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ORIGINAL ARTICLE

Weber in Jerusalem: The Rabbinical Debate over the Establishment of the Rabbinical Court of Appeals, 1918–1921

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Abstract

The twentieth-century processes of legal modernization rendered transformations to the concept of authority and its public perception. This article builds on the complex Weberian articulations of these transformations to analyze a contemporary contentious debate concerning the establishment of a Rabbinical Court of Appeals, in Mandatory Palestine, between 1918 and 1921. This initiative, imposed by the British government and supported by non-religious Jewish leaders, raised a heated controversy between two rabbinical figures—Haim Hirschnson of Hoboken, New Jersey, and Ben-Zion Uziel of Jaffa. Based on a close reading of their texts, juxtaposing them to Weberian conceptualizations of modern authority, and contextualizing them in particular historical circumstances, I argue that both rabbis comprehended the appellate mechanism as transforming the concept of rabbinical authority. By instituting appellate courts, authority shifts from its "charismatic" or "traditional" form to a "legal" institutional-based form. They harshly disagreed, however, if this transformation is a positive development in the modernization of Jewish law, or, on the contrary, will have a detrimental impact on the public's trust in the judiciary. The rabbinical articulations of these Weberian themes, as I suggest to interpret their texts, shed light on the application of the Weberian theory of bureaucracy to the judicial system and legal profession and also provide illuminating insights into the analysis of current church-law relationships, in Israeli law and elsewhere.

Modernity generated gradual but radical transformations in Western societies' legal worlds. The formation of legal bureaucracies, structured codifications, and hierarchic institutions, reconstructed essential social conceptions of legality and authority. How did legal practitioners respond to these shifts? How did they envision the social benefits or costs of these transformations? Were legal agents enthusiastically delighted by the modernization of legal authority, or

were they concerned about the unpredictable consequences of this metamorphosis?

This article examines a particular debate in which these questions played a central role: the rabbinical controversy over the establishment of the Rabbinical Court of Appeals in Mandatory Palestine, forced by the British mandate in the early 1920s. It interprets and analyzes two rabbinical polemic essays regarding this new institution using Weberian theoretical frameworks of bureaucracy and authority. The authors, I argue, comprehended the appellate court as transforming the concept of legal authority and the basis of its legitimacy. Their divergent reactions to its establishment reveal their broader attitudes toward the anticipated modernization of the Jewish legal system and its social impact on the public trust in the judiciary.

This inquiry illuminates the history of the Rabbinical appellate court's establishment, by exploring the conceptual, jurisprudential, and social issues that stood at its background. While some aspects of this history were previously explored, its intellectual origins remain overlooked. As a landmark in the construction of Israel's family law, the institution's establishment had long-term effects on the country's church-state relationships. Moreover, framing the debate as a heated discussion on the consequences of the modernization and bureaucratization of law, provides broader contributions to other contexts of legal–historical inquiry. I discuss these contributions in the concluding section of this article.

The theoretical framework of this analysis builds on the contemporary Max Weber (1864–1920), especially his *Economy and Society*.[1] Weber famously articulates the features of bureaucratic systems and conceptualizes the legitimacy of legal authority. Both bureaucracy and legal authority, in their modern sense, rely upon the functioning of general, impartial rules through structured, hierarchical institutions. This modern feature is opposed to other types of legitimate authority—based on charisma or tradition. Weber finds this turn appealing: General rules lead to rational and uniform decisions, reduce governmental corruption, increase citizens' trust, and result in better outcomes. Nevertheless, Weber also raises concerns about its consequences, some of which were also illuminated, through a different genre, by Franz Kafka (1883–1924).[2] Kafka illustrated how rule-based authority leads to an alienation from the decision-maker and to a profound detachment from the law, eventually threatening its legitimacy.

Would the turn from charisma and tradition to rules and institutions, increase public legitimacy and trust or eventually destroy it? While Weber applies abstract theory, notably similar articulations of modern authority and bureaucracy were expressed and deliberated by two rabbinic figures regarding an actual legal reform: The polemic correspondence between Haim Hirschnson of Hoboken, New Jersey (1857–1935), and Ben-Zion Uziel of Jaffa

[1] Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, eds. Guenther Roth and Claus Wittich (New York: Bedminster Press, 1968).

[2] For the possibility of actual influence, see Douglas Litowitz, "Max Weber and Franz Kafka: A Shared Vision of Modern Law," *Law, Culture and the Humanities* 7 (2011): 48–65.

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(1880–1953), regarding the initiative to establish a Rabbinical Court of Appeals in British Mandatory Palestine.

The British Government, and also some Zionist leaders, pressed on the rabbinical leadership to establish this court, which initially rejected the idea. Ostensibly, this rejection may stem from a doctrinal difficulty, since the *Halakha* (religious Jewish law) does not include a doctrine of appeal. The reasoning of the rabbinic correspondence indicates, however, other factors at stake. Both authors focused on the influence of the proposed reform on the nature of rabbinical authority. They understood the appellate mechanism as a shift from virtue-based authority to bureaucratic-legal authority, and debated its plausibility. Their articulations of these considerations strikingly parallel those brought up by their European contemporaries. While Hirschnson prized the advantages of modern bureaucracy, Uziel feared the devastating legal alienation it could lead to. Interpreting this polemic through a Weberian–Kafkaesque lens provides valuable insight into the specific historical episode and advances our broader understanding of how these tensions functioned, in practice, within preexisting legal cultures experiencing them.

Before proceeding, two methodological points should be made. First, the analysis of the rabbinical debate cannot rely exclusively on a theoretical framework; it requires contextualization. In its backdrop stand the actual contexts in which the debate was written: The recent Ottoman modernization processes, the British approach to religious judicial autonomy, and the personal background and jurisprudential views of the participants. I acknowledge and discuss these contexts and their role in interpreting the correspondence. Notwithstanding, my focus remains on the texts themselves, as they explicitly express socio-legal attitudes toward the initiative, surprisingly resonating with Weberian considerations and terminology.

The second point concerns anachronism. Writing in 1918–1920, the rabbis were probably unaware of contemporary Weberian theories. I do not argue for actual influence but rather demonstrate how Weberian theories illuminate in the best light the legal–political positions of these rabbis. One might accuse this interpretative move as anachronistic.[3] My analysis, however, does not require me to explain the rabbinic positions in ways that they themselves were incapable of expressing. The analysis focuses on concepts explicitly developed and deliberated in their text—a categorization and plausibility of legitimate authority models.[4] The comparison to the analogous Weberian categorizations, allows us to reveal the full motivations and meanings of this discussion.

The article proceeds as follows: The first section provides the theoretical and historical frameworks as a backdrop to the analysis of the debate, which is presented in the second section. In the next two sections, I delve into the legal texts, by Hirschnson and Uziel. Both conclude that, under *Halakha*, it

[3] See James Tully, ed., *Meaning and Context: Quentin Skinner and his Critics* (Princeton, NJ: Princeton University Press, 1988), 29.

[4] See Prudovsky's criteria for "rational reconstruction": Gad Prudovsky, "Can We Ascribe to Past Thinkers Concepts They Had no Linguistic Means to Express," *History & Theory* 36 (1997): 15–31.

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was permitted to establish a Court of Appeals, but they diverge in their attitude to such a move. I interpret their disagreement as a variation on the Weberian–Kafkaesque gravitation toward, and concerns over, modern bureaucratic authority. Finally, I conclude by discussing the valuable insights this analysis provides, both to the particular context and beyond.

A Three-Dimensional Framework

Weber (and Kafka) on modern authority

Weber influentially defines bureaucracy as a rational organization governed by general and calculable rules, and describes its principled features—including hierarchy, documentation, official training, and specialization.[5] Thus, bureaucracy requires impersonalization: "Bureaucracy develops the more perfectly, the more it is 'dehumanized,' the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements."[6] Weber articulates bureaucracy's practical superiority: "Precision, speed, unambiguity, knowledge of the files, continuity, discretion, unity, strict subordination, reduction of friction and of material and personal costs—these are raised to the optimum point in the strictly bureaucratic administration."[7]

In a separate discussion, Weber analyzes a different aspect of bureaucracy—its ability to constitute legitimate authority. Defining domination as "the probability that [...] commands will be obeyed by a given group of persons,"[8] Weber famously outlines three "ideal types" of legitimacy claims: charismatic authority, traditional authority, and legal authority. Charismatic authority is based on the personal virtues of the leader, and traditional authority is based on the virtue of age-old rules and their presumed sanctity. Weber considered both to be the main components of pre-modern authority.[9] By contrast, legal authority is based on the impersonality and rationality of its norms. Bureaucracy—governance by calculable rules—constitutes a new justification for authority: The legitimacy of bureaucratic authority is underpinned by the fact that officials apply general rules and do not execute personal discretion.

