warnings about the possible tyranny that would ensue should the judiciary make law, Kassan saw the present situation as clearly counseling in favor of judicial action. This was “a time of regime change,” he exclaimed. There was no time to waste. It was against his “conscience” to feign ignorance and act like these clearly unconstitutional regulations were constitutional simply because the “new regime”—the Israeli Provisional State Council—had yet time to annul them. Waiting for the Israeli Provisional State Council to act was not an

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60 Ibid., 324.
61 Ibid., 325.
62 Ibid., 324.
63 Ibid., 325.
option. It was also not its intention. “It is possible,” he wrote, “that we will be told that common
sense dictates that now is not the time to be picky about the legality of government actions, given
that our state it only a few weeks old. But I am not in agreement with this view.” The leaders of
the *Yishuv*, many of whom were now members of the Provisional State Council, had declared
these regulations illegal “immediately after they had been published.” What is more, by
establishing the High Court of Justice at the “outset of its operation,” the Provisional State
Council had clearly indicated that it welcomed judicial action, including invalidating
unconstitutional laws even before it found the time to do so. The High Court of Justice thus
needed to be a “partner in creating law.”64 Taking the lead and invalidating the 1945 Regulations
would also not strip the legislature or the executive of the powers that it needed in this moment
of ongoing war. Section 9 of the Law and Administration Ordinance 1948 empowered the
provisional government to issue new emergency regulations that were “appropriate for the
defense of the state, the liberty of the citizen, and the assurance of public safety in Israel.”65 Not
only would undoing the past not impair the present, it would speed up the arrival of a future that
was cleansed of mandatory law.

Although Kassan’s indignation separated him from Bardaky, the two shared a view of
legal continuity. May 14-15 was certainly significant insofar as it marked a transfer of the reins
of jurisdiction and sovereignty. But it by no means constituted a clear temporal or legal
boundary. There was no discussion of May 14-15 being a Zero Hour. Instead, the past bled into
the present and the present could reach back into the past. For all of the debate as to whether the
past was a spring from which the legal present could draw upon or one that needed to be purified
in order for the present to proceed, it undoubtedly continued into and informed the present.

64 Ibid., 324.
65 Ibid., 326.
This view of the relationship between the past and the present stood in stark contrast to that of Judge Max Kantrovich. Born in London in 1907, Kantrovich (later, Kennet) moved to Palestine with his parents in 1919. After studying law at the government-run Law Classes, working in the civil service as a clerk, interpreter and, eventually, magistrate judge, he was appointed a district judge in 1947. Viewed by Israeli leadership as a “good judge” having a legal “understanding and logic,” he was a forerunner of the idea of legal reception. Even though he did not use the term “reception” (or the Hebrew term klita), he embraced a view that saw the past uses and abuses of mandatory-cum-Israeli laws and regulations—and the ensuing questions of their past constitutionality—as being of little relevance. The past, for him, had more clearly passed.

Kantrovich’s choice of metaphorical language to describe mandatory-cum-Israeli law was crucial for his argument. He distinguished between any given law or regulation’s “existence” and “body,” on the one hand, and its “validity” and “head,” on the other. Just as a body could exist but not continue to live without its head (or its soul), so too a law could exist yet not be constitutionally valid without being attached to a proper constitutional source. This was a particularly Kelsenian view of law—that is, a view in which a legal system was founded on a grundnorm from which all other legal norms and laws derived their ultimate legitimacy. While any given law could have a corporeal existence, it needed to be attached to and derived from a grundnorm in order to function as law.

On Kantrovich’s view, it was clear that the 1945 Regulations were valid. They possessed both a “body” and a proper constitutional “head.” Their body “existed” on May 14 as required by

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67 Kantrovich offered two bases for denying the habeas petition. The second one tracked the one advanced by Bardaky. I will thus focus on the first one, which also offered a different temporal understanding of the past and present.
Section 11. They had been produced through the formal mechanisms of promulgation: they were constitutionally promulgated under the 1922 Order-in-Council, which in turn had been passed under the British Crown’s power to legislate for Palestine given that it was under its mandatory rule. They were thus a physical “body” of law on May 14, 1948. Responding to Kook, who had argued that the 1945 Emergency Regulations were not part of Palestinian law (since they were enacted through emergency laws), Kantrovich cited a Mandatory Supreme Court case which stated that “the Emergency Regulations are the substantive law of this country, and their application does not depend on the continuance of otherwise of what were euphemistically called ‘disturbances.’” Furthermore, while Kook had argued that the 1945 Regulations were fleeting, Kantrovich saw them as potentially eternal; they were laws on the books that could be brought to life at any moment. All that was needed was a new breath of life or a connection to the grundnorm—in his words, a “head.” Section 11 did exactly that. The Israeli Provisional State Council was the grundnorm—by dint of the fact that it had established itself as the Israeli sovereign—it had issued the 1948 Law and Administration Ordinance, and through its Section 11 the 1945 Regulations (and all other mandate-era laws) had been given a new lease on life.

In this scheme, the past career of the 1945 Regulations was of little constitutional significance in the present. Kantrovich recognized that the question of the 1945 Regulations’ legal “validity” during was certainly of grave importance to Zionists before May 15, 1948. But, now, he argued, it no longer mattered. This was because the “British Crown disappeared [histalek] from here.” The mandatory past was past. No matter how much Zionists despised the mandate authorities’ use of the 1945 Regulations, once the British left Palestine this was a matter

68 Ibid., 319.
70 Kook, 319.
of history. All that remained were the Regulations’ “body.” And all that was needed was a new “head” to fashion onto the “body” of the regulations. That “head” would need to be an Israeli one. So long as these regulations were deemed “appropriate [‘alehem la-halom]” to the laws of the State of Israel, they could be resuscitated and activated in service of Israeli governance.\footnote{Ibid., 319.} The Israeli legislator had done exactly this in both implicit and explicit terms. In its proclamation on May 14, 1948 and in Section 13(a) of the Law and Administration Ordinance, the Israeli Provisional State Council had explicitly repealed specific provisions of the 1945 Regulations. But since Regulation 111 was not among those repeated, Kantrovich argued that it had been implicitly accepted. The official gazette from June 16, 1948 also explicitly mentioned the 1945 Regulations, stipulating that the powers previously enjoyed by the High Commissioner had been passed to the Israeli Minister of Defense. So long as the body of the 1945 Regulations existed on the eve of Israeli statehood, a new head could be transplanted onto them, re-activating them in the service of the Israeli government. Regardless of the past injustices to which the 1945 Regulations had been put into use, there was little stopping them from being valid after May 15.

Having found the 1945 Regulations valid, Kantrovich sided with Bardaky in determining that Kook’s detainment was legal.\footnote{Even though they denied the habeas petition, they required the respondents (the Attorney General of the Israel Defense Forces) to pay 10 Palestine Liras as legal costs. They did not give a reason for this decision. Ibid., 318.} Yet, Kantrovich’s views clearly stood at a distance from those of Bardaky and Kassan. Especially illuminating was the comparison between Bardaky and Kantrovich. While both of them engaged in similarly formalistic reasoning, their conclusions regarding the relevance of the past were fundamentally at odds with one another. Even as they both argued that law was an autonomous sphere insulated from political forces, they each needed to define the very contours of this system. This included its temporal borders. For Bardaky, these
encompassed parts of the legal past. The mandate-era laws were “not foreign, but rather of the State of Israel even in the period preceding its establishment.” By contrast, Kantrovich saw only the Israeli present as of formal legal relevance. But, even he was forced to construct this autonomous system. Demarcating the past and present was a common enterprise.

