



THE ORTHODOX EMBRACE OF LEGAL PLURALISM IN ISRAEL

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Joshua Holo: Welcome to the College Commons Podcast, passionate perspectives from Judaism's leading thinkers, brought to you by HUC Connect, the Hebrew Union College's online platform for continuing education. I'm Joshua Holo, Dean of HUC's Skirball Campus and your host.

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JH: Welcome to this episode of the College Commons Podcast, and a conversation with Professor Alexander Kaye. Professor Kaye is the Karl, Harry and Helen Stoll Chair of Israel studies at Brandeis University. Where he teaches and publishes on the relationship between law, religion, and politics and in particular on the history of religious Zionism. In 2020, he published *The Invention of Jewish Theocracy: The Struggle for Legal Authority in Modern Israel* from Oxford University Press, which won the Salo Baron Prize for best first book in Jewish Studies and was a finalist for the 2021 Jordan Schnitzer Award in philosophy and Jewish thought. Alex Kaye, welcome to the College Commons Podcast and thanks for joining us.

Alexander Kaye: Thank you so much. It's really a pleasure to be with you.

JH: In your book, *The Invention of Jewish Theocracy*, you respond to the position of those who want the law of the state of Israel to conform to the Jewish traditional religious system of law known as Halakha. Would you start off by walking us through their argument?

AK: Absolutely. Their argument is one that is by now extremely familiar to people that follow the debates over religion and state in Israel which is simply that the government and laws of Israel should be under the auspices of Halakha of traditional Jewish law. And in particular the people that I write about are Orthodox rabbis. So when I refer in our conversation to traditional Jewish law or Halakha I'm talking specifically about Orthodox Halakha. And the people that I write about, as I say are Orthodox rabbis and they're also Zionists. And they look at the state of Israel and see something that by and large they fully support. They're extremely excited in the middle of the 20th century to see after decades of the growth of the Zionist movement, the

establishment of a Jewish state for the first time in two millennia, they see this as a momentous if not miraculous occasion, and they're fully, fully supportive by and large.

AK: But what they also want, they want this Jewish state to be run by Halakha, to be run not by laws that are made up by David Ben-Gurion or laws that were invented by the British Empire or laws that were inherited from the Ottoman rulers of Palestine before the British conquered it after World War I. They believe that Halakha, the Torah essentially, has the potential to govern every aspect of human life and certainly has the ability to govern a Jewish state, and that is what they want to see happen. So that's the goal of the people that I write about from the 1940s on, and it's a position that became increasingly popular and increasingly entrenched in the religious Zionists movement. And so that today in the 21st century I would venture to say that certainly among the religious leadership of the religious Zionist movement today, that is an extremely popular position among the overwhelming majority.

JH: So thank you for that introduction. And by way of clarification, if I may, when we speak about the rabbis who are the proponents of this position, it bears pointing out that when we talk about Halakha in relation to Torah, we're talking about a system of law that derives from Torah, but is mediated and ramified and applied by the very rabbis arguing for this authority, right?

AK: That's exactly right. The people that are arguing that Halakha should govern the state of Israel are arguing that, and this Halakhic system should be one that is both interpreted and applied by the rabbis and which rabbis although those are the very people that are arguing for this system to be the system that governs the state.

JH: Great. Just to establish the interests of the various parties at play. Against this backdrop, share with us your understanding.

AK: I think for many people today the idea that I just outlined which I'll call just for shorthand the idea of the Halakhic state, the idea that the state should be run by Halakha to many people today the idea that orthodox rabbis should want the state of Israel, a Jewish state to be governed by Halakha seems kind of obvious. What else would an Orthodox rabbi want for people that believe that Halakha can govern every aspect of human life including the politics of a modern state. Of course, they would want a Jewish state to be run by Halakha. But what I find in my research is that actually this idea, the idea of a Halakhic state is not something that's obvious or taken for granted and it's not something that is a very old idea. In fact, on the contrary, and I argue that it's an idea that was really quite new, essentially invented really in the middle of the 20th century.