Importantly, however, Weber is not making a direct normative judgment on authority, but rather an observation on the ways authoritative systems cultivate social belief of their legitimacy.[10] Moreover, Weber expressed despair over modernity precisely because of its impersonalization: Modernity is "a process in which all the institutional aspects of culture have been drained of normative meaning and people are caught between structured but meaningless

[5] Weber, *Economy and Society,* vol. 2, at 956.

[6] Ibid., at 975.

[7] Ibid., at 973.

[8] Ibid., vol. 1, at 212.

[9] Clearly, these "ideal types" practically co-exist (in modernity and earlier). I treat charismatic and traditional authority together, as opposed to legal authority, because I focus on the dominance of the latter—as I believe Weber did—for modern bureaucracy.

[10] See David Beetham, *The Legitimation of Power* (London: Macmillan, 1991), 8; Anthony T. Kronman, *Max Weber* (Stanford, CA: Stanford University Press, 1983), 184.

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realms of instrumental action."[11] While modern bureaucracy may advance governance or decision-making, its technicality and impersonality empty these processes of substantive normative meaning.[12] Indeed, Weber's dual normative stance toward modern legal authority was depicted as enigmatic.[13]

This "despairing" theme of bureaucracy was famously magnified by Franz Kafka. Kafka highlights the horrific potential consequences of impersonalizing authority.[14] A well-known characteristic of the Kafkaesque bureaucratic state is its unjust and inefficient outcomes at the expense of the hopeless individual vis-à-vis the state. Kafka "plays" with the components of Weberian bureaucracy and shows how their strict application leads to disastrous systemic clumsiness, resulting counterintuitively in irrational and unjust results.[15]

Kafka also hints at the effect of bureaucracy on perceptions of authority. In a puzzling parable, "Unknown Laws,"[16] Kafka categorically rejects the possibility of a rule of law without designated rulers. The narrator describes "our laws" as secret laws that are known only to a small group of nobles. While the narrator does not idealize this situation, he insists it is impossible to conceptualize the law in any other way but by recognizing the actual people with power who stand behind it: "The only visible unquestionable law that has been imposed on us is the nobility."[17] Put otherwise, a conception of authority deriving from general rules, detached from actual human rulers, is an illusion. Thus, the detrimental outcomes of modern bureaucracy are not attributed (only) to its complexity or impersonal character. They are rooted in the futile attempt to address legal rules as an independent source of legitimate authority. The attempt to substitute personal authority with "the law" is doomed to fail since the law is enshrined in the existence of the nobility itself.

Weber's writings are not isolated from the larger theoretical and jurisprudential conversation regarding the modern turn to impartial rule-based legality, a conversation that took different forms in various socio-legal contexts.[18] I

[11] David M. Trubek, "Max Weber's Tragic Modernism and the Study of Law in Society," *Law & Society Review* 20 (1986): 573–98, at 592 (reviewing Kronman, *Max Weber*).

[12] For this reason, the inner-justification of legal authority was criticized as circular, famously by Jorgen Habermas, *The Theory of Communicative Justice*, vol. 1 (Boston: Beacon Press, 1984), 265. See also, e.g., Lawrence A. Scaff, "Weber on the Cultural Situation of the Modern Age," in *The Cambridge Companion to Weber*, ed. Stephen Turner (Cambridge: Cambridge University Press, 2000), 99–116; William Connolly, "Introduction: Legitimacy and Modernity," in *Legitimacy and the State*, ed. William Connolly (New York: New York University Press, 1984), 1–19.

[13] See Kronman, *Max Weber*, at 182–88.

[14] For Weber–Kafka comparisons, see Litowitz, "Max Weber and Franz Kafka"; Torben Beck Jørgensen, "Weber and Kafka: The Rational and the Enigmatic Bureaucracy," *Public Administration* 90 (2012): 194–210. See also Theodore Ziolkowski, "Law," in *Franz Kafka in Context*, ed. Caroline Duttlinger (Cambridge: Cambridge University Press, 2018), 183–90.

[15] Jørgensen, "Weber and Kafka." This theme is prevalent in his novels *The Trial* and *The Castle*.

[16] Franz Kafka, "Unknown Laws," *London Review of Books* 73(14) (2015), https://www.lrb.co.uk/the-paper/v37/n14/franz-kafka/short-cuts. See also Frederick C. DeCoste, "Kafka, Legal Theorizing and Redemption," *Mosaic* 27 (1994): 161–78.

[17] Kafka, "Unknown Laws."

[18] Noteworthy are the notions of rule of law in common law, and the *Rechsstaat* in continental law, which preceded and influenced Weber. These notions had specific manifestations in various

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use the Weberian framework in particular because the debate participants, like Weber, focus on the *social reaction* to this change, in terms of legitimate authority. The rabbis expressed similar articulations of appeal to, and hesitance from, the bureaucratization of authority, from the perspective of its effect on public trust and perception of authority.

Despite the centrality of these theoretical concerns to the analysis of the rabbinical debate, we should also take into account the particular contexts in which it was conducted. The rabbinic writings were not a theoretical exercise but responded to a particular sociopolitical setting. To contextualize the analysis, I complement the theoretical framework by turning to two aspects of this setting: The British Mandate's attempt to bureaucratize Jewish religious institutions, and the role of an appellate system in constituting bureaucratization.

Ottomans, the British, and the Jewish religious institutions

When the British entered Palestine in 1918, they inherited the Ottoman *millet* system, which granted various communities autonomy to adjudicate their religious issues. Following its status-quo policy the British government preserved the *millet* infrastructure, but radically modernized it in several ways.[19]

The *millet* in general, and its Jewish version in Palestine in particular, was not a monolithic legal arrangement. Rabbinical jurisdiction was respected by the Ottomans, but was not exclusive. Alongside recognized courts, there was a variety of communal religious courts; Imperial courts (*Shari'a* and *Nizamiye*) were accessible as well, and for Jewish European immigrants consulate judgment, according to capitulation agreements, was available too.[20]

Despite the Ottoman centralizing legal reforms of the nineteenth century, the Ottoman legal system still enjoyed a considerable extent of legal pluralism, and the impact of these reforms on our local pluralistic setting was marginal.[21] The British reconstruction of the *millet*, contrarily, was dramatically more monistic.[22] Through a series of proclamations and legislations, the autonomy granted to religious groups was now specified, regulated, and delegated by

contexts. See e.g., Kenneth F. Ledford, "Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court, 1876–1914," *CEH* 37 (2004): 203–24, at 206.

[19] Aharon Layish, "The Heritage of Ottoman Rule in the Israeli Legal System: The Concept of *Umma* and *Millet*," in *The Law Applied: Contextualizing the Islamic Shari'a*, eds. Peri Bearman et al. (New York: I.B. Tauris, 2008), 128–49; Laura Robson, *Colonialism and Christianity in Mandate Palestine* (Austin, TX: University of Texas Press, 2011), ch. 2.

[20] Elimelech Westreich, "Jewish Judicial Autonomy in Nineteenth Century Jerusalem: Background, Jurisdiction, Structure," *Jewish Law Association Studies* 22 (2012): 303–30; Amihai Radzyner, "Jewish Law in Pre-State Palestine," in *The Cambridge Companion to Judaism and Law*, ed. Christine Hayes (New York: Cambridge University Press, 2017), 317–36, at 322–23; Layish, "The Heritage of Ottoman Rule in the Israeli Legal System: The Concept of *Umma* and *Millet*"; Lauren Benton, "Historical Perspectives on Legal Pluralism," *HJRL* 3 (2011): 57–69, at 61–62.

[21] Avi Rubin, "Legal Borrowing and its Impact on Ottoman Legal Culture in the Late Nineteenth Century," *Continuity and Change* 22 (2007): 279–303, at 295; Yuval Ben-Bassat, *Petitioning the Sultan* (London: I.B. Tauris, 2013), 33–44.

[22] Robson, *Colonialism and Christianity*; Layish, "The Heritage of Ottoman Rule in the Israeli Legal System: The Concept of *Umma* and *Millet*."

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the government.[23] The scope of government-delegated religious jurisdiction became one of the core issues in internal and external politics in Palestine.[24]

The British regulation of religious jurisdiction also rendered its exclusiveness. Citizens belonging to a given religious community became exclusively subjected to their religious tribunal's jurisdiction, and, generally speaking, could not turn to civil alternatives. This point stood at the heart of Jewish internal political debates about the proper scope of rabbinical jurisdiction. The question of religious autonomy became a zero-sum game and, therefore, a cornerstone of the church–state relationship debate that rages to this very day in Israel.[25] While secular Zionists attempted to reduce rabbinical adjudication, Zionist rabbis envisioned a legal system based primarily on traditional Jewish law.[26]

Lastly, the British interference in Jewish-religious legal autonomy aimed also at its structural and procedural aspects. This included a reform in the position of the Ottoman-delegated chief rabbi—the *Hacham Bashi*—substituting it with a novel chief rabbinate;[27] an interest in rabbinical courts' procedural rules;[28] and the demand to establish a rabbinical appellate court.