While Kook provided the first forum for these competing temporal understandings to be articulated, it did little to settle the debate. Indeed, given that the Kook majority consisted of Bardaky and Kantrovich’s opinions, it was far from clear which was the ratio decidendi—the controlling reason—of the court. What is more, the decision itself was viewed as problematic. For one, Bardaky and Kantrovich’s decision that the absence of an advisory committee did not affect the legality of the detainment lacked legal reasoning. More fundamentally, although Israelis accepted that draconian measures like Regulation 111 were still needed, the bottom line of the Kook decision went against ideas of justice and legality for which Zionists saw themselves as having long fought for. Even though some found solace in the fact that the court’s decision was driven by the “formal-technical perspective,” the preceding question of whether the Provisional State Council “erred when it gave effect to the Emergency Regulations” lingered. It was perhaps in part due to this discomfort that Kook and Meridor were released ten days after the ruling. It was also perhaps for this reason that these divergent temporal views—Bardaky and Kassan’s divergent attitudes toward legal continuity as well as Kantrovich’s legal reception—would continue to compete in the court’s later jurisprudence.

73 K. Vardi, “Sources of Law in Israel,” Ha-Praklit vol. 7, no. 5 (May 1950), 393.
75 The two also threatened to go on hunger strike, and rallies in their support were held. “Propaganda Campaign for the Release of Hillel Kook and his Colleagues,” Ha-Aretz, 22.8.1948, 4.
Part II

In the wake of Kook, legal continuity emerged as the dominant paradigm for understanding the relationship between the mandatory legal past and the Israeli legal present. But tensions between Bardaky’s willing acceptance of the continuing influence of the legal past and Kassan’s call for using continuity to undo the past persisted. This part tracks how these reactions to legal continuity continued to spar even after the High Court of Justice moved to Jerusalem and came under the auspices of the newly-constituted Israeli Supreme Court in mid-September 1948.

Aside from Kassan’s opinion in Kook, the initial calls to undo parts of the mandatory past came from individuals who were not on the bench. Beginning in the late mandatory period and continuing through the early years of Israeli statehood, figures such as Paltiel Dikstein called for an immediate and systematic overhaul of the legal system. These proponents of Mishpat ‘Ivri (Hebrew Law) argued that, so long as laws adapted from the Jewish legal tradition did not replace existing Ottoman and English laws, formal independence would be of little value. Even as these efforts failed—they were, in the words of Assaf Likhovski, the “failed Jewish legal revolution of 1948”—others espoused a similar zeal and eagerness.76 One example was attorney Reuven Nohimovsky. Representing the petitioners in the early cases of Leon v. Gubernik and Ziv v. Gubernik, Nohimovsky emphatically argued that the political circumstances of Israel’s

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independence needed to influence the legal realm. “This was a time of revolution,” he exclaimed in Leon. It was as much a political revolution as a legal one. It was incumbent upon the court “to accelerate the process of liberating the state of Israel from the binding force” of mandatory laws. Like many participants and observers of the French Revolution who spoke of “a journey through time that takes no time at all,” Nohimovsky sought to accelerate the arrival of the future by “liberating” the present from the past.

The Supreme Court, however, was initially reluctant to accept these calls to radically undo all of the legal past. While it had few qualms intervening in the legal past in specific instances, it generally took a more selective and gradual approach. Legal change, in its view, would not come about instantaneously. As another commentator put it in response to Nohimovsky’s invocation of revolution, only the “October Revolution in Russia” had “cast itself as so foundational that it canceled the law that had previously existed in its entirety.” In all other revolutions, including the present Israeli one, “the existing law remained in effect and was only changed to the extent needed by the new directions of the revolution.” Israel’s revolution was, as T.B. Macaulay famously put it, a “noiseless revolution.”

Still, the Supreme Court repeatedly engaged with the mandatory legal past and viewed it as intrinsically affecting the present. This approach characterized Judge Yitzhak Olshan’s opinion in Al-Karbutli v. Minister of Defense. In this highly-celebrated case, the court (sitting as the High Court of Justice) granted a writ of habeas corpus and ordered that Ahmed Abu-Laban, a

prominent Jaffawi Palestinian Arab leader, be released from detention. The court found that the government’s failure to provide Abu-Laban with the opportunity to appear before the advisory committee per Regulation 111(4) to be legally fatal. Olshan’s opinion for the court thus rejected the contrary determination in Kook. Olshan also questioned other aspects of Bardaky’s opinion including his claim of being bound to mandatory jurisprudence. Still, Olshan looked back to mandatory law and evinced a willingness to question (at least, formally) its validity.

The legal arguments at issue in Al-Karbutli were quite similar to those in Kook. Like in Kook, the government argued in Al-Karbutli that it was using its detainment powers granted to it under Regulation 111 of the Defense (Emergency) Regulations, 1945. And, as in Kook, the petitioner—in this case, Ahmed Shawqi Al-Karbutli—argued that the detainment under Regulation 111 was illegal. Two of Al-Karbutli’s arguments had also already been litigated in Kook. First, that Regulation 111 “was fundamentally invalid” because it was *ultra vires* articles 2 and 9 of the League of Nations Mandate. Second, that the detainment was procedurally invalid, since the advisory committee provided for in Regulation 111(4) had not been established on the day that the detention order was issued.

Judge Olshan cast the mandatory legal past as crucial for determining the outcome of the present case. While conceding that it was “somewhat strange that, after the establishment of the state, we still must grapple for the question” of whether Regulation 111(1) conformed to the terms of the League of Nations Mandate—and whether the Mandate was in fact constitutionally binding—Olshan emphatically stated that Section 11 rendered this pair of questions one of

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81 For other (celebratory) accounts of Al-Karbutli see Nir Kedar XX; Ron Harris, “Gam ma’atzar minhali kafuf la-hok,” in *Beit ha-mishpat: hamishim shnot shefita be-Yisrael* eds. David Cheshin et. al (Israel: Ministry of Defense and Administration of Courts, 1999), 24-26.

82 A third argument—that Regulation 111(1) was invalid because it contradicted the principle that lay at the foundation of the Declaration of the Establishment of the State of Israel—had been brought up in intervening litigation. The court ultimately rejected this argument, holding that the declaration was not a legal binding document.
“utmost practicality.” It was also one for which there were clear answers. “It should be declared without uncertainty,” he wrote, “that the mandate, as part of the international law, was binding on the Great Power that was given mandatory rule in the country.” In turn, “any action executed or law issued by it [the Great Power] in the country that contradicted the terms of the Mandate entailed a violation of international law and the law in this country.” This was a categorical determination of the supreme nature of the League of Nations mandate. This conclusion also followed from the fact that the League of Nations mandate had been assimilated into Mandate Palestine’s municipal law. Article 18 of the 1922 Order-in-Council read, “No Ordinance shall be passed which shall be in any way repugnant to or inconsistent with the provisions of the Mandate.” The Palestine judiciary was thus obliged to examine whether any mandatory ordinance was invalid on the basis that it violated the terms of the League of Nations mandate. That the Palestine courts “did not, as is known, adopt this approach for some reason” did nothing to undo this legislative dictate. In other words, rather than being presumptively bound to these past mandate-era decisions as Bardaky had argued he was, Olshan signaled that the Israeli Supreme Court had the power to question and even overturn them. Olshan’s nominal willingness to break from precedent perhaps stemmed from his previous experience challenging the constitutionality of these regulations when he represented Jews during the mandatory period