AK: And before the 1940s there were also other orthodox rabbis and leaders and thinkers that were also committed to the Zionist movement and thought deeply about what the role of Torah and the role of Halakha might be in a Jewish state when and if it would be established. But they came to different conclusions. Whereas the people that we talked about just earlier who followed the idea of the Halakhic state believe that Halakha should be the exclusive law, the

only law that governs the entire state. Earlier visions, earlier ideas thought that Halakha of course should have a role, but it should only be one of the kinds of law that might be operative in a Jewish state. And what I argue is that that position, that more legally pluralist position is actually a position that is more in sync with a very, very, very long history of the way that Jewish law was practiced in Jewish communities throughout the entire world really over many, many, many centuries. And it's the idea of a Halakhic state which is actually a newer way of thinking.

JH: So give us one pre-modern example and one modern or contemporary example that illustrates your argument.

AK: If we look for pre-modern examples, there are just innumerable examples to choose from because really every single Jewish community over centuries, really millennia was organized around what I'm calling a legally pluralistic structure. So legal pluralism is a term that I'm taking from the academic field of legal studies and it refers to a geographical area in which more than one legal authority exists at the same time. So just by way of illustration, Christian medieval England had numerous legal authorities operating at the same time. There was the law of the king, there were guilds that had their own laws, there were universities that had their own laws, their own courts. Of course, the church had its own law. There was maritime law.

AK: There were all these different laws that kind of overlapped each other and occasionally competed with each other and jostled with each other for primacy, and if you had a legal question, you might go to one court within one legal system and get one answer, to a different court and get a different answer. That was true in medieval England. If we go to Muslim cultures had very similar state of affairs. In other words, most of the world before the modern period had this legally pluralistic structure and the same was true of Jewish communities. In Jewish communities, Halakhah was extremely important. Almost all Jews before the modern era considered themselves as bound by Halakhah.

AK: That is undeniably the case, but there were other kinds of law that Jews before the modern era also considered themselves bound by. For example, there was the law of Dina de-Malkhuta, the law of the state, which according to the Talmud was binding on Jews even though it didn't come from rabbinical interpretation or the Bible. It came from non-Jewish kings, rulers, bishops, the pope even, but Jews consider this law binding upon themselves. That's from outside of the Jewish community and inside the Jewish community, there were also non Halakhic kinds of law.

AK: For example, the lay leadership of Jewish communities was responsible for legislating different kinds of law, whether it would be taxation laws about what people could wear, laws about wages or prices that people could charge for goods. All different kinds of laws that were legislated not by rabbis, but by lay leaders who also set up courts that were non rabbinical courts, but that worked side by side with rabbinical courts. So this is the system of legal pluralism where Halakha is an incredibly important, absolutely central authoritative law for Jews in the pre-modern world, but it's not the only one.

JH: And a contemporary example?

AK: Well, in the modern world, I think since the rise of the state in really the end of the 18th, but especially in the 19th century, beginning in Western Europe and then spreading out across the world, there has been a move in jurisprudence. In other words, in the legal thinking and the legal... The way that states organize themselves to move away from this legally pluralistic way of organizing communities to a more legally centralistic way of organizing communities. So I mentioned medieval England earlier, which had all of these systems of law jostling alongside each other. When it came to the 19th century, there was a total overhaul of that state of affairs with... In the Victorian period, a whole load of acts of parliament that essentially unified all of this law into a single hierarchical structure that said there were no multiple kinds of law in England anymore.

AK: There is a single kind of law. It comes from the state and that is it, and similar kinds of legal overhauls happened in many other countries at the time. And my contention is that the rabbis that I talk about in my book were consciously or unconsciously influenced by these developments in modern European legal thinking, and they kind of imported it onto their own way of understanding Halakha, so whereas rabbis in the 19th century, 18th century, 17th century and earlier would've been extremely comfortable with the idea of Halakha being one of many kinds of law for a Jewish community. When it comes to the middle of the 20th century, that suddenly became an anathema to the leaders of religious cynicism.

JH: Let's learn about this really fascinating character of Rabbi Isaac Hertzog who was so instrumental in rejecting legal pluralism and focusing on legal centralism for his philosophy of the State of Israel. Tell us about him and how his personality shapes this debate.