These institutional reforms held significant implications for the internal development of Jewish law, as they would constitute an institutional centralization of Jewish religious adjudication. Historically, Jewish law had developed to be a decentralized, pluralistic legal system, containing coexisting legal traditions and practices, mostly along ethno-cultural lines.[29] Jewish Ottoman Jerusalem was a multi-communal region, with multiple operating Jewish courts. This legal pluralism found itself confronted by an unprecedented modernistic challenge, as the British Government treated all Jews as one homogeneous legal community under the jurisdiction of a single system. Indeed, strong opposition to this exclusivity came from the conservative ultra-Orthodox

[23] See "Courts, Proclamation No. 42" (June 24, 1918), in *Proclamations, Ordinances and Notices issued by O.E.T.A. (South) to August 1919* (Cairo: Oriental Advertising Co., 1919), 9, para. 10 (proclaiming the jurisdiction of Christian and Jewish courts over matters of personal status would "be as it was before the occupation"); Repeated in Article 9, The League of Nations Mandate for Palestine (July 24, 1922). The delegation of particular judicial authority is mainly in clauses 51–54, The Palestine Order-in-Council, 1922, featuring a list of subjects over which the religious courts hold jurisdiction.

[24] Daphne Tsimhoni, "The British Mandate and the Status of the Religious Communities in Palestine," *Cathedra* 80 (1996): 150–74 [Hebrew]; Menachem Friedman, *Society and Religion: The Non-Zionist Orthodox in Eretz-Israel—1918–1936* (Jerusalem: Yad Ben-Zvi, 1977), 113 [Hebrew].

[25] Radzyner, "Jewish Law in Pre-State Palestine," at 331.

[26] Assaf Likhovski, *Law and Identity in Mandate Palestine* (Chapel Hill, NC: University of North Carolina Press, 2006), ch. 6; Ronen Shamir, *The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine* (Cambridge: Cambridge University Press, 2000), ch. 3; Friedman, *Society and Religion*; Alexander Kaye, *The Invention of Jewish Theocracy: The Struggle for Legal Authority in Modern Israel* (New York: Oxford University Press, 2020).

[27] See Friedman, *Society and Religion*, at 117; Aryeh Morgenstern, *The Chief Rabbinate of Eretz-Israel* (Jerusalem: Hamakor, 1973) [Hebrew].

[28] See Radzyner, "Jewish Law in Pre-State Palestine," at 332.

[29] See e.g., Richard Hidary, *Dispute for the Sake of Heaven: Legal Pluralism in the Talmud* (Providence: Brown Judaic Studies, 2010).

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group *Agudath Israel*, which feared the operation of coercive judicial power by lenient religious institutions.[30] This resistance demonstrates how the decentralized character of Jewish law stood in tension with the British Government's intention to centralize the religious judicial authority.

Appellate systems in the modernistic infrastructure

Appellate courts are not a modern invention. Some variations of the mechanism existed in late-Roman law and medieval Continental law.[31] Appellate options were available in the Ottoman Empire and, sporadically, in some Jewish courts.[32] However, the role of appeals, as some scholars point out, has shifted dramatically through its Western modernization. As a pre-modern phenomenon, appeals served mainly as an authoritarian–political mechanism for supervising the courts.[33] Gradually, modern bureaucratic perceptions structured and integrated the appellate process into a larger scheme of systematic–bureaucratic governance, designed to "ensure that the law shall be uniform, impersonal, impartial, principled, and clearly elaborated."[34] Indeed, Weber himself regarded the administrative appeal as a basic feature of bureaucracy.[35] The rule-based governance of bureaucracy renders hierarchical review possible and necessary.[36]

These aspects of the appellate process should not be viewed as dichotomous. Our debate occurred during the gradual transformation of appeals from an authoritative to a bureaucratic-institutional feature. How did its participants perceive the essence of the appeal in these terms? Before delving into the rabbinic episode, I contextualize this question by observing its broader background.

First, the Ottoman *Nizamiye* courts, established in the mid-nineteenth century, introduced a hierarchic, multileveled judicial system. A cornerstone of this system's self-portrait was an embracement of French judicial formalism, minimal discretion, and strict procedure, to achieve rationality.[37] The system's influence on the population was probably minor, and the incorporation of appeals into the Ottoman infrastructure did not diminish alternative forms

[30] Tsimhoni, "The British Mandate and the Status of the Religious Communities"; Friedman, *Society and Religion*, at 185.

[31] Peter D. Marshall, "A Comparative Analysis of the Right to Appeal," *Duke Journal of Comparative & International Law* 22 (2011): 1–46, at 12; Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), 30, 60.

[32] See Rubin, "Legal Borrowing"; Ben-Bassat, *Petitioning the Sultan*, at 31–44, 148. On the role of Jewish precedents of appeals in the debate, see Amihai Radzyner, "Rabbi Uziel, the Tel-Aviv-Jaffa Rabbinate, and the Rabbinical Court of Appeals: A Play in Four Acts," *Bar-Ilan Law Review* 21 (2004): 129–243, at 174 [Hebrew].

[33] This notion is elaborated by Martin Shapiro, "Appeal," *Law & Society Review* 14 (1980): 629–62; see also Damaška, *The Faces of Justice*.

[34] Ibid., at 631.

[35] Weber, *Economy and Society*, at 957.

[36] Authoritarian-motivated appellate systems are also hierarchical, thus the line between them and bureaucratic–legalistic ones, is blurred. See also Damaška, *The Faces of Justice*; Owen M. Fiss, "The Bureaucratization of the Judiciary," *Yale Law Journal* 92 (1983): 1442–68.

[37] Rubin, "Legal Borrowing."

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of seeking governmental aid.[38] Still, its proclaimed formalistic agenda stands in the background of the rabbinic debate—that occurred just a few years after their abolition.

Second, I turn to the British history of appeals, which is twofold—internal and colonial. Internally, Common law's incorporation of appellate mechanisms was gradual and relatively late. In civil cases, appeals were introduced already in the early modern era, but in the criminal context only during the late nineteenth century.[39] Only in 1907, after several decades of proposals, England established a functioning criminal appellate system, a delay mainly due to an ongoing debate with the opposing judiciary.[40] Their arguments against it focused on its material and time costs, but underlying these utilitarian arguments was the fear that an established appellate system would inevitably decrease public trust in courts. The push toward a criminal appellate system, one judge argued, was motivated by those "who live by crime, and who have a great interest in imputing that Courts of Justice are often mistaken."[41] In other words, bureaucratizing the judiciary could have negative consequences for its public esteem and legitimacy, its charismatic authority, and the obedience of its subjects.

In the colonial context, appeals had a dominant authoritative aspect, as a means of supervising the colonies' legal systems. This was emphasized where local or indigenous lawyers served as judges in lower courts.[42] The role of judicial bureaucracy, through the creation of a colonial-controlled hierarchy, was to oversee that judicial practices resonate with the interests of the government. British Palestine was no exception.[43] The case of the Rabbinical Court of Appeals is, however, complex. It was meant to be composed of rabbis, not government officials. Thus it was not a direct supervisory institution.[44] While supervision might be part of the story, the British motivation for initiating

[38] Ben-Bassat, *Petitioning the Sultan*, at 148.

[39] See John Baker, *Introduction to English Legal History*, 5th ed. (Oxford: Oxford University Press, 2019), 145–64; Shapiro, "Appeal"; Damaška, *Faces of Justice*, at 30, 60; Benjamin L. Berger, "Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals," *Canadian Criminal Law Review* 10 (2005): 1–41; David John Adams Cairns, *Advocacy and the Making of the Adversarial Criminal Trial, 1800–1865* (Oxford: Clarendon, 1998), 169–74.

[40] See Berger, "Criminal Appeals as Jury Control"; Cairns, *Adversarial Criminal Trial*.

[41] Lord Denman, quoted in The Report from the Select Committee of the House of Lords on the Criminal Law Administration Amendment Bill (1848), 45; Quoted by Berger, "Criminal Appeals as Jury Control," at 28.