84 Ibid., 10. The Palestine courts employed a dualist argument to avoid seeing the mandate as binding unless it was incorporated into the text of the Order-in-Council. Article 18 arguably did so. Still, mandatory courts did not read Article 18 as applying to laws and regulations that had been enacted under the authority of Orders-in-Council that were not the 1922 Order-in-Council. In other words, the courts stated that the 1937 Order-in-Council (under which the 1945 Regulations had been promulgated) did not need to adhere to the terms of the mandate for it to be valid in Palestine courts. The Al-Karbutli court went on to reject this mandatory argument. On its view, Article 89 of the 1922 Order-in-Council reserved for the British Crown the power to make law and ordinances for Palestine “in accordance with the Mandate conferred on him.” The court stated that this qualifying clause in turn applied to the 1937 Order-in-Council and any regulations promulgated thereunder, including Regulation 111 of the 1945 Regulations.
who had been detained under Regulation 111 and other emergency regulations.\textsuperscript{85} He thereby not only rejected a view that cast the past as irrelevant—as Judge Kantrovich had—he also purported to embrace an interventionist, Judge Kassan-like form of legal continuity.

Almost immediately thereafter, however, Olshan removed the sting out of his inquiry into the legal past. Al-Karbutli argued that Regulation 111 clearly ran afoul of Articles 2 and 9 of the League of Nations mandate by depriving individuals of their civil rights and the protections of a judicial process. Olshan disagreed. For one, he read these articles as not specifying what the civil rights of citizens were. In the absence of clear specifications, it was impossible to say that the regulations in question violated the mandate. Olshan also questioned the premise that Regulation 111 was in fact violative of “individual freedom [\textit{hofesh ha-prat}].” The 1945 Regulations, he explained, replaced similar regulations from 1936. These earlier regulations were intended to quell the violence and the emergency situation “that had been created by various elements, which tried to force the authorities and the Yishuv to sin against [\textit{lim’ol}] and renounce [\textit{lehitkahesh}] the goals of the mandate.” This was, of course, a reference to the 1936-1939 Arab Revolt.\textsuperscript{86} Since the 1936 Regulations were used to suppress Palestinian violence, they “certainly, did not have in them a contradiction with the mandate.” On the contrary, “their promulgation was in a sense a guarantee for individual freedom insofar as their goal was ensuring public security.” The en masse use of the regulations against Palestinian Arabs was thus not simply dismissed as unfortunate but unavoidable; rather, it was necessary for the preservation of (Jewish) public

\textsuperscript{85} See e.g. “Supreme Court Upholds Harsh Judgment Imposed on Those Who Defended Themselves,” \textit{Davar} 20.8.1936. Olshan (originally, Olshansky) was born in Kovno in 1895 and moved to Palestine in 1912. After serving in the Jewish Legion in World War One, he studied law and oriental studies in London. Upon returning to Palestine in the late 1920s, he continued to be involved in Zionist politics and a member of the paramilitary organization \textit{Haganah}.

\textsuperscript{86} On the use of the 1936 Regulations see Matthew Kraig Kelly, \textit{The Crime of Nationalism: Britain, Palestine, and Nation-Building on the Fringe of Empire} (Oakland, California: University of California Press, 2017); Matthew Hughes, \textit{Britain’s Pacification of Palestine: The British Army, the Colonial State, and the Arab Revolt, 1936-1939} (Cambridge; New York: Cambridge University Press, 2019).
security, the accompanying individual (Jewish) freedom, and the mandate itself. This statement was extraordinary not the least given that the applicant in the present case was himself a Palestinian Arab.\(^8\) Unwilling, however, to follow this statement with a conclusion that upheld the 1936 and 1945 Regulations, Olshan distinguished between law as written and law as applied. In the aftermath of the publication of the 1939 White Paper, the 1936 Regulations were deployed for another end: as a tool to suppress the \textit{Yishuv}. This subsequent history was a bitter one that was still fresh in the minds of the Israeli public. But, herein lay the crux of Olshan’s argument: the 1936 and 1945 Regulations were only instruments. They had no particular valence in their written form. They could be used to protect the mandate or dismantle it. And, crucially, it was only “the malicious use” of these regulations that violated the mandate. It was not the regulations that violated the mandate; it was the British. No matter how heinous this use was, it had no bearing on the validity of the regulations themselves. “If the law itself is valid, it does not become invalid because the authorities began to use it for an illegal goal.” Regulation 111(1), concluded Olshan, did not violate the terms of the mandate.\(^8\) Ever the loyalist to the Israeli governmental cause, Olshan found a way to square his past criticism of Regulation 111 with his present determination to empower the military authorities.

In reaching this conclusion, Olshan embraced a view of legal continuity, while in fact nearly entirely neutering any Judge Kassan-like impulse to undo the past. The legal past, he argued, needed to be scrutinized and revised. It was thus crucial to examine whether the British had violated the terms of the mandate, the constitutional bedrock upon which they had ruled Palestine for nearly thirty years. At the same time, however, any actual operations of any such scrutiny were almost completely nullified. Although it was clear that the British had violated the

\(^8\) Unsurprisingly, the celebratory accounts of \textit{Al-Karbutli} do not discuss this logic.
\(^8\) \textit{Al-Karbutli}, 12.
terms of the mandate, even the most reviled laws could not be said to have themselves infringed upon the mandate. This was because an abuse of the law did not mean that the law itself was invalid. Olshan thereby opened the past to present revision, while, at the very same time, stripping any such inquiry from radically undoing the framework of the past.

Olshan’s articulation of legal continuity did, however, bear fruit when it came to Regulation 111(4). As noted above, Olshan found the government’s failure to give Abu-Laban an opportunity to appear before the advisory committee grounds for issuing habeas. To reach this conclusion, he relied on mandatory jurisprudence. Aside from implicitly following the mandate-era decision of Steindler in finding this advisory committee to be necessary, Olshan explicitly invoked the mandate-era decision Olles II as a justification for why Kook could be overturned. As discussed elsewhere in the dissertation, Olles II overturned the prior decision of ex parte Birnstiel. Olles II, Olshan stated, stood in support of the proposition that, although overturning precedent was not desired, it could be done when absolutely necessary.\(^{89}\) Olshan’s reliance on Olles II was quite ironic. After all, in pushing for legal continuity, Bardaky had claimed that the Israeli court was bound by mandatory precedents. Even though Olshan did not go so far as to accept this blanket view—he only cited one mandatory Supreme Court precedent—he did so specifically to reject Bardaky’s interpretation of Regulation 111(4). So long as the mandatory legal past continued to matter, even Bardaky was not free from its net.

Ultimately, Olshan’s view of legal continuity was a relatively tempered one. While he subjected the legal past to inquiry and rejected mandatory Supreme Court jurisprudence, he did not follow through on Kassan and others’ call to fully undo this past.