JH: Rabbi Yitzhak Isaac HaLevi Hertzog was Israel's first Ashkenazic chief rabbi. He served alongside Israel's first Sephardic chief rabbi who was called Rabbi Meir Hai Ben-Zion Uziel. He was born in Poland and moved with his family pretty early on to England. He was internationally recognized as a leading rabbinical authority. What makes him particularly interesting though and unusual is that alongside his religious training, he also had an extremely wide general education, and he studied in the University of London, he studied at the Sorbonne in Paris. He understood Greek and Latin and all different kinds of languages, was extremely widely read, and became a rabbi in Belfast and later in Dublin and became chief rabbi of Ireland, which was at the time newly independent from Britain before he came to what was then the British mandate for Palestine and became chief rabbi there before the State of Israel was established, and he became chief rabbi of Israel.

AK: So what I really wanted to hammer home about Rabbi Hertzog is that he's an incredibly balanced character. Well, you might get the impression from what I'm talking about here that he is in a sense one of the founders of this idea of Halakhic state that today is associated with a certain kind of fundamentalism, extremism, and in some cases even radicalism among religious

groups in Israel who are insistent that are like only Halakha can rule the day in Israel, and some of the groups espousing that kind of ideology today are extremely uncompromising figures.

AK: Who are extremely distrustful of secular society in any kind of way. That was not the case for Rabbi Hertzog. He did deeply, deeply care about the Torah. He was incredibly adamant that he wanted Halakha to be the law of the state of Israel. But at the same time, his personality had a moderating aspect to it. He was very very open to different kinds of knowledge, to different kinds of people, to different kinds of compromise. And even in his religious thinking, he was absolutely committed to the idea that the state of Israel would be a democratic modern state that was one in which, all of its citizens would be full and equal members of the state. For somebody like Rabbi Hertzog who wants the state of Israel to be run exclusively by Halakha, there are sort of two ways you can go.

AK: You could say, I don't care at all about the secular world. It has to be Halakha or nothing and forget your egalitarianism and forget your democracy. And the state should be a theocracy and everything else should go hang. And that's not the route that Rabbi Hertzog took. He took a different route, which is let's delve into Halakha, let's think extremely creatively, sometimes even radically, to find in the massive corpus of traditional Halakha, the interpretations that we need to find to do what we can to make Halakha as egalitarian and as democratic as possible to make it fitting for a modern state. So he did want the state of Israel to be run by Halakha, but he also did whatever he could in his sort of inventive and innovative legal thinking to make that position also accommodating of people who were not Orthodox Jews, or not Jewish at all, to make them sort of buy in as much as possible to his vision.

JH: So he was a complex character despite coming in favor of a rather, unitary approach. You also point out in your book that colleagues in his day were themselves actually legal pluralists as you've defined it. So we have a lot of texture and a lot of variability here, including, significant pushes within the Orthodox world for legal pluralism in the state of Israel. All of which begs the follow up question, why is it the case then that this version of the Halakhic state, why is it so persistent? Why is it so insistent today?

AK: At the time, Rabbi Hertzog was thinking through these questions, there was actually a younger rabbi who at the time was called Goren Sheikh, and later changed his name to a name that listeners might be more familiar with, which was Goren, Rabbi Shlomo Goren, who decades later himself also became the Chief Rabbi of Israel. But at the time, he was a younger rabbi, still very brilliant. And he was asking himself the same questions that Rabbi Hertzog and many others were being asked, which is, what role should Halakha have in the state of Israel. And Rabbi Goren Sheikh later Goren's opinion was let's go down this legally pluralistic, road and let's have two court systems in the state of Israel. Let's have a rabbinical court system and a civil court system. So, if you want to sue somebody in court and in a civil matter, you couldn't choose which court system, which court stream you want to go to.

AK: And he talked about all kinds of precedents in Jewish history for this. And Rabbi Hertzog said, Absolutely not. It's inconceivable that there should be any such a thing. There can only be one law, one Torah in a Jewish state. And that is Halakhic there's no room for civil courts in Israel at all. And for all of his willingness to compromise in some area, both he and Rabbi Uziel, the two chief rabbis of Israel at the time that the state was established and boycotted the opening event of the Supreme Court of Israel. And they just refused to come because there were so appalled at the, establishment of a secular court system. These were rabbis who really felt that they had the entire law for the whole state ready to go. Rabbi Hertzog had committees put together and raised funding to pay rabbis to write law books.