[42] Supervision via appeals was both internal (within the colony), and external (the central government supervising colonial officials). I focus on the former. See e.g., Taslim Olawale Elias, "Colonial Courts and the Doctrine of Judicial Precedent," *Modern Law Review* 18 (1955): 356–70; Abhinav Chandrachud, *An Independent, Colonial Judiciary: A History of the Bombay High Court during the British Raj, 1862–1947* (New Delhi: Oxford University Press, 2015), 20–23; 205–32. On the latter, see David B. Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council*, 1833–1986 (Manchester, UK: Manchester University Press. 1987); John McLaren, *Dewigged, Bothered, and Bewildered: British Colonial Judges on Trial, 1800–1900* (Toronto: University of Toronto Press, 2011); Shapiro, "Appeal," at 639.

[43] Assaf Likhovski, "In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine," *Israel Law Review* 29 (1995): 291–359.

[44] Notwithstanding, the rabbinical appellate court itself *was* supervised by the HCJ—the civil supreme court, which indeed served as a supervisory mechanism. See Radzyner, "Jewish Law in Pre-State Palestine," at 333.

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the rabbinic appellate court (which we will soon examine), as well as their general approach toward rabbinical jurisdiction, should be mainly understood as an attempt to "modernize" traditional legal practices. This occurred through an ambivalent contradiction between keeping the status quo granting religious autonomy, and simultaneously qualifying it by subordinating it to modern principles of unification and hierarchy.[45]

After introducing the Weberian theoretical framework, the British efforts to modernize rabbinical jurisdiction, and the role of appeals within these dimensions, we can now delve into the history of the debate itself.

The Rabbinical Debate and its Weberian Themes

As part of reshaping the *millet* system, the British authorities set up a committee to reform the malfunctioning Ottoman-established position of Chief Rabbi (*Hakham Bashi*). Chaired by the Mandate's Attorney-General (and enthusiastic Zionist Jew) Norman Bentwich,[46] the committee's report (dated November 11, 1920) set out its idea of constructing a chief rabbinate in Palestine.[47] The report focused on the ethnic tensions between Ashkenazi and Sephardic communities and suggested that the new institution should be composed of representatives of both ethno–legal traditions.[48]

Debating the institution's authorities, the committee proposed to establish a court of appeals for Jewish religious tribunals. It described the urge for such a reform in light of Jewish legal pluralism:

> Currently, there is no court of appeals in the Land of Israel to which appeals from the religious Jewish courts can be submitted. In Jaffa and other Jewish cities, there is a single court that serves as a court for all Jewish ethnic communities.[49] In Jerusalem there is an office of the rabbinate [...] where judges from all the different ethnicities adjudicate; apart from that, different ethnic communities make up their own courts and there is no higher authority to prevent conflicts arising in connection with questions of adjudication.[50]

[45] Ibid., at 331; Also see Sally Engle Merry, "Law and Colonialism," *Law & Society Review* 25 (1991): 889–922; Elke E. Stockreiter, "'British Kadhis' and 'Muslim Judges': Modernisation, Inconsistencies and Accommodation in Zanzibar's Colonial Judiciary," *Journal of Eastern African Studies* 4 (2010): 560–76.

[46] Bentwich had a central role in formulating the British position. Born to a British-Jewish Zionist family, Bentwich held dual identities which he wished to reconcile. He joined the colonial administration as a manifestation of both identities, and his influence on its legal system should thus be observed from both British and Jewish perspectives. See Robson, *Colonialism and Christianity*, at 51–54.

[47] The Report, titled "The Report of the Committee about the Position of the Hakham Bashi" [Hebrew], can be found at the Central Zionist Archive, Jerusalem, J1-191; reproduced in Morgenstern, *The Chief Rabbinate*, at 169–74 (hereafter: The Hakham Bashi Committee).

[48] Morgenstern, *The Chief Rabbinate*; On the Ashkenazi–Sephardic separation, see Zvi Zohar, *Rabbinic Creativity in the Modern Middle East* (London: Bloomsbury Academic, 2013).

[49] The original word—"*Edot*"—has multiple meanings; the particular context clearly refers to the different ethno-legal traditions.

[50] The Hakham Bashi Committee, at 172–73.

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Bentwich acknowledged the pluralistic structure of Jewish law, understood its consequences in terms of the unequal operation of the law, and linked it to the lack of an appellate court. Jewish legal pluralism, he observed, causes an unequal application of religious law by rabbinical courts, each deciding according to different legal traditions. It is debatable if Bentwich's perspective is of a British colonizer aiming for legal modernization of the religious local system, a Jewish Zionist envisioning an eventually modern Jewish state—or both.[51] In any case, this concern motivated the British approach to rabbinical jurisdiction. Following this report, the British administration conditioned their consent to grant rabbinical autonomous jurisdiction on the establishment of an appellate court. The rabbis, who did not want to surrender their legal autonomy, eventually could not refuse.[52]

British external pressure was the prominent reason for the establishment of this court, but the issue was also in internal Jewish debate. Preceding the British report, on June 18, 1918, during a meeting of Zionist leaders, the legal activist Mordechai Ben-Hillel Hacohen called for establishing an appellate court. Hacohen, a proponent of *civil* (albeit Jewish-law-inspired)[53] courts, criticized the malfunctioning religious courts:

> Our religious courts do not properly maintain procedural rules [...] whatever is usually called "procedure"—has lost all its value in our courts [...] In addition, there is also no option for appeals, since the [Jewish law] doctrine is that no court can cancel the ruling of a fellow court [...]—this, also, sometimes alienates the modern crowd.[54]

Bentwich's main concern was the unification of the legal system; Hacohen was concerned with individuals' procedural justice.[55] Both of these issues resonate with Weberian themes. Analogously, these figures believed that rectifying them, by constructing a hierarchical appellate system, would lead to just results and increase public trust. How did the Rabbis respond to these concerns and aspirations?

Among Hacohen's audience was Rabbi Ben-Zion Uziel—then, the local Rabbi of Jaffa (and, eventually, the Sephardic Chief Rabbi of Israel). Hacohen's complaints about the rabbinical courts and his support for an appellate system made Uziel furious, and he forcefully opposed the idea.[56] The rumor of this

[51] See above, note 46. This requires further investigation on the cooperation of the colonial infrastructure with Bentwich. See Robson, *Colonialism and Christianity*, at 55–62.

[52] Radzyner, "Rabbi Uziel, the Tel-Aviv-Jaffa Rabbinate, and the Rabbinical Court of Appeals" at 167.

[53] On the secular project to construct a modern legal system inspired by traditional Jewish Law, which Hacohen participated in, see Likhovski, *Law and Identity*.

[54] See the protocol of the assembly, Central Zionist Archive J1/8763; quoted by Radzyner, "Rabbi Uziel, the Tel-Aviv-Jaffa Rabbinate, and the Rabbinical Court of Appeals," at 141. The precise quote is translated from Hacohen's autobiography: Mordechai Ben-Hillel Hacohen, *Atchalta*, vol. 2 (Jerusalem: Ayanot, 1942), 120–21 [Hebrew].

[55] Bentwich was also concerned with procedural justice and public trust, as he mentioned in a speech: Radzyner, "Rabbi Uziel, the Tel-Aviv-Jaffa Rabbinate, and the Rabbinical Court of Appeals," at 169.

[56] For a detailed survey of the discussion, see Radzyner, ibid.

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dispute reached Hoboken, New Jersey—where Haim Hirschnson served as the local rabbi. Hirschnson, who was born in Safed, and had immigrated to Istanbul before settling in the United States, was both an enthusiastic Zionist and a devoted rabbi. As such, he wrote extensively on Jewish–legal issues regarding an innovative Jewish state. After being informed on the Hacohen–Uziel controversy by the press,[57] Hirschnson wrote a detailed legal essay on the subject matter of appeal, and vigorously justified its institutional establishment.[58] Hirschnson sent his essay to Uziel, who responded with a legal essay of his own. There, he claimed that an appeal was needless and problematic—although he did not forbid its establishment.[59] It is to these two texts to which I now turn to analyze.[60]

The focus is on the analysis of the texts themselves. Long and detailed, they provide rich legal reasoning for the support or opposition to the establishment of an appellate court. While they are majorly dedicated to doctrinal discussion (on the Jewish legal approach to appeal), their jurisprudential and sociological considerations are presented upfront.[61]

There are several possible explanations for a rabbinical hesitation at the prospect of introducing an appellate system. First is the appellate mechanism's incoherence with traditional Jewish law, which plainly, did not include a doctrine of appeal.[62] Therefore, the debate's starting point was that an appellate court requires grounding. A second explanation could be a general conservative fear of change per se. A third concern could be over external governmental intervention in the content and practice of Jewish law by foreign, gentile, strangers.

Undoubtedly, these themes played an important role in the socio-political debate around the proposed development. An ultra-Orthodox pamphlet

[57] See Radzyner, ibid., at 147.