\(^{89}\) Ibid., 11.
At other times, however, the Israeli Supreme Court intervened more aggressively in the legal past. One such instance was *Katz-Cohen v. Attorney General*. The appellant in this case had been found guilty by an Israeli district court of having murdered his wife in the waning weeks of the mandatory period. In his appeal to the Supreme Court, the appellant argued that Israeli courts lacked the jurisdiction to try him. Since criminal law was a matter of public law—that is, it was not solely of concern between the perpetrator and the victim (private law), but also between the state (representing the public) and the perpetrator—the prosecution of a given crime, he argued, was solely within the prerogative of the state that existed at the time the crime was perpetrated. Only the mandatory administration could try him.\(^90\) What is more, the 1948 Law and Administration Ordinance did not grant the Israeli state the power to try crimes allegedly committed in the mandate period. Section 11 (along with other sections), he argued, was only future-looking; it did not empower the Israeli state to claim jurisdiction over the past.\(^91\)

While conceding that there was a certain appeal to these arguments, Chief Justice Moshe Smoira insisted that the court could not accept them.

> The feeling of justice and the public welfare demand that there be continuity \([rezifut]\) between the penal authority of the previous sovereign and the penal authority of the new sovereign and that this authority extend to crimes that were committed before the commencement of the new regime…. Even if we assume that there is a need for an explicit statement of this continuity, the new sovereign established this continuity….\(^92\)

While Smoira combined a moral inclination with international and municipal legal claims, the crux of the matter was solved by the Israeli legal pronouncement in the Law and Administration Ordinance. Specifically, it was the Law and Administration Ordinance that constituted a two-way bridge between the past and the present and thereby allowed the Israeli state, judiciary, and

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\(^{91}\) Ibid., 691-92.

\(^{92}\) Ibid., 696.
law to prosecute crimes perpetrated during the mandatory period. Smoira paid particular attention to the statutory language of Section 11. Section 11 used the verb ‘amad, which literally meant to stand or to remain. According to Smoira, it thereby dictated that the law which existed in Palestine on May 14, 1948 would stand or remain in its effect. “This law was not legislated anew as new law in the State of Israel, but rather remained [‘amad] in its effect, and there is therefore continuity in terms of the law.”93 This statement was important in two respects. First, in stating that the “law was not legislated anew,” Smoira distanced himself from the idea of legal reception. Second, in embracing the idea that mandate-era law remained or came to a position of rest, as it were, on May 14, Smoira put forth the image that Section 11 then encountered this law in a static state and, acting like a tailor, began to stitch it into the fabric of nascent Israeli law.

Yet, rather than only assimilate this law into the Israeli legal fabric—an imagery evoking the idea of legal reception-- Section 11 allowed the new Israeli legal tailor to examine stitches that had been made in the past or at least tie in loose ends. That is, Section 11 brought about a two-way seam between the past and the present. By virtue of the Law and Administration Ordinance, the law, the administration, and the courts of Israel were all able to “stich together the tears” of the past and present and extend their jurisdictional power back in time to try and punish criminal acts committed during the mandate period.94 This rationale extended beyond individual criminal cases. As one commentator noted, in Katz-Cohen the court evinced the view that it is “authorized

93 Ibid., 695. Emphasis in original.
94 This specific language is from CrimA 147/51 Farkash v. Attorney General 6 PD 412, 414 (1952). There, the Court invoked Katz-Cohen to find that it had the authority to punish one Jewish immigrant by the name of Farkash with smuggling watches into Palestine without paying customs duties in late 1947. While the Israeli Supreme Court recognized that the obligation to pay taxes was one owed to a specific government—here, the Palestine government—it found that the principle of Katz-Cohen applied to Section 21 of the Law and Administration Ordinance which stipulated that taxes and payments owed to the Mandatory government and which had not been paid by May 14 “shall be paid to the Provisional Government.” A similar (though less invasive) logic applied when the court determined that it could recognize a repeat offender’s past crimes committed during the mandate as it weighed the severity of punishment for another crime perpetrated after May 15. CrimA 1/51 Fischel v. Attorney General 5 PD 507 (1951).
to examine the legality of ordinances and regulations that were passed during the mandate and
determine that they are annulled as of the moment of their promulgation.”⁹⁵

At the same time as it embraced this imagery of mandatory law being stitched into the
Israeli legal tapestry, the Israeli Supreme Court rejected other proposed metaphorical language
that resonated with legal reception. Arguments that mandate-era law ceased to exist on May
14—and could not be revived—were emphatically rejected. In one case, the court dismissed the
argument that mandate-era regulations were ghost-like apparitions that may have remained valid
under Section 11 but became “mute [‘arita’iot], valueless [mehusarot erekh] regulations that
cannot be operationalized.”⁹⁶ In another case, it declined to accept the claim that mandate-era
laws were a “living-dead creature [ke-‘en bar-minan-hai] or a body the arteries of which have
calcified [ke-‘en guf asher ‘orkav histaydu].” In this case, the petitioners drew attention to
Section 11’s verb ‘amad. The static nature of the verb was intentional, they claimed. That the
statute used this term, and not a verb of dynamic continuity (such as the verb mashakh) meant
that on May 15 the mandatory laws “stagnated [nitabnu].”⁹⁷ Comparing Section 11 to its rough
equivalent in the 1922 Irish Constitution, they argued, made the static connotation of ‘amad even
clearer. Irish Article 73 read that the law that was previously in existence “shall continue to be of
full force and effect.” Even without arguing that Section 11 was modeled on Article 73—though
some would later make this quite plausible suggestion—the petitioners stated that the use of
“continue” in the latter context underscored the significance of the absence of an equivalent verb
emphasizing dynamic continuity in the former.⁹⁸ The court, in an opinion by Chief Justice

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⁹⁵ K. Vardi, “The Sources of Law in Israel,” Ha-Praklit vol.7 no. 5 (May 1950), 392.
⁹⁶ HCJ 70/50 Mikhlin and others v. Minister of Health and others 4 PD 319, 322 (1950).
⁹⁷ HCJ 125-127/50 Workers Group for Cooperative Settlement Ltd. v. Court for Profiteering, Haifa and others 5 PD
113, 143 (1951).
⁹⁸ In 1955, Uriel Gorney suggested that Leo Kohn was the crucial figure in this enterprise. Kohn, who had written
extensively about the 1922 Irish Constitution and had been involved in drafting the Irish Constitution in 1937, was
deeply involved in creating a legal framework for the State of Israel in the last year of the mandatory period. Kohn
Smoira, refused to bite. In a rather stark departure from his previous emphasis on the connotation of the verb ‘amad, Smoira reasoned that the Israeli legislator did not intend to imbue the statutory language with a connotation of “freezing or paralysis but rather simply chose this word (rather than the verb mashakh) “because of the purity of the language of Hebrew.”99 Instead, mandate-era law continued into Israel.

With this determination, the Israeli Supreme Court faced the problem of how to stop this stream of the past from inundating the present. These concerns were especially pronounced when it came to mandate-era judicial precedents. Recall that in Kook, Chief Judge Bardaky and Judge Kassan agreed that mandatory decisions were still of legal relevance after May 15 but split over whether these should be binding on Israeli courts or should be rejected. Iterations of this disagreement continued in the following years. This was not an all-or-nothing question; not all mandatory precedents, including those that were recognized as legally flawed, were overturned. As Judge Shimon Agranat counseled in 1952, it was sometimes necessary to resist doing so lest it bring about a “detachment from reality”— the reliance on these precedents served as a counterweight to their rejection.100 Still, there was a willingness—indeed desire—to overturn rulings issued by the mandate-era court. Agranat himself stated that he had no problem overturning certain mandatory precedents that were in fundamental error or that no longer matched the post-independence reality.101 Indeed, the Supreme Court overturned numerous of its

99 Workers Group for Cooperative Settlement Ltd., 143.

100 CA 150/50 Kaufman v. Margines 6 PD 1005, 1031 (1952). Agranat attributed this realist view that the law was not simply a closed system of logic to a number of prominent jurists, including Oliver Wendell Holmes and the Earl of Halbury. See also CA 58/50 Brenner v. Weinrich 5 PD 1451, 1460 (1951).