AK: If you go into a legal office today or into a court, you see all the bound laws, of the state along the walls, you sort of gonna have these leather bound volumes. Rabbi Hertzog wanted the equivalent volumes of the state of Israel to look the same, but the law inside would be Halakhic law. And he said about actively writing these laws, even as I said, if that meant being very innovative with his interpretation of Halakha to make it fitting for a democratic state. So you've asked really a really important question, given that there were these alternatives. What explains the success of this vision? The dominance of this vision of legal centralism? And if I could even strengthen the question in one other way. I mentioned that Rabbi Hertzog had to be very innovative, for example, to figure out ways to make Halakha fitting for a modern democratic state.

AK: The system that I mentioned that Rabbi Goren outlined with this two parallel courts, although in a way that sounds, that he was more willing to play nice, if you like, with the secular powers in the state. That, in that model there was far less need to compromise in the rabbinical side of this dual system because you could always say to people, "Hey, if you don't like the fact that the rabbinical courts tend to favor men over women or Jews over non-Jews, just go to the civil courts. You have that option." But for Rabbi Hertzog who wanted everything to be governed by Halakha, he couldn't say that. He needed to find ways to make Halakha more egalitarian and more democratic and did. So now why did the system of legal centralism really become dominant and so dominant that to date's taken more or less for granted? I think that the answer to that question is found not internally to religious Zionism itself, or really even internally to Judaism.

AK: I think to answer that question, we have to sort of raise our eyes and look at the legal landscape of the modern state in general. Not just Israel, but states in general. I mentioned earlier that since the rise of the nation state, it was essentially taken for granted that the state would have one legitimate exclusive legal authority. And that was the state itself. In a way, the modern state is defined by the fact that it alone has full control over all of the normative authority within its boundaries. And we see it again and again in post-colonial contexts. So we're talking about states that are created after the end of Imperial Rule. We see again and again that the people that set up these states, whether they be in Asia or Africa or South America are often people who have been an anti-imperialist leaders, anti-colonial leaders, but people who were

educated in the heartland, in the capitals of the European colonial powers themselves and learned about how to found and run a state and its legal apparatus from the colonial powers.

AK: And that's why when you see post-colonial states being founded, their constitutions tend to be modeled exactly on these very centralized European constitutions. And by the way, that's true of the state of Israel in general. I mean, the Rabbi Hertzog's vision was not realized. The state of Israel is not run by Halakha much to his chagrin and to the chagrin of people in his circle and other people like him. But the state of Israel, was based on a kind of an amalgam of laws that, and legal traditions that came from Britain, that came from Germany, that came from Switzerland, that came from other places, but mainly really European legal traditions.

AK: And I think that the same is true inside the religious Zionist world. This idea that the state itself can have only one single exclusive source of normative authority is such a powerful idea in the modern world that it's seeped into even religious Zionist circles. And there's a deep irony to that which is that when religious Zionist are arguing that the, that Halakha should be the exclusive law of the state of Israel, very often the argument that they're making is that they're being in a way anti-modern or anti-European. "We don't want to draw on all this European law. We have our own law. We don't want to give up our own traditions. We have our own traditions." And that's true to a degree that is legitimately what they are arguing for, but they're arguing for a model, a structure of law, which is drawing very, very heavily from that European tradition.

JH: The College Commons Podcast is proud to be part of HUC Connect, the Hebrew Union College's online platform for continuing education. HUC Connect features four programs, webinars, live conversations with social and cultural influencers on topics of civil society, arts and culture, religion and redefining allyship community connect, ready made lesson plans for synagogue and community learning. The masterclass, live sessions of Judaica with HUC faculty exclusively for our alumni. Enroll soon because seats are limited. And of course, the College Commons Podcast, in depth conversations with Judaism's leading thinkers. For more information about HUC Connect and all it has to offer, visit huc.edu/hucconnect. And now back to our program.