[58] The text was eventually printed in the first volume of Hirschnson's book *Malki BaKodesh*, reprinted and annotated as *Malki Bakodesh Responsa—Part One: By Rabbi Hayyim Hirschensohn*, ed. David Zohar (Jerusalem: Hartman Institute, 2006) [Hebrew].

[59] Initially printed as *Hok U'mishpat Be'Yisrael* (=Law and Adjudication in Israel) in the local journal *Hadvir*, vol. 5 (1919). Radzyner, "Rabbi Uziel, the Tel-Aviv-Jaffa Rabbinate, and the Rabbinical Court of Appeals," reveals that after time, Uziel softened his attitude toward the court of appeals, slightly amended this text, and reprinted it in *Mishpetei Uziel, Part Choshen Mishpat*, sec. 1 (Tel Aviv: Lewitzy Publishers, 1940). Radzyner also analyzes the motivations of Uziel's shift. In this article I analyze his initial position which stands for itself as a unique objection to the Weberian Ideal. His eventual openness toward the initiative is mainly a result of the inevitable modernizing process, which rendered judicial hierarchy non-relinquishable.

[60] Hirschnson and Uziel's texts were the most detailed Halakhic argumentations about the matter written at the time. Other contemporary rabbinic expressions were incidental or succinct. See Rabbi Avraham Yitzhak Hacohen Kook, *Igrot Re'aya, vol. 4* (Jerusalem: Mechon Haratzia, 1984), 23–25 (Letter no. 994) [Hebrew]; Rabbi Yizhak Isaac Halevy Herzog, *Psakim Uchtavim*, vol. 9 (Jerusalem: Mosad Harav Kook, 1991), 31–32 (Responsa no. 11) [Hebrew].

[61] On this methodology, see Isaac B. Gottlieb, "The Politics of Pronunciation," *AJS Review* 32 (2008): 335–68.

[62] This does not mean that appeals did not historically exist in Jewish courts; see above, note 32. See also Judah David Bleich, "The Appeal Process in the Jewish Legal System," *Tradition* 28 (1993): 94–112.

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disseminated in Jerusalem in 1920 proclaimed that an appellate court "stems from gentile laws and contradicts our Torah."[63] Presenting the opposing view, Simcha Assaf, a religious supporter of the initiative (and later an Israeli Supreme Court Justice), wrote an academic history to "prove" the pre-existence of appellate courts in Jewish tradition.[64]

However, adherence to traditional doctrine, and fears of internal and external changes within it, cannot fully explain the *Halakhic* controversy. The debate is not a superficial "conservative versus progressive" one: Both authors shared sympathy for modern ideas and were relatively open to changes in Jewish law.

Uziel was a creative interpreter of the Jewish legal tradition, sympathetic to modernity and social change. On issues such as the women's vote, attitudes toward non-religious Jews, or conversion, he took a lenient line.[65] Uziel held that the anticipated Jewish state should be based on modern democratic institutions, even when these were not easily reconciled with Jewish legal doctrine. Thus, he promoted the participation of religious parties in the democratic political framework established by Zionists in Palestine.[66] His positive attitude toward modernity, scholars argue, derived from his Sephardic tradition, which was less hostile toward modernity than European–Jewish traditions, and from the modernistic social environment within the late Ottoman elite.[67] Against this backdrop, his resistance to an appellate court calls for explanation.

Like Uziel, Haim Hirschnson was also a supporter of modern values and their incorporation into Jewish law. He intensively addressed conflicts between Jewish law and contemporary challenges, attempting their reconciliation. Scholars situated his approach in his exposure to the American social and political culture, as well as in his familial background.[68] Notably, Hirschnson endorsed the pluralistic nature of Jewish law and did not attempt to centralize

[63] The pamphlet is on file at the Goren-Goldstein Diaspora Research Center archive, A3/203; quoted by Radzyner, "Rabbi Uziel, the Tel-Aviv-Jaffa Rabbinate, and the Rabbinical Court of Appeals," at 136.

[64] Ibid., at 133.

[65] See e.g., Marc D. Angel, *Loving Truth and Peace: The Grand Religious Worldview of Rabbi Benzion Uziel* (Northvale: Jason Aronson Inc., 1999); Zvi Zohar, "Should Non-Jews be Regarded as Equal? A Partial Mapping of 20th Century Rabbinic Positions with Regard to Non-Jews," *Journal of Law, Religion & State* 4 (2016): 267–92, at 289–91.

[66] Malka Katz, "Rabbi Uziel and the Democratic Way in Religious Zionism During the Pre-State Period: Historic Observations," in *Rabbi Benzion Meir Hai Uziel: Thinker, Halakhist, Leader*, Zvi Zohar et al., eds. (Ramat-Gan: Bar-Ilan University Press, 2020), 297–328 [Hebrew].

[67] Katz, "Rabbi Uziel and the Democratic Way in Religious Zionism During the Pre-State Period," at 315–17; Moshe Hellinger, "Judaism, Zionism, Modernity and Democracy in the Thought of Rabbi Ben-Zion Uziel," in *Rabbi Uzziel and His Peers*, ed. Zvi Zohar (Jerusalem: Hava'ad Lehotza'at Kitvei Harav Uziel, 2009), 84–119 [Hebrew]. See also Zvi Zohar, *Rabbinic Creativity*, at 355–68. On modernism in Ottoman Palestine, see Michelle U. Campos, *Ottoman Brothers: Muslims, Christians, and Jews in Early Twentieth-Century Palestine* (Stanford, CA: Stanford University Press, 2011).

[68] See Eliezer Schweid, *Democracy and Halakhah* (Lanham: University Press of America, 1994); Ari Ackerman, "'Judging the Sinner Favorably': R. Hayyim Hirschensohn on the Need for Leniency in Halakhic Decision-Making," *Modern Judaism* 22 (2002): 261–80. Some scholars argue for a Sephardic influence on Hirschnson, see David Zohar, *Jewish Commitment in a Modern World: R. Hayyim Hirschensohn and His Attitude towards the Moderna* (Jerusalem: Hakibbutz Hameuchad, 2003), at 78–82 [Hebrew].

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its content, an approach that might be incongruent with establishing a court of appeal.[69]

This overview suggests that the controversy was not a matter of conservatism versus change as such. Both rabbis were open to legal change and were sympathetic to modernity. What, then, can explain their heated split on this issue? Perhaps, the geographical difference has a role: the local rabbi, closely exposed to the tensions between the Jewish community and the government, was more hesitant toward the initiative than the distant observer from overseas. One may suggest other influences.[70] Instead of speculating, I suggest looking at their explicit legal argumentation to reveal the particular concerns that underpin the controversy.

A close textual observation indicates that the concept of appeal triggered pressing questions on the nature of rabbinic authority in a modern legal environment. For Hirschnson, the idea of appeal represented a transformation in authority which he viewed as crucial for constituting a modern Jewish state. For Uziel, on the contrary, this very idea threatened the legitimacy of preexisting rabbinical authority in ways that bear detrimental consequences. I contend that it was this metamorphosis that stood at the center of the seemingly doctrinal debate.

Hirschnson: Governmental Authority vs. Moral Authority

Hirschnson's rich text is predominantly a classic Legal-Talmudic discussion. Its introduction, however, reveals his motivation and ideology behind it. Hirschnson expresses full awareness of a gap between Jewish law's concept of legal authority, and the modernistic one underpinning an appellate system. This, however, causes him not to reject the initiative but, rather, to call for a renewal within Jewish legal thought.

His discussion starts with the necessity to establish an appellate system:

> Can we imagine such a thing, as establishing a judiciary with absolute, non-appealable courts, without any "court of appeals"? This is something unthinkable in our times, and the nations will never agree to grant us such jurisdiction in the land that one law will exist within, to the Israelites and gentiles.[71]

This passage hints at the British condition to establish an appellate court, but also explains that its absence is intrinsically "unthinkable," due to the modern unification of the law. Hirschnson contrasts this unification with the current

[69] See Haim Hirschnson, *Malki BaKodesh Responsa: Part Two*, ed. David Zohar (Jerusalem: Hartman Institute, 2012), 141–44 [Hebrew]. It is likely that this approach was inspired by the American Federalist system. See Schweid, *Democracy and Halakhah*, at chapter 6.

[70] Such as Hirschnson's exposure to the variety of unorthodox denominations in American Jewry. See Adam S. Ferziger, *Beyond Sectarianism: The Realignment of American Orthodox Judaism* (Detroit: Wayne State University Press, 2015), 19–41.

[71] Hirschnson, *Malki Bakodesh Responsa—Part One*, at 29.