101 Kaufman v. Margines, 1031.
predecessor’s decisions. In his 1949 decision in *Rosenbaum v. Rosenbaum*, Chief Justice Smoira memorably rejected a mandatory precedent concerning the interpretation of “alimony” and “maintenance.” Though recognizing that it was certainly important that the meaning attributed to legal terms be stable, Smoira asserted that when forced to decide between “truth and stability—truth is preferable [emet ve-yatziv—emet ʼadif].”102 And, yet, as if to underscore that he still viewed the Israeli legal present as being inherently linked to the mandatory legal past, Smoira relied on mandate-era decisions to justify his position and his overturning of mandate-era precedent.103 In another case, Judge Moshe Zilberg “respectfully” distanced himself from two mandatory decisions, terming their holdings “fundamental error” and determining that they no longer should be seen as binding.104 A number of district courts also openly questioned whether mandate-era decisions would continue to have precedential weight. Although some of these courts posed the question but continued to follow the existing precedents, others acted on their doubt.105 The Tel Aviv District Court was “happy” to announce that in certain instances it would not view itself as bound by either English or mandatory decisions.106

If overturning mandate-era decisions embodied not only the idea of legal continuity but also an initial zealous desire to uproot or correct the past, over time it came to be cast as an unnecessary, even immature, over-eagerness. Israeli courts, alleged one early commentator, questioned mandatory precedents without even bothering to see if the decisions were good or

102 CA 376/46 *Rosenbaum v. Rosenbaum* 2 PD 235, 254 (1949). This was a play on the liturgical use of the term “emet ve-yatziv,” which combined these two words to connote certainty and truth as going together (at least insofar as God’s supremacy was concerned).
104 CA 87/50 *Liebman v. Lifshitz* 6 PD 57, 72 (1952)
105 For the former see e.g., CA (District Court Haifa) 22/48, Psakim 162 (1949); CA (District Court Jerusalem) 2/48, Psakim 72 (1949), paragraph 39.
106 Originating Motion (District Court Tel Aviv) 114/48, Yalkut Cohen 289 (1948).
bad; it was as if these judges “had an old account with them [the mandatory precedents] and the time had arrived to collect the debt.” 107 Israel, it would seem, was like a child rebelling against its parents. And, indeed, this eagerness to challenge the past waned along with Israeli animosity toward Britain in the coming years. Hand in hand, as the next part shows, the idea of legal reception gained prominence. Simultaneously, gradualist views that sought to carefully scrutinize the legal present—and its reception of the legal past—before embracing an alternative legal future replaced these attempts to undo the past and rapidly bring about a novel future.

Part III

While the notion that the advent of Israeli sovereignty marked a legally and constitutionally discernable moment in the relationship between the mandatory legal past and the Israeli legal present already emerged in Judge Kantrovich’s opinion in Kook, it later became encapsulated in the idea that Israel “received” mandatory law. Legal commentators were the first to express this idea of legal reception, but it gradually gained adherents within the judiciary. Over time, proponents of legal reception shed the anxieties that accompanied the idea of legal continuity. Instead of sharing the sense of urgency underlying the notion of legal continuity, they cast the mandatory past as static even as they recognized that mandatory-cum-Israeli law continued to operate in the present. In tandem, they positioned the Israeli legal present as increasingly distant from the desired and idealized future.

At the beginning, however, this was not the case. The initial voices to weigh in on the matter evinced a deep anxiety about Section 11’s legal ramifications. Most worrisome was the possibility that Section 11 extended the precepts of Article 46 of the 1922 Order-in-Council into the Israeli legal system. For Paltiel Dikstein, this combination had the potential to “constitute a

severe blow” to any modicum of Israeli independence. Article 46 was a “pipeline” through which “the English legal culture was received [nikleta] into our lives” during the mandatory period. Seeing as Section 11 further extended this channel into Israel, Israeli jurists who encountered any lacuna in the existing legal system would be obliged to continue to look “to a foreign legal source”—that is, English common law and equity. As if this was not alarming enough, common law and equity were not “dead and fossilized.” They were ever-evolving. If Israeli courts were required to continuously pay heed to the constantly developing English common law—rather than only look at the common law as it existed on May 14, 1948—there would be little by way of true Israeli judicial independence. It was thus necessary, according to Dikstein, to immediately annul Article 46 and halt the continued operation of this pipeline.108 Likewise, Yoel Zussman, who would soon thereafter be appointed to the Supreme Court, agonized over the implications of “the pipeline of Section 11” especially insofar as it related to the applicability of the doctrine of stare decisis (a topic I discuss in the next chapter of my dissertation).109 In their view, it was only a matter of time before the Israeli judiciary and legislature would have to face head-on this Janus like predicament. Only then would they be able to break out of the “vicious cycle [ma’agal ksamim]” that plagued any and all efforts to continue the mandatory legal system while emphatically claiming that there was a temporal break.110

Although neither Dikstein nor Zussman explicitly used the term “legal reception,” their descriptions of Section 11 as a “pipeline” were evocative of this idea. Already in the mandate period, Article 46 was repeatedly cast as a “pipeline” through which English common law and

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108 P. Dikstein “Political Independence and Legal Independence,” Ha-Praklit vol. 5 no. 5-6 (May-June 1948), 108-09.
equity were “received” into Palestine. While there were deep divides as to when this pipeline of law flowed, it was widely recognized in the mandatory period that the selective Anglicization of the country’s legal system would occur through legal reception.\footnote{Likhovski, \textit{Law and Identity in Mandate Palestine}, chs. 2-3. For a description of Article 46 as a “pipeline,” see Tamar Hoffman, “‘A Pipeline Importing’ English Law to Israel—Section 46 of the Order-in-Council,” \textit{Ha-Praklit} 12, no. 1 (November 1955), 40-50.}

It was thus notable when K. Vardi explicitly described Section 11 as bringing about legal reception in an article in the May 1950 volume of the legal journal \textit{Ha-Praklit}.\footnote{K. Vardi, “The Sources of Law in Israel,” \textit{Ha-Praklit} vol.7 no. 5 (May 1950), 394.} According to Vardi, the Supreme Court had thus far misconstrued the legal significance of Section 11. In repeatedly casting mandatory law as the “source of law in Israel,” it had read Section 11 as a provision that merely “declared a fact and was not a law making” pronouncement. There was, however, a better way of understanding Section 11: as a statute through which the Israeli Provisional State Council “created an independent legal system and thereby cancelled the mandatory laws.”\footnote{Ibid.} That this independent legal system subsequently declared itself to be composed of all of the laws of the now-defunct mandatory legal system did not change its independence nor its distinctiveness. “This legislative method is known as that of reception.” In crucial distinction to the Supreme Court’s interpretation, he continued, the words “remain in effect” in Section 11 “have a constitutive power and not merely a declarative power.” Section 11 did not simply announce that a legal system was in existence; it \textit{created} one. Even as Section 11 reenacted the substance of mandate laws, it rendered them into Israeli law. The implications were twofold. First, since these new Israeli laws lacked mandatory roots, there was no judicial power to examine these mandate-cum-Israeli laws in light of the League of Nations mandate. That said, and secondly, the judiciary gained an important power through Section 11’s stipulation that
mandatory-cum-Israeli law would remain “subject to such modification as may result from the establishment of the State and its authorities.” The courts could thereby evaluate these laws against this yardstick. But—and again in departure from an understanding of Section 11 as continuing mandate-era law—the judiciary only had the power to invalidate laws as of their date of reception—May 15—and not from the moment they were promulgated in their previous mandatory life. The mandatory past was thus no longer open to Israeli meddling.