JH: You published together with our friend and colleague UCLA Professor David Meyers, collected essays by one of the 20th centuries greatest Jewish historians named Yosef Hayim Yerushalmi. And one of these essays by this incredible historian, tackles the problem of messianism and the projection of Messianic hopes onto the modern state building enterprise of today's state of Israel. Tell us briefly how you define Messianism and answer the question, if you would, if you think that maybe in some corners it from a religious perspective impels this newly reinvigorated argument for an exclusively Halakhic state.

AK: That's a very interesting hypothesis, and there's no question that there is a tremendous amount of messianic energy in the religious Zionist community today. In other words, an energy which comes from a belief that the state of Israel isn't simply a state like any other state, but it's a state that represents the redemption of the Jewish people and in fact the redemption of all

people. And in some circles it represents the redemption of existence itself, the entire kind of cosmic redemption. And what I hear in your question is that you're wondering whether there's something in that power of messianic thinking that in itself could also help explain this push to Halakha to play such a central, in fact an exclusive role in the running of the state. And I'm going to push back against the hypothesis in a couple of ways.

AK: One way is that certainly today the messianic energy in religious Zionist circles is strong. And there has always been an element of it for sure. But in the '40s and '50s and even in the '60s certainly before the six day war, I would say that the Messianic element in the way that I just described it was not as central in religious Zionist thinking. It was certainly there, but to the extent that it was there, it tended to be expressed in different ways than the ways we're thinking of today. So for example, there was the religious kibbutz movement, it had a certain amount of Messianic energy involved in it. But it was not interested in imposing Halakha as the law of the state of Israel so much. It was thinking of Israel as a grand experiment in creating a perfect society that would have a socialist orientation and would... And of course through the realization of the values of Halakhah as they saw it would stamp out inequality among all people.

AK: And just one more also, caveat to the hypothesis that you put forward is that if we go back to Rabbi Kook himself, Rabbi Abraham Isaac HaKohen Kook, who really represents more than anyone else the foundation of this deeply most transcendental Messianic aspect to the modern Zionist movement.

AK: He did think a little bit about what would be the legal organization of a Jewish state and he wrote about the long history of legal pluralism in the Jewish community and he noted that there had been in ancient times a Jewish king who created his own laws and legislation alongside Halakhah and he wrote that in the absence of a king, the authority of that king would devolve back onto the people as a whole. And he didn't expand on that too much, although, but it seems that even Rav Kook himself thought that alongside Halakha there could be this lay legislative and possibly even judiciary power in a Jewish state. So I absolutely agree with you that the kind of Messianic favor that characterizes much of religious Zionist life today sort of adds a kind of energy and it adds a kind of radical element to some strands of religious Zionist society in leadership when it comes to pursuing their goals of Halakhic establishment in Israel but I don't think that there is anything intrinsic about a messianic ideology that needs to lead into a sort of Halakhic unitary position.

JH: So let's flip the coin, we've been speaking about the competing streams of legal pluralism versus legal centrism within the context predominantly of the Orthodox religious community in the first place. Let's look at the secular world of Israeli law, give us one food digest thought on the very tension of the state of Israel itself today as it ultimately washed out between Jewish law and secular law as we experience it now.

AK: Well, that tension is definitely present and plays out in two ways. One is, I would say institutionally, and one is substantively in the kind of law that the state of Israel applies. So

substantively there was always a question among secular lawyers in Israel, secular Jurists about how far the laws of the state of Israel should be based on the Jewish tradition? Some of the people I'm talking about were Orthodox Jews or Jews who had had Orthodox backgrounds, but many had not, but still understood Jewish law as if not something that came from God or something of religious importance, at a very least, something that had national importance. In other words, there was something about Jewish law that was important to the Jewish nation, just like there was something about the Hebrew language or Hebrew literature, theater or whatever it may be that was important to Jewish nationalist aspirations. So there were from quite early on some attempts among Jewish lawyers to have the tradition of Jewish law, not as a religious ideal, but the tradition of Jewish law to play a larger role in the law of the state of Israel. That by and large didn't play out initially in the first years of the state but over the years, aspects of Jewish law have come into the Israeli legal system, whether it be through Supreme Court justices quoting Halakhah as kind of precedent, whether it be in the language of the courts themselves.