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character of Jewish law. He does so by juxtaposing two kinds of authority, which he terms "governmental authority" and "moral authority."[72]

Moral authority, Hirschnson describes, is the conscientious self-obligation to adhere to the legal order. Moral authority does not require sovereignty or coercion; when it exists, people obey the law as part of an inner sense of duty: "When the moral spirit is robust, there is no need of a government."[73] While moral authority can rely on various inner convictions, Hirschnson focuses on its religious character: Obedience to Jewish civil law under this type of authority is "exactly as the fulfillment of other *Mitzvot* [religious obligations] towards God."[74]

Governmental authority, by contrast, is the top-down authority of the state and its legal system and institutional enforcement. Hirschnson acknowledges, in fairness, that current Jewish law lacks mechanisms and doctrines that can facilitate this concept of authority, and instead relies on its adherents' moral-religious obligation. He therefore, surprisingly, defends Hacohen's attack on rabbinical adjudication. Hacohen, the Zionist supporter of secular courts, accused the Rabbinical courts of their inadequacy for modern adjudication. Hirschnson admits that this accusation is based on good intuitions:

> This writer [Hacohen], who knows a chapter or two [in Jewish law], did not have bad intentions; he realized that the core of our legal system is not based on governmental authority, rather on the moral obligations of the litigants.[75]

This foundational point also explains, according to Hirschnson, the absence of appellate mechanisms in Jewish law: appeals, he argues, are based on a "governmental" concept of authority, which current Jewish law is incompatible with.

Hirschnson claims, however, that Hacohen was mistaken to ignore some aspects of Jewish law that rely on governmental authority. This type of authority *can* be found in some Jewish legal sources and doctrines, even if in the margins. If we develop these margins, we can ground a doctrine of appeals:

> [Nevertheless] we do have many civil law doctrines which are based on "governmental authority" [...] this author has forgotten, or did not know, this point [...] according to these doctrines we can establish a legal, governmental, order like any other civilized sovereignty. And also a court of appeals...[76]

Although Hirschnson's categories of authority are not identical to the Weberian division of charismatic–traditional–legal authority, they have much in common. "Moral authority" derives from a religious belief in the legitimacy

[72] Hirschnson does not use the Hebrew term for "authority" (*Samchut*), a Modern-Hebrew term, but *Mishpat*, which is usually translated as "law." However, he clearly does not refer to legal arrangements but to reasons for obeying them.

[73] Hirschnson, *Malki Bakodesh Responsa—Part One*, at 30.

[74] Ibid.

[75] ibid., at 29–30.

[76] Ibid.

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of the judiciary due to its virtues. This belief stems from traditional perceptions or from the charisma of its leadership. Contrarily, "governmental authority" is based on top-down commands from the legal system. Hirschnson assumes that only the latter can facilitate an appellate system. This is explained further in his discussion, arguing that granting appellate power means granting authority to the judge based on his hierarchical–institutional *position*, not according to his personal *virtues*.[77] This requires a "governmental" and not a "moral" type of authority.

After proclaiming that the absence of appeals in Jewish law derives from its reliance on a different type of authority, Hirschnson shifts his argument and claims that this apparently irresolvable gap is illusionary: Talmudic sources, in fact, *do* contain aspects of governmental authority that can facilitate an appeal doctrine. His goal in this essay is to reveal these aspects, in the particular context of appeals, and to justify upon them the establishment of an appellate court. His implicit assumption is that these "governmental" sources were undeveloped and underestimated by Jewish legal scholars because Jewish law was historically applied in a communal, non-sovereign environment, with minimal enforcement mechanisms; in a future modern Jewish state, they should be revived.

Hirschnson's introduction is striking in several ways. First, he acknowledges that the Jewish legal notion of authority fundamentally differs from its modern parallel. Second, he expresses unease over the absence of modern "governmental" authority within the system, since establishing a modern Jewish state cannot be based only on some inner conscience of "moral authority." Third, the lack of appellate courts is a symptom of this problem and a key to its rectification. This rectification requires innovative readings of old sources and emphasizing their "governmental authority" aspects.

The establishment of a court of appeals is therefore a principled issue. It manifests a metamorphosis from a traditional–charismatic form of obedience, based on religious morality, to a legal–institutional one, in which authority does not derive from the virtues of a specific judge but from his official position. To establish a modern legal system, Hirschnson believes, Jewish law needs to adjust to this type of authority. His task is to ground it in Talmudic sources. He does so by analyzing these sources in the prism of his distinction between moral and governmental authorities.

Notably, the focus on authority analytically precedes the instrumental concerns expressed by Hacohen and Bentwich. Their interest in legal unification and procedural justice, are secondary to—and stem from—the transformation of legitimate authority. However, Hirschnson also addresses these perspectives. His discussion focuses on a Talmudic passage dealing with the situation of a mistaken court judgment.[78] The Talmud aims to reconcile contradicting opinions on the matter, and it discusses optional consequences of the mistake, such as nullifying the verdict or imposing personal responsibility on the judge. The Talmud does not suggest appellate review, but one Talmudic opinion

[77] Ibid., at 179.

[78] Babylonian Talmud, Sanhedrin, 33a. See Arie Edrei, "Erroneous Rulings," in *Windows onto Jewish Legal Culture*, vol. 1, eds. Hanina Ben-Menahem et al. (London: Routledge, 2011), 131–72.

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distinguishes between self-recognition of the mistake and a scenario in which the mistake is revealed by a "greater" rabbi. This distinction, argues Hirschnson, can be interpreted as a government-authority-based justification for establishing appeals.

Two points, in particular, should be highlighted. First, Jewish legal jurists traditionally did not follow this opinion. Hirschnson's suggestion to rely on it is revolutionary, and is justified only by his moral vs. governmental categorization: Jewish law, Hirschnson argues, traditionally ignored this opinion because other opinions fit better with the "moral authority" regime; if we seek to establish a modern state, we should now decide differently. This reasoning deviates from the mainstream Jewish legal decision-making mechanisms.[79]

Second, Hirschnson's preferred Talmudic opinion is not clearly "governmental": It refers to the virtue of the corrector—not to an institutional authority but, rather, to a "greater" rabbi's judgment. Hirschnson replies to this difficulty in an essential paragraph. He argues that, while the Talmudic opinion speaks of a "sporadic" appellate review, it also invites the option of an institutional review. Institutional review is based on bureaucratic–legal hierarchy, because in this scenario, the appellate court is superior due to its official position, even if the appellate judges are not as worthy, in virtue, as the lower judges: "Possibly, the appellate judges are no 'greater,' in their scholarly skills, than the first judge, who was not appointed to the appellate court [...] Nevertheless, the appellate court has the authority to reverse the judgment."[80]

To conclude, Hirschnson shares Bentwich's vision of an appellate court as a basic feature of a modern state, although not necessarily as a means of centralization but, rather, as a means of transforming legal authority, from one based on virtue to one based on hierarchic institutions.[81] He acknowledges—similarly to the ways Weber discusses legal domination—that modernizing religious law requires abandoning its reliance on self-adherence to traditions or charismatic leaders. A modern legal system relies on top-down, hierarchal legal authority.[82]

[79] Although Jewish law celebrates legal pluralism, there are some axioms regarding its borders, one of them (superficially described) is not to rely on Talmudic opinions that were practically rejected by the main medieval authorities. Deciding to overrule these authorities because of the political philosophy underlying each Talmudic opinion, renders Hirschnson's move even more radical.

[80] Hirschnson, *Malki Bakodesh Responsa—Part One*, at 179–80.

[81] Jewish law contains a broad concept of judicial discretion to deviate from formal law, which can be viewed in light of its charismatic authority. See Hanina Ben-Menahem, *Judicial Deviation in Talmudic Law: Governed by Men, Not by Rules* (Chur: Harwood Academic Publishers, 1991). An appellate system, undoubtedly, narrows the scope of judicial discretion, a point that will disturb Uziel. Hirschnson indeed argues that the appellate court should hold authority to overturn "discretionary errors" of lower courts. However, authority, and not discretion, stand in his focus. His other writings also indicate so: see above, note 69.

[82] This does not mean that the authority of law does not derive from "the People." Elsewhere, Hirschnson notes that "without the power granted by the people, the court has no power whatsoever" (Haim Hirschnson, *Malki Bakodesh vol. 3* (Hoboken, NJ: Moinester Printing Co., 1923), at 81 [Hebrew]; See Schweid, *Democracy and Halakhah*, at 63). The apparatus of law and legal bureaucrats, however, should transform into the top-down, state-enforced, legal authority.

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This transfiguration is carried out by institutional reform, establishing an appellate court.