While agreeing with Dikstein and Zussman regarding the legal effect of Section 11, Vardi did not share their outward anxieties. “Israel arose through the powers of its own will and it alone decides which laws are binding in its interior.” Or, as another lawyer later put it, English common law continued to be relevant not because “we are shackled or bound to the judgements of a foreign court” but because the Israeli law directed attention to an outside legal source. Just as Thomas Jefferson and other Americans had been “content to utilize whatever portions of the past seemed desirable and build on them for the future,” so too Israel would utilize those parts of the mandatory legal past to build its future. Section 11, on this view, was an intentional legal expression of a sovereign entity. The only question was whether Israel would do so in the near or distant future.

In answering this question, a number of commentators counseled patience. As one legal commentator wrote, even if Section 11 and Article 46 presently required Israeli judges to “view themselves as if they are sitting on the English bench” and rule in accordance with common law and equity, such a reality was acceptable. After all, “Israeli law is still in its infancy and must

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114 Ibid., 395.
117 Brown, 37.
be given the opportunity of ‘trial and error.’”

This same sentiment of gradualism and cautious experimentation came to dominate contemporaneous Israeli discussions regarding constitution-writing. It also came through in an article written by Uri Yadin, the first director of legal planning in the Ministry of Justice. Writing in Ha-Praklit, Yadin stated that, while the Law and Administration Ordinance did very little “by way of ‘substantive’ legal planning,” it embodied the end of a “colonial regime” and the beginning of a “democratic” one. It announced a monumental shift from “the form of legislation and expressions of the idea of the legislator that existed in the Anglo-Saxon world and were practiced in Palestine, to modes of expression and ways of thinking that were original, Hebrew, new-old.” What is more, it was only the first of many steps in the process of bringing about a unique Israeli legal future. What was needed was a plan. This would be a “sprawling plan. A spectacular, heart-shaking plan. A plan whose realization requires a lot of time, many forces, and various means.” Rather than trying to overturn the past and bring about the future overnight, Israeli legislators, jurists, and lawyers would need to engage in careful and meticulous legal work. While some mandate-era legislation would certainly be found to be “foreign to our spirit” or outdated and need to be replaced, others would be maintained. This would be an evolutionary process, not a revolutionary moment.

Yadin’s view of a gradual progression from the present to the future was possible specifically because the past was seen as something that had passed. Not only was the legal past not abhorred, it also posed no substantial threat to the Israeli present. It was a quarry from which Israel had taken laws. But these laws could be discarded if they were no longer deemed valuable.

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119 Ibid., 351.
120 On Israeli constitution-writing and the decision to not write a unified constitution see e.g., Shuki Fridman and Amihai Radzyner, Hukah she-lo ketuvah ba-Torah (Jerusalem: ha-Makhon ha-Yisreeli le-demokratyah, 2006).
121 Uri Yadin “Legal Planning at this Time,” Ha-Praklit vol. 7, no. 1-2 (Jan.-Feb. 1950), 283.
122 Ibid.
123 Ibid.
Once the legal past was no longer a present danger, the horizons of the idealized future could be allowed to recede. As another commentator reassuringly noted, although “there is a still a long way to go until our complete legal independence,” it was certainly within the Knesset’s prerogative to “find a solution which can both satisfy the national feeling and the aspiration for an independent and original legal creation.” All that was needed was time and patience.

In the ensuing years, this notion of legal reception gained ground. The broader waning of revolutionary hopes—and the (grudging) acceptance that any change would be piecemeal — mapped onto the broader cultural shift in Israel during the 1950s. By the late 1950s, legal reception was widespread. One of its appeals was that it was a paradigm used to explain the legal systems of other former parts of the British empire.

Another was its resonance with Kelsenian positivism. A 1953 article by Moshe Sternberg highlighted this fact. Sternberg’s main argument was that the mandatory and Israeli legal systems were different specifically because they derived their normative authority from distinct grundnorms. Mandate Palestine’s grundnorm was the British constitution. By virtue of these unwritten constitutional norms, Parliament had enacted the Foreign Jurisdiction Act, 1890,

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126 Ibid., 322-346. Gorney discussed at varying lengths the United State of America, Australia, India, Canada, Ireland, Northern Rhodesia, Hong-Kong, Gibraltar, Bermuda, and Nigeria. For another (later) comparative view, though focused on Article 46, see Ze’ev Salanter, “Article 46 of the Order-in-Council as an Interstitial Legal Command,” Ha-Praklit 16, no. 4 (June 1960), 300-329. See also, Uri Yadin, “Reception and Rejection of English Law in Israel,” The International and Comparative Law Quarterly 11, no. 1 (January 1962): 59-72. Non-Israeli scholars also embraced the idea of legal reception. The prominent Australian scholar of constitutional law and empire K.C. Wheare embraced a nautical metaphor to explain the movement of British law to former parts of the British Commonwealth. Regarding the movement of British law to India he wrote, “The parliament at Westminster takes away from its acts their power, of their own motion, to cross the seas to India. It stops them at the water’s edge, so to speak, and they can proceed no farther unless an Indian vessel picks them up and takes them to India. In this respect, indeed, the British acts are no different from the acts of say, the parliament of Norway. The Indian legislature may enact that a Norwegian law should extend to India, if it chooses to do so.” K.C. Wheare, The Constitutional Structure of the Commonwealth (Oxford: Oxford University Press, 1960), 30-31.
127 Moshe Sternberg, “The Basic Norm of Law in Israel,” Ha-Praklit 9, no. 2 (1953), 137. Another good example of Kelsen’s reception in Israel is Yosef Lamm, Toldot ha-ra’yon ha-medini (Tel-Aviv: Mif’al ha-shikhpul, 1966).
which, in turn, was the normative basis for the 1922 Order-in-Council. The *grundnorm* of the Israeli constitutional order, by contrast, was the Provisional State Council’s *ex nihilo* creation of the State of Israel. Section 11 was thus a “reception pipeline”: in enacting it as part of its first legislative action (the 1948 Law and Administration Ordinance), “the new *grundnorm*, the Provisional State Council, adopted an existing legal system.” Echoing Kantrovich and Vardi, Sternberg explained that, although the Israeli state had indeed simply copied the texts of mandatory law, the fact that it was an Israeli legislator rather than a mandatory one made all the difference. Section 11’s two-word phrase “shall remain in force *ya’amod be-tokef*” encapsulated this difference: the two words meant that the law “shall remain in force *by virtue of a new norm.*”

