

# The Living Torah as Life of Action: A Jurisprudential Approach to the Early Thought of *Ha-Po'el Ha-Mizrahi*

Alexander Kaye

In the 1920s, a new Jewish approach to life, which combined a commitment to Torah with Zionism and socialism, was born. The proponents of this approach did not only think of these three commitments as independently valuable; they believed that they were all parts of a unified way of life, which together would usher in the rebirth of the Jewish people. The intellectual life of the group was extraordinary in a number of ways. They were among the relatively small number of Zionists who were committed to Torah and the relatively small number of religious Jews who were Zionists. They saw themselves as the vanguard of a new world order that would usher in both economic justice and spiritual revival. They were both revolutionaries and conservatives, both political organizers and religious visionaries.

Members of the group constituted a significant sub-section of an international network of religious Zionist societies in Europe and Palestine that were broadly known as *ha-Po'el ha-Mizrahi* [The Mizrahi Worker] or the *Torah va-Avodah* [Torah and Labor] Movement. The full history of this movement with its various factions and ideological differences is quite complex. (It is not even always obvious what to call the movement because it was known by variety of names. Here, I will typically refer to it as *ha-Po'el ha-Mizrahi*.)<sup>1</sup> My focus in this article is the ideology of a small number of

- 1 Sections of this international movement were also variously called *Tse'irei Mizrahi* [Mizrahi Youth] and—in Germany—*Bahad* [an acronym for “The Covenant of Religious Pioneers”]. The terminology and the history of the political organization around this group can be rather difficult to follow because of the frequent changes in the name of various subgroups, the fact that similar groups were often called by different names in different countries, and the fact that the same terminology

its founders, in particular Shmuel Ḥayyim Landau. I hope to demonstrate the advantages of thinking about this ideology from the perspective of comparative jurisprudence.

One of the enduring lessons of Prof. Suzanne Last Stone, a lesson that she has transmitted brilliantly to her numerous students, is that legal thinking has distinctive and identifiable qualities. That is to say, law as a discipline provides conceptual categories and core questions that can transcend the specificities of historical context. Irrespective of their specific circumstances, thinkers orientated towards a legal mindset tend to ask similar questions, share certain fundamental assumptions, and draw from the same pool of intellectual moves when it comes to interpreting texts, assessing analogies, defining exceptions, and so on.

While a legal framing is certainly not the only way to approach the ideology of *ha-Po'el ha-Mizraḥi*, it enhances our understanding of this topic considerably.<sup>2</sup> Looking at the legal theory underpinning the ideas of *ha-Po'el ha-Mizraḥi* thinkers reveals aspects of their thought that might otherwise

referred to different things in different periods. Furthermore, *ha-Po'el ha-Mizraḥi* for some years was divided into two or more factions, and it also served as a trade union as well as a political party. For an excellent summary of the organizational history of the movement, along with a discussion of the ideologies of its key leaders, see Iddo Haklai, “‘God Is Still Speaking’—The Religious Thought of the Religious-Zionist Labor Movement in Mandatory Palestine, 1922–1948” (PhD diss., Brandeis University, 2023), especially 16 ff. For an analysis of the Religious Kibbutz Movement, a core faction of the wider community, see Aryei Fishman, *Judaism and Modernization on the Religious Kibbutz* (New York: Cambridge University Press, 1992).

- 2 Other scholars have made inroads into thinking about Shaḥal, and *ha-Po'el ha-Mizraḥi* in general, from other angles. See, for example, Fishman, *Judaism and Modernization*; Nachum Baruchi, *We Shall Arise and Build: Rehabilitation of the Religious Kibbutz Movement after the War of Independence* (Jerusalem: Yad Yitshak Ben-Zvi, 2011); Mikhael Benadmon, *Rebellion and Creativity in Religious Zionist Thought: Moshe Unna and the Religious Kibbutz Revolution* (Ramat Gan: Bar-Ilan University, 2013); Yosef Katz, *The Religious Kibbutz Movement in the Land of Israel, 1930–1948* (Jerusalem: Magnes Press, 1999); Dov Schwartz, *Religious-Zionism: History and Ideology* (Boston: Academic Studies Press, 2009); Haklai, “‘God Is Still Speaking’”; various articles in Avi Sagi and Dov Schwartz, eds., *A Hundred Years of Religious Zionism* (Ramat Gan: Bar Ilan University, 2003); Yosef Salmon, *Religion and Zionism: First Encounters* (Jerusalem: Magnes Press, 2002); and Daniel Mahla, *Orthodox Judaism and the Politics of Religion: From Prewar Europe to the State of Israel* (Cambridge: Cambridge University Press, 2020) on the European beginnings of Orthodox Zionism.

be missed. In the following pages, I will offer a jurisprudential approach to the basic ideology of the movement's founders, categorizing it into a set of three jurisprudential principles. I will also introduce an analogy to another school of legal theory known as the historical school of jurisprudence, which provides further analytical clarity when investigating the thought of early *ha-Po'el ha-Mizrahi* intellectual leaders, Landau in particular.