Uziel: The Collapse of Modern Legal Authority

In response to Hirschnson's essay, Uziel wrote a detailed reply.[83] Its main critique is not aimed at Hirschnson's doctrinal conclusions, but rather at his jurisprudential arguments.

Uziel begins with an apologetic text describing the extraordinary virtues of the Jewish judiciary, in comparison to other nations—virtues that render the appeal unnecessary. The Jewish judge is described as a righteous person who is not satisfied with strictly applying the law but strives instead for a just outcome. Such devoted judges will rarely err, and, therefore, appeals are unnecessary.

However, Uziel does not leave the matter there. Like Hirschnson, Uziel's arguments focus on the concept of authority that the appellate system internalizes, and its impact on public trust. The virtues of Jewish judges not only decrease the possibility of error but also establish public trust in their authority. Therefore appeals are needless: "A litigant will not appeal unless he thinks his judges were ignorant or biased, and wherever there is wisdom and awe, there is also trust."[84] Appeals cause an inevitable flipside effect on the public because they are systematically based on a concept of authority that does not derive from the acknowledged wisdom or charisma of the judges, but from their institutional legal-based superiority. Judicial hierarchy assumes—and simultaneously constitutes—suspicion of lower-court judges. Uziel articulates this negative implication of Weberian hierarchy: it implies consistent suspicion toward the bureaucrat.[85]

This destruction of trust is linked to another characteristic of Weberian bureaucracy—its rule-based decision making. In his opening passage that resonates with the Ottoman attempt at creating judicial rationality, Uziel cynically connects the rule of law and the distrust of authority, strikingly resembling the Kafkaesque criticism of modern bureaucracy:

> Before all judges stands the "legal code." Finding the relevant provision and applying it to the case, the judge fulfills his obligation and is considered just, in the sense that his verdict is correlative with the codex—even if the judgment is not substantively just. This judge is not required—and perhaps is not allowed—to make an exception from the law. He is obligated to rule according to the law in front of him. Contrarily, the Jewish judge is commanded to achieve a just result [...] this derives an obligation to make appropriate exceptions from the strict law.[86]

[83] On its publication, see above, note 59. Although Uziel amended the initial text, I refer here to the final version in *Mishpetei Uziel*, since the changes in the text are not reflected in my quotations.

[84] *Mishpetei Uziel*, at 2.

[85] This argumentation resonates with the English judiciary's opposition to establish criminal appeals—see above, near note 41.

[86] *Mishpetei Uziel*, at 1.

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The depiction of the judge as a technocrat applying the law regardless of the unjust outcome echoes both Weber's impersonalization and Kafka's horrifying description of its consequences. Uziel's Kafkaesque criticism supports his broader argument about bureaucratization's influence on authority. When the judges are publicly recognized as righteous people striving for justice, the litigants trust them and surrender their fate to their hands; but, if they are state bureaucrats technically applying the law, there is no reason to accept their authority, except for state enforcement. Establishing a court of appeals is dangerous since its underpinned bureaucratic concept of authority threatens the communal, charisma-based belief in the pure motivations and goals of the judiciary.[87]

The devastating results of this transformation are illustrated in the following passage, which again juxtaposes the Jewish judiciary with a modern one:

> The wisdom of the last generations that invented the appellate courts cannot be compared to the justice of Jewish law, which compels its judges to achieve just outcomes, and by that establishes trust and belief in the hearts of the litigants, so they will stand to trial with a confident heart, wishing to achieve justice and to truly know their rights and obligations; and not like merchants in the marketplace, where each one is trying to deceive his fellow and the judge, such that, if his deceit succeeds he is satisfied, and if he is not satisfied by the decision—ignoring the question of if it is just or not—he appeals to the higher court. And what is the value of this appeal? If not again a frivolous play, perhaps he will be lucky and the judges will decide to reverse the first decision.[88]

Replacing the courtroom with the marketplace, Uziel identifies the modern judicial procedure with distrust. Contrary to Weberian assumptions, the appellate process does not strengthen public trust in the court—but rather diminishes it. A judicial hierarchy constitutes an institutional distrust in the lower courts. Uziel's alternative is to strengthen substantive trust in the judges as trustworthy persons. It is the personalization of judicial authority—*not* Weberian impersonalization—that is key to constituting judicial authority.

Compare Uziel's account with Hirschnson's distinction between moral authority and governmental authority. For Hirschnson, moral authority—conscientious self-obligation—is insufficient for a modern state with functioning legal institutions. Governmental authority—top-down legal enforcement—is required; it is both essential for, and is executed by, the establishment of an appellate court. Uziel acknowledges this transformation in the nature of authority but emphasizes its dangers to the traditional communal structure of Jewish law. It may contribute to constituting a Jewish state but it will surely

[87] Uziel can be read in light of broader jurisprudential issues, such as the long-living tension between law and equity, judicial formalism, and judicial discretion (see above note 81). These issues are however articulated and reshaped here in their bureaucratic version. I return to this point in the following section.

[88] *Mishpetei Uziel*, at 9.

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collapse the structure of genuine self-obligation to the communal leadership institutions, which, in his eyes, exists in the pre-state condition.

Uziel's objection to the moral/governmental separation is revealed in his conclusion. Before setting out his practical suggestions, Uziel directly rejects the distinction that Hirschnson is building upon, offering a radical view of judicial independence:

> I do not agree with this separation of moral and governmental, as I think that in the Torah the moral and the governmental are one strong unseparated unit [...] In all other nations, the judiciary is an organic part of the government, and without government, it is impossible to establish courts [...] In Jewish law, notwithstanding that the judiciary is part of the governmental administration [...] the judiciary does not rely on the government—and, even when the government ceases to exist, and the nation disperses in exile, the religious judiciary still functions in all its might, and all people obey its judges and judgments, since they recognize them as carriers of a true and just law [...] the authority of this religious judiciary also remains when the people of Israel are in exile and there is no authoritative spiritual central institution.[89]

The distinction between moral and governmental authority is unacceptable, Uziel argues, because it enables to construct a system based merely on top-down legal enforcement, without any sense of conscientious self-obligation. In 1920, this is not a price that Uziel is willing to pay for a modern judicial system. It requires him to argue that Jewish courts, by definition, derive their legitimacy solely from their virtues—recognized by the litigants—and not from any institutional state-based infrastructure. Even when Jewish sovereignty exists and administratively sponsors the judicial system, it remains essentially independent, in the sense of its source of legitimate authority.

Clearly, Uziel's image of the communal, virtue-based trust in the religious judiciary and its radical independence are romantic idealizations; they are no more realistic than Hirschnson's Weberian ideal. In reality, the modernization of the religious judiciary was an unavoidable cost for rabbinical dreams of a modern Jewish state. Even Uziel himself eventually surrendered and cooperated with—indeed, actively participated in—the new hierarchal system.[90] However, the initial response of both Hirschnson and Uziel to the call to establish an appellate court provides an important window into how religious leaders conceptualized the promise and threat of the modern legal world.

Concluding Discussion: Historical Lessons—Past and Present, Local and General

The two rabbinical-legal polemic essays on the initiative of a Rabbinical Court of Appeals reveal a genuine and passionate deliberation on the nature and

[89] *Mishpetei Uziel*, at 18.

[90] See above, note 59.

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consequences of the new bureaucratic legality. The rabbis considered the appeal system a revolutionary transformation in judicial authority and its public legitimacy and strongly disagreed on its plausibility and costs. In the following lines, I summarize the essential positions in the debate and subsequently discuss its contributions to the understanding of legal modernization in three different areas.

The initiators of the Rabbinical Court of Appeals pursued legal unification—of substantive law (Bentwich) or its execution (Hacohen). Assuming systemization and unification will improve judicial outcomes and increase public trust, Hacohen proclaimed that its absence "alienates the modern crowd."[91] The rabbinical essays go one step further, indicating that a prerequisite of bureaucratizing the rabbinic judiciary is transforming its foundational perception of legal authority. Hirschnson embraces this change: moral authority was a workable framework in the non-sovereign Jewish history, in which adherence to religious law was based on inner morality; seeking a Jewish state, in its full modern meaning, requires transforming to a top-down, institutional-based form of authority. It is "unthinkable," politically and substantively, to construct the new legal system otherwise. This Weberian ideal is confronted by Uziel's resistance to the appellate court. Trust and legitimacy are sustained by public belief in the virtue of judges. This requires personalization of the judiciary and broad judicial discretion. It is the appellate system and the institutional–legal authority underpinning it that lead to judicial alienation, he argues, resonating with Kafka's absurdities depicting this process.