The Israeli Supreme Court also became increasingly receptive to legal reception. Crucially, and in a departure from the scholars discussed above, it did not agree that legal reception would inevitably lead to the flooding in of English common law and equity. Here, again, it constructed the temporal boundaries of its formalism. Judge Moshe Zilberg was the central figure in this regard. Although primarily known for advocating for an increased role for *Mishpat ‘Ivri* in Israeli law, Zilberg laid the groundwork for this stance by pushing for limitations on the influence of English law in Israel. Before he explicitly argued that Section 11 was an instance of legal reception in the highly-publicized 1952 homicide case of *Yaakobovitch v. Attorney General*, the concept had not appeared in Supreme Court jurisprudence. While the

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128 Ibid., 138.
129 Ibid., Emphasis added.
130 CrimA 125/50 *Yaakobovitch v. Attorney General* 6 PD 514, 564-65 (1952) (Zilberg concurring). In the early case of *Lahis v. Minister of Defence*, Cheshin’s majority opinion (in which Zilberg joined) described a specific Israeli statute (the Hukat ha-Shiput Tashach, which was actually created the Haganah forces and then adopted by the Israeli state) as a “reception” statute and a “pipeline” through which the Mandatory Criminal Code continued to operate in Israel. While this was obviously a very similar idea, the judgement only stated that this *statute* received law; it did not speak about Section 11 of the Law and Administration Ordinance and the accompanying question of the functioning of Article 46. See HCJ 24/47 *Lahis v. Minister of Defence* 2 PD 153, 163 (1949).
final ruling in *Yaakobovitch* hinged on a question of intent, Judge Zilberg concurred in order to reject an evidentiary claim that the prosecution had raised. The prosecution’s reliance on a 1952 English case—that is, a case decided four years after Section 11 had been promulgated—was misguided, he argued. While acknowledging that Section 11 was an act “of reception,” Zilberg doubted that the legislator had intended for such a “broad reception” whereby “Israeli courts are obligated to follow legal innovations [hidushe halakhah] made after the establishment of the state in English courts.” It made little sense, he continued, that the Provisional State Council had sought to lay a pipeline through which “alien legal matter, undefined and unlimited” that was “created and altered by foreign courts outside of the boundaries of the state” would incessantly stream into Israel. Had they done so, they “would be enslaving, so to speak, the Israeli judicature to the winds of constant change in English courts” and would have created “a dangerous obstruction to the development of independent, original legal innovation.” Instead, Zilberg offered an alternative reading of Section 11. Section 11 provided for a far more limited reception: a one-time reception of admittedly “alien legal matter, set and limited, which was ‘frozen’ and adopted at a certain point in order to be developed and enhanced by local courts within the boundaries of the state.”

Zilberg’s legal analysis was rather thin. That he emphasized the intent of the Provisional State Council was not invalid in and of itself; discerning the intent of the legislator was standard judicial practice. Yet, in comparison to the formalistic arguments that had previously been put forth detailing the operations of Article 46 and Section 11, Zilberg’s opinion was lacking. It

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132 *Yaakobovitch*, 564-65 (Zilberg, concurring).
133 Ibid., 565 (Zilberg, concurring). For similar reasoning see H. Flakenstein, “Dependence on Foreign Law,” *Ha-Praklit* vol. 11 no. 2 (April 1955), 149-52.
134 See also Shimon Gratch, “Paddling in the World of Law,” *Ha-Praklit* 14, no.1 (November 1957), 42.
was, perhaps, for this reason that he closed by stressing that he did not “come to nail this matter shut.”

This was both a concession that the judiciary could only rely on its interpretative toolkit to minimize the unimpeded entrance of British common law into Israel and a call to the Knesset to formally announce how—if at all—Article 46 would continue to operate in Israel.

It took some time for Zilberg’s ideas about reception to gain ground. In Gorali v. Diskin, he was successful in getting the majority opinion to include imagery reminiscent of legal reception when it wrote that Section 11 was intended to serve as a “corner stone in a new edifice.”

Still, he failed to persuade his colleagues in finding that Article 46 and Section 11 did not receive an English empire-wide law concerning consuls’ powers. In “Palas” v. Ministry of Transportation, Zilberg wrote for himself when he stated that, given that the drafters of the Law and Administration Ordinance were forced to work quickly and under extreme conditions, it was clear that they “did not have time to weigh the possible implications of each and every word.”

Once again, he seemed to be laying the foundation for questioning the scope of Section 11’s reception. It also marked a clear departure from Chief Justice Smoira’s earlier underlying assumption that Section 11 was carefully drafted and that the word “‘amad” had an intentional and specific meaning.

Even while Acting Chief Justice Shlomo Cheshin and Judge David Goitein agreed with Zilberg on the ultimate outcome and while Cheshin’s portrayal of Israel as a “new creation” and Zilberg’s assertion that the Provisional State Council voluntarily “took upon itself…the burden of the Palestinian law as it existed on May 14, 1948” were quite reminiscent

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135 Yaakobovitch, 565 (Zilberg, concurring).
136 As part of this subsequent effort to use interpretation, Zilberg laid down restrictions to resorting to Article 46 to fill ostensible lacunas. See CA 118/51 New Zealand Insurance Company Ltd. v. Yuval 7 PD 518, 528 (1953); CA 133/51-135/52 Rigby v. General Director of Train 7 PD 333, 335 (1953).
137 CA 19/54 Gorali v. Diskin 8 PD 521, 531 (1954) (Goitein, dissenting).
138 Ibid., 526.
140 See discussion above concerning Workers Group for Cooperative Settlement Ltd. and Katz-Cohen.
of legal reception, it was clear that neither had a desire to join in on Zilberg’s ruminations concerning Section 11. Likewise, in *Eshed v. Attorney General*, Judge Cheshin’s majority opinion refused to weigh in on whether a post-1948 Queen’s Bench decision should influence the outcome of the case. Whereas Zilberg (in dissent) repeated his statement from *Yaakobovitch*, Cheshin limited himself to saying that the question of whether Article 46 and Section 11 continued to import post-1948 English common law was one “that will continue to knock on the doors of courts and will require a complete and definite solution sooner or later.”

This changed, however, in the 1957 case of *Kochavi v. Becker*. In this “shocking and disturbing case,” one Erich Becker was blinded after drinking cognac into which methanol had been mixed. In the ensuing tort action, the court was asked whether, in assessing the amount of compensatory damages for Becker, it should deduct a sum equivalent to the income tax that he would have been expected to pay in the future had he been able to continue to work. In the 1952 case *Grossman v. Roth*, the Israeli Supreme Court had followed the 1949 English case *Billingham v. Hughes* in ruling that income tax not be accounted for in assessing damages. In 1955, the House of Lords in *British Transport Commission v. Gourley* reversed *Billingham v. Hughes* and held that income tax should be considered. The petitioners in *Kochavi*, in turn, argued that the Israeli Supreme Court should follow suit: given that the Israeli courts had previously followed post-1948 English precedent (*Billingham*), they should continue to do so. While the three-judge panel unanimously rejected the petitioners’ argument, Judge Alfred Witkon and Acting Chief Justice Cheshin (with whom Judge Moshe Landau agreed) weighed in separately on a question that was not squarely at issue in the case: the place of pre-1948 English

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141 “Palas”, 436.
precedent in Israel. Even as this was dicta (given that the relevant English cases were all decided after 1948), these divides highlighted the growing acceptance of Zilberg’s notion legal reception.