Shmuel H̄ayyim Landau (1892–1928), often known as Shaḥal, was raised in central Poland in a hasidic family associated with the Kotsk hasidic court. He was ordained at eighteen and was reportedly deeply influenced as a very young man by the controversial Zionist pamphlet, *Shelom Yerushalayim* [*The Peace of Jerusalem*], written by the hasidic Rebbe Israel of Pilov. Shaḥal quickly became a Zionist organizer, a member of *Mizrahi*, and, in 1922, one of the founders of *Tse'irei Mizrahi* in Poland. In 1925, he immigrated to Palestine, where he became a revered leader of the movement, helping to unify its left and right factions in 1927, shortly before his untimely death in 1928 at the age of thirty-six after complications from an appendectomy.<sup>3</sup> Shaḥal is a worthy figure of investigation because of his prominence in the early years of the movement and the influence of his writings and speeches during his lifetime and on future generations.

In Shaḥal's thought we find three basic principles. First, there is a very close relationship—almost an identity—between Jewish law and the Jewish nation. Some version of this idea is common in many strands of Jewish thought, from ancient times to the present day, but Shaḥal's articulation of it is distinctive. It emphasizes the role of the historical circumstances of the Jewish nation in the development of Torah. Specifically, the history of the Jews in exile distorted Torah by limiting it to a narrow field of subjects. Exile made Jewish life dependent on foreign powers when it came to dealing with the basic necessities of everyday life, thereby petrifying the law's ability to evolve. Shaḥal believed that the national revival of the Jews in the Land of Israel would both rely on and bring about a change in the nature of Torah.

Shaḥal's second principle was to establish an extremely expansive definition of Torah. Shaḥal believed that the Torah is not simply a list of rules, but is more akin to the spirit of the nation itself, an essential cultural core that arises from, and in turn influences, the historical and social circumstances of

3 For biographical details, see Shabtai Don-Yehia, *Ha-mered ha-qadosh: Shmuel Hayyim Landau ufo'alo* (Tel Aviv: Moreshet, 1960).

the nation in its entirety. As such, the meaning of “Torah” extends to almost all aspects of Jewish existence.

Third, Shaḥal’s approach to legal interpretation and legal change respected the ancient origins of the nation’s law, while allowing for ongoing dynamism in response to historical change. Because the Torah flows from the spirit and the history of the people, it also has to be responsive to their current circumstances. By contrast to the more rigid and intractable approaches to Jewish law that were common in Orthodox circles at the time, Shaḥal and his colleagues and followers developed legal methodologies designed to allow for halakhic flexibility within the framework of divine revelation.

### Law, Nation, History

I will develop this jurisprudential framing of Shaḥal’s thought by examining his exploration of these three principles. Often, Shaḥal’s ideological speeches and writings are embedded in debates with other factions. Shaḥal’s first principle—that the Torah is integrally connected with the Jewish nation, as an expression of its spirit evolving through history—arises in the context of his engagement with the writings of Rabbi Samson Raphael Hirsch. Hirsch died four years before Shaḥal’s birth, so the two men never interacted directly, but Hirsch’s legacy loomed large in his own world. Shaḥal observed the increasing influence of what he called “Western [i.e., West European] Orthodoxy” on Jewish believers in Eastern Europe.<sup>4</sup> By Western Orthodoxy, Shaḥal had in mind the anti-Zionist Orthodox, who act in a way that “so disturbs the hearts of nationalist Jews,” who claim to want nothing more than the survival of Judaism, and yet “declare war on the revival of the people of Israel and its land,” and “work with all their hearts to break apart the nation.”<sup>5</sup> Shaḥal blamed this destructive approach on the mistaken underlying ideology of the movement, best articulated in the works of Hirsch himself.

Shaḥal had three critiques of Hirsch’s approach to Jewish law. First, he noted, Hirsch rejected the Jewish nation as a legal category. The *mitsvot* for Hirsch are rules that “pertain to the Jew as individual,” and not to the

4 Shmuel Ḥayyim Landau, “Orayta ve-Yisra’el,” in *Shaḥal: Ḥolem ve-lohem*, ed. Haya Frumer (Jerusalem: Erez, 2008), 191. Shaḥal did not refer to himself as “Orthodox.” He typically referred to believing Jews such as himself as “*ḥaredim*,” a term that did not at the time carry the connotation of today’s “Ultra-Orthodox.”