AK: If you go and sit in the Supreme Court and listen to the justices discussing a case, you will hear some terminology that is taken from the Talmud and is similar terminology that is being used in orthodox Yeshivot, but used in an entirely secular context. So Jewish law definitely does exist in a kind of secularized form, even in the civil secular law of the state of Israel, although it plays a relatively small role in that law. But institutionally, Jewish law plays a far more central role in the law of the state of Israel and that is because in Israel all aspects of what is called personal status law, that is law pertaining to marriage and divorce and a few other things, all aspects of personal status law are governed exclusively by religious law. And that means that Jews who want to get married or divorce in the state of Israel can only do so under religious Jewish law.

AK: And by the way, Muslims can only do so under Islamic law and Christians under a Christian law and so on. And by and large, religious courts in the state of Israel, and there are many of them in different religious communities, these courts have exclusive jurisdiction of marriage and divorce. And this is for many people a serious problem and a serious, and in serious tension with democratic values because it means that basically the only real way to get married inside Israel is through a religious court. The state of Israel compromises for this state of affairs by having a very, very developed system of civil unions. So it's possible to have a union not under religious auspices that has more or less the same legal standing as a marriage, although not an identical one. And it's also possible to get married outside of the state of Israel and then when you come back into Israel, that marriage is recognized by the state but there is still this historical reasons, this exclusive hold on marriage and divorce by religious courts and it remains a very controversial issue to this day.

JH: So we've delved into many of the directions and difficulties facing the modern state of Israel. But I'd like to close by asking what single source, what single text did you discover in the course of this research that most surprised you?

AK: I had a real privilege during the course of the research for this book because a lot of the documents that I used were from the personal archive of rabbi Hertzog which now are part of the state archive of the state of Israel. But at the time were not, they were basically in some filing cabinets at the back of the third floor of a building called.

[foreign language]

AK: In the center of Jerusalem. And I kind of sat on the floor of this very dusty, essentially a storage room with my digital camera for days sort of taking photographs of these documents. And it was quite a thing to hold in my hands, you know, the documents that he had written with his own hands, including his diaries with the... His own doodling on them and all of this kind of stuff. There are many candidates for the sort of most surprising or most revealing kind of document that I discovered. But one of the sets of documents that I found was actually in the religious Zionist archive, which is in Mossad Ha-Rav Kook in Jerusalem.

AK: And there I found, the minutes of the meetings that took place among this committee to create a modern Halakhic law for the state of Israel. And so you have the letters going backwards and forwards between rabbi Hertzog and other rabbis too, who had made themselves responsible for writing this law. And you have rabbi Hertzog saying, it needs to be this way. It needs to look like a modern law book. Okay? Don't give me all of the asides and tangents and long Talmudic explanations that you rabbis are used to writing.

AK: It needs to be really short, really to the point, like a modern law book, if you have any footnotes, make them short and put them in the margins. And then the rabbis would come back and they just weren't sure exactly how to write something in that format, because it is not a traditional way of thinking about or writing about Jewish law. One rabbi actually wrote a letter back saying, "You are asking me to write the laws for a modern state. And many aspects of modern state law, of course, are not found in traditional Halakha." You know Halakha doesn't deal with whether an electrical power plant can be open on Shabbat, for example. You might be able to interpret Halakha in such a ways to give you that answer, but it's not immediately and obviously there, and somebody wrote back and said, You're asking me to do something here, which is like creating something.

[foreign language]

AK: You are asking me to basically to create something from nothing ex nihilo, like the way that God created the existence, something from nothing. And there for me, sort of encapsulated this sense that these people recognize that what they were being asked to do was something radically new. Even though on the one hand they believed that there must be in Halakha ways to achieve the goal that they wanted to do, but they also recognized that the goal that they had had set for themselves was something that was also very very new. So that's one of the documents when I saw that, I thought, yeah, that really gets at something deep in this project.

JH: It's a great example for this incredible research, which was really just a wonderful topic of conversation and a pleasure to have it with you. Thank you for joining us, Alex Kaye, on the College Commons Podcast.

AK: Thank you so much.

JH: We hope you've enjoyed this episode of the College Commons Podcast. Available wherever you listen to your podcasts, and check out HUC connect compelling conversations at the forefront of Jewish learning. For more information about all that HUC Connect has to offer, visit huc.edu/huc.

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