Cheshin explicitly embraced legal reception. Whereas Witkon argued that English precedents, regardless of whether they were issued before or after May 15, 1948, were no longer binding following the establishment of the State of Israel, Cheshin asserted that it was crucial to distinguish between English common law and equity that had been received before May 15, 1948 from that which was created after. By virtue of having been received into mandatory law via the “pipeline” of Article 46, the former had “merged” into mandatory law and became part of the law of the country. When Section 11 was legislated, this law was received into Israel like the rest of mandatory law. Crucial here was the nature of Section 11:

Section 11 did not open a new pipeline for legislation of a foreign state, but it also did not close an old pipeline. It only established that the old legal pipelines—including the pipeline that was opened by Article 46 of the 1922 Order-in-Council—would remain open but with new valves [shastomim hadashim]. The impact of the operations of these valves is the continued flowing of the old law [into Israel] subject to the changes that resulted from the establishment of the state and its authorities.

Section 11 served as an extension to the existing reception pipelines. Crucially, however, in order for Section 11’s valves to allow in mandatory law, the law needed to meet the criteria laid out therein. So long as English common law that had been received into the mandatory system

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144 Kochavi v. Becker, 238. In making this argument, Cheshin was also rehashing an earlier disagreement he had with Judge Goitein about Article 46. In dicta in the 1952 case Goldberg v. Ben Asher, Goitein argued that not only did Article 46 not import common law created after 1948, it only applied to the common law and equity as it existed on September 1, 1922—the date that the 1922 Order-in-Council was promulgated. Goitein thereby implicitly questioned the intervening thirty-three years of jurisprudence during which Article 46 was seen as importing evolving common law. Even without expressly calling on the court to reverse this longstanding jurisprudence, Goitein’s statement was reminiscent of those who had earlier calling the mandatory legal past into question under the framework of legal continuity. Startled by the implications of Goitein’s stance, Acting Chief Justice Cheshin responded that “one cannot avoid the conclusion that these ‘revolutionary’ ideas voiced by Judge Goitein would constitute a shattering of old vessels [shvirat kelim yeshanim] and would uproot a number of legal concepts that have seemingly already taken root as established law.” “It is therefore imperative,” Cheshin concluded, “that we act with extra care before we accept” such views. CA 179/51 Goldberg v. Ben Asher 9 PD 909, 915-16, 919-20 (1955).

145 Kochavi v. Becker, 238.
fulfilled these criteria, it too could continue to operate in Israel; there was no “foreign” taint that continued to distinguish this law. By contrast, and following Zilberg’s argument in Yaakobovitch, English common law that was created after May 15, 1948 did not enter Israel through a continuous operation of Article 46. “It is not feasible that a sovereign state that has a legal system and jurisprudence of its own will continue to be subservient to a legal system in a foreign country and future precedents that will emerge from its courts simply because in the past, when there was a close connection between the countries, the former imbibed the latter’s domains of law.”146 To bolster this point, Cheshin looked to a host of reception statutes and related jurisprudence in “North American colonies after the revolution.”147 As American legislators and judges—including U.S. Supreme Court Chief Justice John Marshall—had emphatically stated, while English common law decisions made before the revolution became part of American states’ laws, subsequent decisions were not binding.148 If Cheshin had left Zilberg to opine for himself on Israeli reception in Eshed, by Kochavi he now embraced the view that Israel’s relationship to its mandatory legal past was defined by legal reception.149

In the wake of Kochavi, legal reception became the orthodox view through which to explain Israel’s legal relationship to the mandatory legal past. In the 1959 case Shlifkovitz v. Municipality of Bat-Yam, even Judge Witkon conceded that by virtue Section 11 “it was as if all of the mandatory law was legislated anew and included within the Israeli ordinance through a general reference.”150 Two years later, the influential jurist and scholar Hans (Yitzhak)

146 Ibid., 244.
147 Ibid., 239.
148 Ibid., 239-43. Cheshin quoted jurisprudence from Oregon, Mississippi, Maryland, Montana, New Jersey, the Seventh Circuit, the D.C. Circuit, and the U.S. Supreme Court. The Supreme Court case he cited was Cathcart v. Robinson, 30 U.S. 264 (1831).
149 Shortly thereafter, Cheshin again evinced the view of legal reception in CA 41/57, 42/57 Ida v. Sasson 11 PD 1100 (1957).
Klinghoffer confidently stated that there was no “legal continuity [rezifut mishpatit]” between the legal system in Mandate Palestine and that in Israel; rather, Section 11 “received” the laws that were in existence on May 14, 1948.\footnote{Hans Klinghoffer, “Die Entstehung des Staates Israel,” in Jahrbuch des öffentlichen Rechts der Gegenwart (Tübingen: J. C. B. Mohr, 1961), XX.} “If not for this reception ordinance,” he continued, “the validity of Palestinian law would have dissipated.” And, citing to Shlifkovitz, he determined that Section 11 was “a constitutive legislative act, that gave new validity to the law which existed, though with certain exceptions and changes.”

Meanwhile, although the question of how Section 11 interacted with Article 46 was not resolved in the short term, the disagreements around it gradually abated. Only in 1980, with the passage of the Foundations of Law, 1980 Law was Article 46 formally abolished (the law clarified that any reception of English law that had already occurred would not be affected). In its stead, courts facing a legal lacuna were to rule in “light of the principles of freedom, justice, equity and peace of Israel's heritage.”\footnote{Sefer Hukim 978 (July 31, 1980), p. 163.} While the meaning of this new provision opened a new frontier in Israeli jurisprudential disagreements, the disabling of Article 46 meant that the Israeli legal system was finally formally disconnected from the pipeline of English common law and equity. That it took thirty-two years until this happened underscored how the urgency of those proponents of legal continuity ultimately lost out to the gradualist impulses of those who espoused legal reception. When the future finally arrived, the past had long gone.

**Conclusion**

By 1962, Uri Yadin could confidently and calmly explain that

the change in the position of English law in Israel is somehow parallel to the change in the political relation between the two countries. Previously England had governed Palestine and had imposed its law on the country from without. Today the two countries are independent from one another and the further introduction of
English law depends on voluntary reception from within. Instead of being applied *ratione imperii*, English law is now adopted *imperio rationis*.\(^\text{153}\)

Yadin’s equanimity when he spoke of English law’s influence on Israeli law did not always characterize Israeli legal discourse. Rather, as this chapter has argued, his acceptance of the English fingerprint on Israeli law—as well as his claim that Israel “received” English law—vied with the alternative view that reluctantly conceded that Israel continued English and mandatory law. While both of these competing views of the mandatory past conceived the Israeli legal system as “emerging out that which is itself unlawful,” as Robert Cover famously put it, their views of how to deal with this prior unlawfulness differed greatly.\(^\text{154}\) For those espousing legal continuity, it was necessary to quickly cleanse Israeli law of its mandatory past. Only then would Israel fully emerge out of its prior unlawfulness. By contrast, for advocates of legal reception this wholesale deconstruction of mandatory law was not only unnecessary, it was also immature and dangerous. Even while conceding that the Israeli legal future would be different from the present, they believed that there was little rush to arrive at this future. After all, Israel had already emerged out of its past unlawfulness by dint of attaining independence.

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