5 Landau, “Orayta ve-Yisra’el,” 191.

collective body of the Jewish people.<sup>6</sup> This was indeed true of Hirsch, who took pains to de-politicize Jewish law. Like Mendelssohn before him, and like his contemporary Geiger, Hirsch wanted to encourage Jewish emancipation by reducing Jewish particularism to a matter of confessional faith rather than a collective identity.<sup>7</sup> Zionists in general considered this position to be deeply misguided, but for Shaḥal this critique went deeper still. He objected to Hirsch's suppression of the Jewish people as the collective subject of the Torah, over and above Jewish individuals. Hirsch attempted to defend the rationale of the *mitsvot* by "prov[ing] that they fit the mission of each Jewish person as an individual," wrote Shaḥal, "but there is another mission; that is the mission of Israel in general, the mission of the Jewish person as a member of the Israelite nation."<sup>8</sup> The idea that the collective of the Jewish people constitutes an independent individual legal subject was axiomatic for Shaḥal. Mirroring the language of many romantically inclined nationalists of his generation, he wrote: "The people is a body that lives for itself, a collective 'I,' not only a collection of individuals. It is the way of the nation to connect the individual to the world, to creation, and to existence in its entirety."<sup>9</sup> Nothing could be further from Hirsch's liberal idea that Jewish law is directed at the individual.

Shaḥal's second critique of Hirsch targeted his use of the term "mission." Shaḥal read Hirsch in historical perspective. He noted that Hirsch lived in a period in which Jewish reformers tried to prevent Jewish assimilation by teaching about the mission of Israel, the calling of Jews to spread "ethical monotheism" to the world.<sup>10</sup> Shaḥal observed that Hirsch had himself adopted the rhetoric of the Jewish mission, and that he had distinguished himself from the reformers only by extending it beyond ethical ideals to all

6 Landau, "Orayta ve-Yisra'el," 192.

7 See, for example, Leora Batnitzky, *How Judaism Became a Religion: An Introduction to Modern Jewish Thought* (Princeton: Princeton University Press, 2011).

8 Landau, "Orayta ve-Yisra'el" 192.

9 Ḥaya Frumer, ed., *Shaḥal: Ḥolem ve-loḥem* (Jerusalem: Erez, 2008), 411.

10 For more on Hirsch's relationship to Reform theology, as well as his use of the idea of a Jewish "mission," see Michael Meyer, *Response to Modernity: A History of the Reform Movement in Judaism* (Detroit: Wayne State University Press, 1995), 77 ff. For the way that the "mission" of the Jews moved from being an anti-Zionist argument to being a central pillar of Zionist rhetoric, see Alexander Kaye, "'Or La-Goyim': From Diaspora Theology to Zionist Dogma," *Journal of Israeli History* 38 (2020): 191–211.

the commandments. "Even Hirsch," he wrote, "being of his generation, was influenced by the idea of 'mission,' but applied it not only to the principle of monotheism but to all the *mitsvot*."<sup>11</sup> Shaḥal recognized early on something that subsequent historians have also emphasized: that Hirsch, despite being one of the most vocal opponents of Reform Judaism, essentially adopted its perspective on the Jews' universal ethical mission in history. As Michael Meyer has written, "Like the Reformers, Hirsch thought of Judaism in universal terms. . . . Israel's unity, he believed, was spiritual, not political. . . . For the foreseeable future it was the Jews' task to disseminate 'pure humanity' among the nations. That, Hirsch insisted repeatedly, was the 'mission of Israel,' for which it had been exiled from its land."<sup>12</sup>

Hirsch's aping of Reform rhetoric did not in itself bother Shaḥal. More significant was that one consequence of Hirsch's "mission" idea was to deny an independent value to Jewish existence. The argument that the *mitsvot* are valuable because they represent a mission to the nations of the world implies that the Torah is valuable only insofar as it educates the rest of humanity. Shaḥal disparagingly quoted Hirsch to this effect: "The People of Israel . . . has no value in itself, but only in its role as an 'institution of teachers and educators responsible for the education of humanity in general.'"<sup>13</sup> By contrast, the entire objective of Zionism was to place the Jewish nation on an independent footing, rather than evaluating Jewish existence according to some external measure of value. The Torah, Shaḥal, believed, was a law for the Jews, not a law that exploited the Jews for the benefit of others: "Rabbi [Hirsch] struggles to make the Torah, the Torah of Moses, the legacy of the congregation of Jacob, into something universal to humankind. . . . He claims as axiomatic the idea that the existence of the Jewish people depends on their fulfillment of the mission of being a light unto the nations." It was critical for Shaḥal that the Torah be understood on its own particularistic terms, not only through the eyes of imaginary Christian onlookers, who might only think well of Jewish law if it contributes to the goal of a universal law.