The rabbinical articulations of the relationship between legitimacy and bureaucracy are important on three levels. First, on the theoretical level, they are important to the understanding of the Weberian framework itself and its applicability to the judicial system. Weber's writings are ambiguous regarding the interrelations between the bureaucratic phenomenon, its method of gaining authority, and its social ramifications in the modern situation.[92] This test case breathes life into these intertwined reciprocal relationships—the reliance of bureaucratic legitimacy on its impersonalization and its simultaneous costs. Moreover, the rabbinical debate imports these considerations into the judicial realm, demonstrating a novel perception of bureaucratizing the judiciary. By sympathizing with this move and embracing its necessity for gaining public trust, Hirschnson presents a Weberian ideal of the bureaucratized judiciary. Uziel's Kafkaesque resistance highlights, in contrast, two of its important aspects—jurisprudential and sociological.

On the jurisprudential level, Uziel ties the rule-based Weberian bureaucracy to the long-living debate on law versus equity and judicial deviation from legal rules.[93] While this philosophical inquiry seems to be naturally interconnected to the normative aspects of Weberian bureaucracy, it is the judicial realm that fully exposes its implications. Uziel contrasts the bureaucratization of the

[91] Above, note 54.

[92] See above, note 12 and accompanying text.

[93] See e.g., Allan Beever, "Aristotle on Equity, Law, and Justice," *Legal Theory* 10 (2004): 33–50.

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judiciary with the established tradition of judicial discretion in Jewish law.[94] This move reveals the theoretical potency of juxtaposing Aristotle on equity and Weber on bureaucracy, a hitherto undeveloped theme in Weberian literature.[95]

Uziel's articulation contributes also to the sociology of judicial bureaucratization. Kafka himself, when illustrating the devastating consequences of legal bureaucratization, referred not only to enforcement and prosecution bureaucrats but also to the judiciary itself. Kafka's perspective—which Uziel indeed echoes—is the alienation of the citizen. However, while Kafka focuses on the existential–psychological experience of the individual, Uziel sheds light on a different aspect of this process: the exploitation of the legal system, and its formulation into a randomly operated marketplace. Writing in 1920, his illustration of the bureaucratized judiciary is a fascinating albeit dismal depiction of the modern legal profession, exemplifying how bureaucratic modernization drains the judiciary of its virtues and substitutes them with an inherent mode of reciprocal distrust. Connecting this process not to the greed or morality of lawyers, but rather to the inherent consequences of bureaucratization, is perhaps one of the first articulations of this sociological phenomenon of the twentieth-century legal profession.[96]

On a second level, this study provides a significant contribution to understanding church–state tensions in Israeli law. Following this formative episode, the Israeli legislature granted the rabbinical judicial system exclusive jurisdiction in family law.[97] Since then, rabbinical courts and the Israeli Supreme Court regularly conflict regarding the scope of rabbinical jurisdiction. These conflicts are frequently and thoroughly discussed, usually focusing on the *content* of religious law versus civil law.[98] Analyzing these tensions as competing *types* of authority—institutional-based or communal-based—is overlooked.[99]

It is commonplace to explain Israeli church–state tensions as an outcome of religious courts' dual source of authority—legally delegated by state law but self-understood as deriving from divine law. In this regard, religious courts conflict with their limited legally delegated jurisdiction and their internal religious-based comprehensive one. This study suggests there is an additional dimension to this struggle: it is not only a question of dual authority but also of authorities of contradicting nature. Religious courts may struggle between their (self-depiction of) communal, charismatic, or traditional authority, and their legal–institutional one. Current rabbinical courts in Israel operate as state agents, and their coercive powers are publicly legitimatized only as such. Still, their practical operation suggests that rabbinical judges assume,

[94] Above, note 81.

[95] For Weber's skepticism from adjudicating by a discretionary "sense of justice," see *Economy and Society*, at 758–60, 976–78.

[96] Cf. Fiss, "The Bureaucratization."

[97] Rabbinical Courts Jurisdiction (Marriage and Divorce) Act, 1953 [Hebrew].

[98] For a general discussion, see Michael H. Helfand, "Fighting for the Debtor's Soul: Regulating Religious Commercial Conduct," *George Mason Law Review* 19 (2011): 157–96.

[99] See Radzyner, "Jewish Law in Pre-State Palestine," at 333–34.

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sometimes, that they are operating under a bottom-up, charismatic model of authority.

This tension is apparent in the actual function of the rabbinical appellate system. Despite its hierarchical nature, some rabbinical judges do not adhere to the idea that institutional superiority obligates them to adhere to the appellate court's decisions. If they believe their opinion is the correct interpretation of Jewish law, or they regard themselves as scholarly superior to the appellate judges, they might disobey an appellate decision. Although this Uziel-styled "judicial independence" is not common, it imposes practical problems and was responded to by creating an official procedure of transmitting the case to a different judge in a "conscientious" refusal to obey a hierarchical decision.[100]

Interestingly, the lines between the legal and charismatic types of authority controlling the appellate system have blurred. A fascinating example is the "Safed *Get*" episode. In 2014, a rabbinical court in Safed controversially delivered a divorce to a woman while her husband was in a coma, although Jewish law requires the husband's free will for a divorce. Chief Rabbi Yitzhak Yosef opposed this decision and responded to it at length. Nevertheless, using his official legal powers as an appellate judge, he could not reverse it, because no side of the divorce appealed. Yosef responded as a "charismatic" authority—to convince his adheres and the rabbinical community that the decision was mistaken—but his *legal* authority was limited to his official hierarchical powers. Surprisingly, an unknown person (allegedly, but not proven, sent by Yosef) filed an appeal on the Safed decision, arguing that any Jew is a concerned party in matters of a mistaken divorce. Before the rabbinical court of appeals heard the case, the Israeli Supreme Court blocked it from doing so.[101] This case demonstrates the surprising aftermath of the transformation to legal authority. After receiving state-based legal authority, Yosef did not suffice with his pre-state charismatic opposition to what he viewed as an erred decision. He eagers the coercive powers accompanying legal authority to carry out his religious ruling.[102]

These insights are not only useful for our historical understanding of the Israeli church–state origins; they also provide normative insights concerning religious adjudication and arbitration in general. Scholars are debating whether and to what extent courts should employ procedural obligations on

[100] Rule 5 of The Ethics Rules for Rabbinical Judges (2008) [Hebrew]. For a rabbinical discussion of this problem see Uriel Lavi, *Ateret Devorah* (Jerusalem: Shaharit, 2021), 3:8 [Hebrew].

[101] HCJ 9261/16 *Unanimous v. The Rabbinical Court of Appeals* (3/30/2017) [Hebrew].

[102] This duality also underpins particular religious–legal doctrines executed by this court. As Hirschnson indicated, Jewish law sometimes assumes voluntary addressees that obey religious law under soft coercive mechanisms. For instance, a divorce must be given by the free will of the husband; a coerced divorce is invalid. This imposes a tremendous challenge on religious courts as modern legal agents. See Amihai Radzyner, "Rabbenu Tam's Return: Imposing Religious, Social and Economic Sanctions on Get Refusers in Israeli Rabbinical Courts," *Jewish Law Annual* 31 (2022): 179–260 [Hebrew]. Another example is the legitimacy of communal–social pressure on members refusing to adjudicate in religious arbitration tribunals—an issue also in the U.S. See Helfand, "Fighting for the Debtor's Soul: Regulating Religious Commercial Conduct."

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religious arbitration to protect vulnerable litigants.[103] These discussions might overlook the prices that religious communities pay by adhering to these modernistic procedures, prices that this analysis has carefully examined.

The third level of contribution this study provides is to the analysis of other historical processes of legal modernization. The principled resistance to bureaucratizing the judiciary perceived it as a transformation of authority and its effects on public legitimacy and trust. Can this pattern shed light on other struggles regarding the modernization of legal systems? This requires, of course, a close examination of those struggles, while not underestimating the unique particularities of the rabbinical case. I have already hinted above to the possibility that the judicial resistance to the establishment of criminal appeals in England might resemble the kinds of concerns observed here. Other cases in which bureaucratization was forced by external powers on pre-existing communal legal cultures, might also be adequate for such an analysis. This prism might be useful for colonial settings, bureaucratized by modern empires.[104] It can also apply to the hierarchical modernization of Muslim courts by the French-influenced Ottoman Empire.[105] Analyzing these episodes requires a careful contextual examination and understanding of the precise methods and motivations underlying their modernization. I hope that the framework provided and exemplified in this article will set the path for these horizons.

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[103] See for example, Michael A. Helfand, "'The Peculiar Genius of Private-Law Systems': Making Room for Religious Commerce," *Washington U. Law Review* 97 (2020): 1787–1832.

[104] See above, note 45.

[105] See e.g., David S. Powers, "On Judicial Review in Islamic Law," *Law and Society Review* 26 (1992): 315–41; Above, near note 37.

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