11 Landau, "Orayta ve-Yisra'el," 192.

12 Meyer, *Response to Modernity*, 78. On Hirsch's universalism, see also Moshe Y. Miller, *Samson Raphael Hirsch's Religious Universalism and the German-Jewish Quest for Emancipation* (Tuscaloosa: University of Alabama Press, 2024).

13 Landau, "Orayta ve-Yisra'el," 192. Shaḥal is quoting from Samson Raphael Hirsch, *The Nineteen Letters on Judaism* (New York: P. Feldheim, 1960), letter 7.

Shaḥal's final objection to Hirsch was with regard to Hirsch's idea of history. For Hirsch, the Torah cannot and should not be impacted by history. It is "an untouchable sanctuary," which applies the same way at "all times and in every situation."<sup>14</sup> This approach asserted the immutability of Jewish law by exempting Jewish life from the material conditions of the rest of humanity. For Hirsch this made total sense. The removal of the Jews from material concerns was a great benefit because it allowed the Jews, as Shaḥal put it, to "shed their national-particular form and adopt a universal human form." From this perspective, as Hirsch explicitly wrote, the Jewish exile was counterintuitively a great blessing for the Jews because it removed them from the distractions of political life and allowed them to concentrate on their universal mission. For Shaḥal this was, of course, an unacceptable position. Exile for him was a perversion of the natural order and the return of the Jews to their land was a primary objective. Jews in exile, he later wrote, had become "parasitic" on other peoples and needed to be reborn as a productive people on its own land.<sup>15</sup>

Shaḥal also reacted against Hirsch's rejection of history from another perspective. If for Hirsch the Torah was immutable—an eternal status quo—for Shaḥal, the Torah demanded revolution. Shaḥal called for a "holy rebellion" against the exilic way of life represented by people like Hirsch. He explicitly called on his followers to carry out "a revolution among the ranks of religious youth."<sup>16</sup> We will see below that this revolution even extended to pushing for changes in halakhah itself, a position that would have been anathema to Hirsch.

So Shaḥal objected to Hirsch's approach to Jewish law on three grounds: that Hirsch believed that Jewish law pertained only to Jews as individuals, not as a collective; that the mission of Jewish law to teach lessons to other peoples denied independent value to the Torah and the Jewish people; and that the Torah was disconnected from history. All of these critiques flowed from Shaḥal's foundational belief that the Torah was inherently connected with the Jewish nation, a subjective collective "I" with its own independent

14 See Batnitzky, *How Judaism Became a Religion*, 40, quoted from Samson Raphael Hirsch, *Judaism Eternal* (London: Soncino Press, 1959), 103.

15 Shmuel Ḥayyim Landau, "Le-virur shitatenu," in *Shaḥal: Ḥolem ve-loḥem*, ed. Haya Frumer (Jerusalem: Erez, 2008), 411.

16 Shmuel Ḥayyim Landau, "Al mahut ha-po'el ha-Mizraḥi," in *Shaḥal: Ḥolem ve-loḥem*, ed. Haya Frumer (Jerusalem: Erez, 2008), 474.

and irreducible value. The Torah was designed to support the unique existence of the Jewish nation, and developed as a mystical expression of its unique historical circumstances.

## Living Torah

The second principle of Shaḥal's legal thought is that Torah is defined extremely expansively. He frequently referred to Torah as "*torat ḥayyim*," "living Torah." He meant by this that the meaning of Jewish law was not exhausted by a list of rules, but was an expression of the comprehensive spiritual life of the nation.

Shaḥal discussed this topic in a programmatic article, "Clarifying our Philosophy," which was devoted to an analysis of the motto of *ha-Po'el ha-Mizraḥi*, "*Torah va-Avodah*" [Torah and Labor].<sup>17</sup> In the article, Shaḥal drew a distinction between two ways of understanding "Torah":

[Torah] incorporates two general ideas. The first is the Torah as a book of laws and statutes which the Jewish person has to follow, the obligation on each Jewish individual. The second is the Torah in its inclusive meaning, as the spirit of the people, the source of its culture and its life soul, the public-national foundation in the Torah.<sup>18</sup>

So Shaḥal drew a dichotomy between an understanding of Torah as a list of rules incumbent upon each individual and Torah as "the spirit of the people, the source of its culture and its life soul." This is a distinction between a "merely legalistic and religious" Torah and a "living Torah."<sup>19</sup> The more expansive understanding of Torah is of a "world view" which encompasses "all of life and its various details, from most profane to the most sacred, from its material, economic, daily needs to its spiritual-ideal foundations."<sup>20</sup>

It might seem that Shaḥal's distinction is between an interpretation of Torah as law and an interpretation of Torah as something else, something so general and comprehensive that it transcends any reasonable definition

17 Landau, "Le-virur shitatenu," 407.

18 Landau, "Le-virur shitatenu," 407.

19 Landau, "Le-virur shitatenu," 412.

20 Landau, "Le-virur shitatenu," 412.



of law. In fact, however, Shaḥal's distinction can best be understood as a distinction between two different ways of understanding law. The first is akin to a positivist approach to law as a series of rules issued by an appropriate authority. To understand the second, more expansive, definition of Torah, it is helpful to consider its similarity to the outlook of another approach to law known as the historical school of jurisprudence. The historical school neither associates law with moral intuition (as do natural lawyers), nor with legislation produced and authorized by the state (as do legal positivists), but rather with the nation and its history. According to the first major modern theorist of the school, German jurist Friedrich Carl von Savigny, there is "an organic connection of law with the being and character of the people."<sup>21</sup> The idea that law is an expression of the spirit of the nation results in a very expansive definition of law. For Savigny and his intellectual descendants, law is far more than a system of regulations, whether based on legislation or morality; it is the totality of the personal and institutional relations, ideas, and practices that constitute society itself. Put simply, "the law is the concrete representation of this popular consciousness, of the Volksgeist."<sup>22</sup>

These early articulations of the historical school of jurisprudence already reflect attitudes about law similar to those of Shaḥal. Just like Savigny's approach to law, Shaḥal thought of Torah as the spirit of the people, "the source of its culture and its life soul." Later representatives of the historical school use language even more reminiscent of Shaḥal's thought. One such scholar was Eugen Ehrlich (1862–1922), a Jewish-born Austrian jurist who was an older contemporary of Shaḥal.<sup>23</sup> In parallel to Shaḥal's criticism of the narrow legal definition of Hirsch, Ehrlich was known for challenging the legal positivism of Hans Kelsen. Whereas Kelsen limited the definition of law to the body of regulations enacted by the state, Ehrlich claimed that there is a second source of law, beyond formally enacted rules and precedents, which—in a telling echo of Shaḥal's "living Torah" —Ehrlich called "living

21 Friedrich Karl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans. Abraham Hayward (London: Littlewood and Co., 1831), 27.

22 Reut Yael Paz, "Legalizing Antisemitism? The Legacy of Savigny's Roman(tic) Law," in *Christianity and International Law*, ed. John D. Haskell and Pamela Slotte (Cambridge: Cambridge University Press, 2021), 178.

23 For a full account of Ehrlich's life, work, and reception, see Marc Hertogh, ed., *Living Law: Reconsidering Eugen Ehrlich* (Oxford: Hart Publishing, 2009).

law.”<sup>24</sup> This living law, wrote Ehrlich, is the “facts of daily life, apart from their legal aspect,” which emerges from society in its totality, not formal law-making institutions.<sup>25</sup> It is the law which “dominates life itself even though it has not been posited in legal propositions.”<sup>26</sup> In the words of his admiring contemporary, Roscoe Pound, Ehrlich had shown that one “should look upon nothing human as foreign to [law], in a sense everything human is a part of it.”<sup>27</sup>

Is it possible that there was a direct influence of the historical school of jurisprudence on Shaḥal’s own intellectual development? While not impossible, that is not the argument I would like to make here. For one thing, there are important differences between the legal thought of *ha-Po’el ha-Mizraḥi* and Savigny’s historical school, not least that “Savigny was a committed antisemite, driven by his obsessive marginalization of Jews from German law as both citizens and practicing jurists.”<sup>28</sup> At the same time, there are undoubtedly instances in which European jurisprudence did have an impact on Zionist thought in general, and religious Zionist thought in particular.<sup>29</sup> Savigny’s

24 For Ehrlich on “living law,” see Hertogh, *Living Law*; Brian Z. Tamanaha, “A Vision of Social-Legal Change: Rescuing Ehrlich from ‘Living Law,’” review of *Fundamental Principles of the Sociology of Law*, by Eugen Ehrlich, *Law & Social Inquiry* 36 (2011): 297–318.

25 Quoted in Monica Eppinger, “Governing in the Vernacular: Eugen Ehrlich and Late Habsburg Ethnography,” in *Living Law: Reconsidering Eugen Ehrlich*, ed. Marc Hertogh (Oxford: Hart Publishing, 2009), 22.

26 Quoted in Brian Z. Tamanaha, *A Realistic Theory of Law* (Cambridge: University Press, 2017), 40.

27 Quoted in Brian Z. Tamanaha, “The Third Pillar of Jurisprudence: Social Legal Theory,” *William and Mary Law Review* 56 (2015): 2254.

28 Paz, “Legalizing Antisemitism?,” 180. Paz has argued that Savigny’s antisemitism was sufficiently important in his overall philosophy that it should stop being trivialized or footnoted, and should instead be taken as a symptom or representation of a deeper pathology within the development of international law and the state.

29 I have written elsewhere about the impact of European jurisprudence on the leaders of the *Mizraḥi* movement and of the religious kibbutz movement. It is beyond any doubt that many *ha-Po’el ha-Mizraḥi* thinkers, particularly those from Western Europe and the United States, had extensive familiarity with European and American jurisprudence. The writings of Yeshayahu Leibowitz, Moshe Unna, Eliezer Goldman, and many others abound with references, explicit and implicit, to European thought. See Alexander Kaye, “Eliezer Goldman and the Origins of Meta-Halacha,” *Modern Judaism* 34 (2014): 309–33; Alexander Kaye, *The Invention of Jewish Theocracy: The Struggle for Legal Authority in Modern Israel*

ideas in particular were circulating widely in Mandate Palestine.<sup>30</sup> His ideas were particularly important to the approach of many Jewish lawyers—both Orthodox and “free-thinking”—who were associated with the *Mishpat Ivri* movement. This movement was made up of jurists who saw “Hebrew law” as a national asset much like the Hebrew language, and pushed for it to be used as the law of the Jewish community in Palestine and later Israel.<sup>31</sup> Savigny’s reach can also be found outside legal circles. Arguably, the very term “*Volksgeist*,” which grounded German romantic nationalism, arose from Savigny’s writings.<sup>32</sup> In its Hebrew translation—*ruah ha’am* or *ruah le’umi*—the concept lay at the center of the thought of Aḥad Ha’am and his followers. Despite these circumstantial indications, however, I doubt that a direct line of influence between European historical jurists and Shaḥal himself could be established even with further research. Nevertheless, there is value to introducing historical jurisprudence as an analog to Shaḥal’s legal ideology because it helps us recognize his thinking as legal thinking, even when his definition of Torah was so broad. The idea of the “living law” has a venerable place in the history of jurisprudence. Shaḥal, for whom the Torah encompassed “all of life,” had come to this same expansive view of the Torah out of his own intellectual and spiritual sources.

(New York: Oxford University Press, 2020); Alexander Kaye, “Religion, Law, and the Dynamics of Intellectual Transmission: Weimar Jurisprudence among Religious Socialists in Israel,” *Law and History Review* 40 (2022): 305–33.

- 30 This is unsurprising, given the fact that he was closely associated with the development of the intellectual underpinnings of modern nationalism and that so many of the Zionist jurists who created the legal infrastructure of the Yishuv and, later, the State of Israel, were educated in German law schools. See, for example, Fania Oz-Salzberger and Eli Salzberger, “The Secret German Sources of the Israeli Supreme Court,” *Israel Studies* 3 (1998): 159–92.
- 31 Assaf Likhovski has written about this in several places. On the *Mishpat Ivri* movement, Likhovski writes: “Hebrew law was born out of an affair between German professors and Zionist students. Its progenitor was Fredrich Karl von Savigny, a German professor of law, who was the main spokesman of the early nineteenth-century German Historical School and the expounder of its nationalist theory of law.” Assaf Likhovski, “The Invention of ‘Hebrew Law’ in Mandatory Palestine,” *American Journal of Comparative Law* 46 (1998): 341. See also Assaf Likhovski, *Law and Identity in Mandate Palestine* (Chapel Hill: University of North Carolina Press, 2006).
- 32 Susan Gaylord Gale, “Very German Legal Science: Savigny and the Historical School,” *Stanford Journal of International Law* 18 (1982): 131.

## Shaḥal and the Rebirth of the Jewish Nation

The combination of the first two principles in Shaḥal's legal thinking—that the nation is the true subject of the law and that law is essentially synonymous with the spirit of the nation—resulted in a powerful statement about the role of the Torah in the national rebirth that was the goal of Zionist activity.

Like many romantic nationalists, Shaḥal believed in the primordial division of humanity into national groups.<sup>33</sup> He considered the “division of humanity into nations” to be “one of the principles of creation which is based, according to the religious outlook, on the higher will of God, which [human] intelligence cannot encompass.”<sup>34</sup> This was perhaps uniquely the case for the Jewish nation. “The existence of Israel as a people,” he wrote, was “one of the foundations of creation, an existence prior to any object or thought that the consciousness of man can comprehend.”<sup>35</sup>

Shaḥal may have encountered this primordialist attitude in a number of places. Rav Kook, for example, Shaḥal's older contemporary and admirer, also believed in the cosmic significance of the unity of the Jewish people.<sup>36</sup> There is also no shortage of such thinking in the hasidic *kabbalah* in which Shaḥal was steeped as a child. Nevertheless, a legal framing also deepens our understanding of this aspect of Shaḥal's thought, especially because Shaḥal's primordialist approach to Jewish nationalism was intimately connected with his legal thinking, particularly with his expansive definition of Torah.

Shaḥal's discussions of the role of Torah in the nationalist movement were especially prevalent in his critique of the *Mizraḥi* movement. Founded in 1902, *Mizraḥi* (a contraction of “*merkaz ruḥani*” [spiritual center]) was the most powerful political body to represent the religious wing of the Zionist movement for much of the twentieth century. While the *ha-Po'el ha-Mizraḥi* movement was born out of *Mizraḥi*, it came to differentiate itself in a number of ways. The differences were represented in the mottoes of the two groups. While *ha-Po'el ha-Mizraḥi*'s motto was “Torah and Labor,” *Mizraḥi*'s was “*Am*

33 For a historiography of nationalist primordialism, see Anthony D. Smith, *Nationalism: Theory, Ideology, History* (Malden, MA: Polity, 2010), 53 ff.

34 Shmuel Ḥayyim Landau, “Ha-Tsiyonut ha-datit le'umit,” in *Shaḥal: Ḥolem ve-lohem*, ed. Ḥaya Frumer (Jerusalem: Erez, 2008), 454.

35 Landau, “Ha-Tsiyonut ha-datit le'umit,” 453.

36 This idea pervaded Kook's thought. See Yehudah Mirsky, *Rav Kook: Mystic in a Time of Revolution* (New Haven: Yale University Press, 2014).

*Yisra'el be-Erets Yisra'el al pi Torat Yisra'el* ["The people of Israel in the Land of Israel according to the Torah of Israel"].

Shaḥal's ideological critique of *Mizraḥi* was that it failed to unite the nation and the Torah into a single a priori value, a fact he said was revealed by its motto. He believed, by contrast, that "the religious principle and the national principle [should] not appear to stand side by side or be hyphenated together, but decisively united by their incorporation into a single principle."<sup>37</sup> In fact, he asserted, not only did *Mizraḥi* fail to unite these two principles, but it created a hierarchy by which the nation was subordinate to the Torah. Shaḥal observed that although the ideological founders of *Mizraḥi*, like Rabbi Yitṣhak Ya'akov Reines, had set out with a commitment to the Zionist idea as a source of spiritual redemption, they had changed over time. In order to appease their non-Zionist Orthodox critics, they had limited their engagement with Zionism to purely pragmatic politics. This is why—shockingly, for Shaḥal—they had sided against the "democratic faction" which wanted to make the promotion of Jewish "culture" a central pillar of the Zionist movement.<sup>38</sup>

The source of the errors of Reines and *Mizraḥi*, Shaḥal believed, was their mistake in associating Torah with the observance of commandments per se. As a result, Shaḥal wrote, the "raison d'être" of *Mizraḥi* had been reduced to "preserving the observation of religion in the land and the rule of religious and traditional life in the rebuilt land of Israel."<sup>39</sup> According to this perspective, national rebirth can only be of value if it can be located as a formal rule in this positivist understanding of the law. For Shaḥal, this makes the position of *Mizraḥi* far too close to that of "Western Orthodoxy." Even the Hirschian anti-Orthodox recognized that living in the Land of Israel is, ideally, one of the rules of the Torah. But reducing national rebirth to a single rule among hundreds of others "mocks the idea of . . . the return to Zion," and "contradicts the national idea to its core."<sup>40</sup>

Shaḥal bemoaned the fact that this mistaken ideology led the *Mizraḥi* movement to focus its energies on only a small part of the Jewish people—those who observed the commandments—and to treat other Jews as, at best, targets

37 Landau, "Ha-Tsiyonut ha-datit le'umit," 452.

38 Shmuel Ḥayyim Landau, "Yisra'el ve-Erets Yisra'el," in *Shaḥal: Ḥolem ve-loḥem*, ed. Ḥaya Frumer (Jerusalem: Erez, 2008), 388 ff.

39 Landau, "Ha-Tsiyonut ha-datit le'umit," 452.

40 Landau, "Ha-Tsiyonut ha-datit le'umit," 453.

to convert to the life of Torah.<sup>41</sup> The exclusive focus on the attempt to make religious life more prominent in the Yishuv, Shaḥal believed, weakened the unity of the Jewish people. It was at the core of *Mizraḥi's* decision to split from the Histadrut, and ultimately, created an internal tension that weakened *Mizraḥi* and distanced it from the true work that was needed to incorporate the entire Jewish nation.<sup>42</sup>

For Shaḥal, the way for *Mizraḥi* to return to its true redemptive roots was to widen its understanding of Torah, away from a positivist idea of law and towards the more expansive definition of living law. "The fundamental platform of the religious Zionist idea," he wrote, was "not in religion in the sense of Torah and commandment that Jews are required to perform," but rather "in religion in the sense of a view on the world, life and creation."<sup>43</sup> This entailed "a life of action, as the living Torah of Judaism," which is "the starting point of the religious principle, and the national principle in the life of the people of Israel."<sup>44</sup> For Shaḥal, this approach was represented in his motto "Torah and Labor." Torah as a living law and "labor" as a life of action were "two aspects of a single essence: rebirth [of the nation]."<sup>45</sup> As Yeshayahu Leibowitz, a member of *ha-Po'el ha-Mizraḥi*, put it around the same time: "A life of labor is not only a means to Torah, but is Torah itself."<sup>46</sup>

### Shaḥal's Legacy: The Dynamism of Torah

After his death in 1928, Shaḥal continued to have a significant posthumous influence on *ha-Po'el ha-Mizraḥi* for several decades. In terms of the legal framing of religious Zionist thought, one of his main contributions was to discussions of the question of halakhic change among the left wing of religious Zionism.

As we have seen, Shaḥal rejected a positivist definition of Torah as a list of rules. He saw Torah as a comprehensive world view, which arose

41 Landau, "Yisra'el ve-Erets Yisra'el," 386.

42 Landau, "Yisra'el ve-Erets Yisra'el," 387.

43 Landau, "Ha-Tsiyonut ha-datit le'umit," 454.

44 Landau, "Ha-Tsiyonut ha-datit le'umit," 454.

45 Landau, "Le-virur shitatenu," 412.

46 Quoted in Aryei Fishman, "Ha-ḥatirah le-aḥdut ḥavayatit-datit: Ma'amarei ha-shaḥarut shel Yeshayahu Leibowitz," in *Yeshayahu Leibowitz: His World and Philosophy*, ed. Avi Sagi (Jerusalem: Keter, 1995), 124.

from the spirit and historical circumstances of the nation and needed to serve the principle of national renewal. As such, he believed that religious Zionism had to be revolutionary, and that the Torah had to evolve in order to support the new independent national existence of the Jewish people in the Land of Israel.

As with other aspects of his legal thinking, there are echoes of the historical school of jurisprudence in the perspective of Shaḥal and his intellectual heirs on questions of legal change. As Eugen Ehrlich pithily wrote, “[T]o attempt to imprison the law of a time or of a people within the sections of a code, is about as reasonable as to attempt to confine a stream within a pond.”<sup>47</sup> Still, like Shaḥal, jurists affiliated with the historical school also believed that law had to respect precedent. Savigny had written that it was “impossible to change completely the nature of existing legal relations” because of the “indissoluble organic connection of generations and ages; between which, development only, not absolute end and absolute beginning, is conceivable.”<sup>48</sup> And while Ehrlich had a very broad definition of law, he also recognized the ongoing legal validity of existing legislation. This complex attitude, with a belief in the necessary dynamism of law alongside a fealty to precedent and historical legislation, resembles the approach of left-wing religious Zionists, who were devoted to the authority of divine revelation while also believing that the Torah had to reflect changing historical circumstances. Shaḥal’s call to “holy rebellion” neatly encapsulates this creative tension. He wanted his followers to rebel against what he saw as the narrowness and inertia of contemporary halakhic thought. But for the rebellion to be “holy,” it had to be rooted in revelation and in the experiences of the Jewish nation.

Shaḥal left relatively little writing about the detailed practice of legal interpretation that such a revolution should entail, though he did on occasion directly criticize rabbinical rulings of his day.<sup>49</sup> In general, however, his speeches and writings typically kept to a more abstract level, with a focus on the political organization of religious Zionists and of the Zionist movement more broadly. Many of his contemporaries, though, as well as his followers from later generations, took his ideas to their natural conclusions, applying Shaḥal’s call for a “holy rebellion” to the question of legal interpretation and

47 Quoted in Tamanaha, “Vision of Social-Legal Change,” 302.

48 Tamanaha, “Third Pillar of Jurisprudence,” 2246.

49 See, for example, Shmuel Ḥayyim Landau, “Rabbanim, hizaharu be-ma’asekhem,” in *Shaḥal: Ḥolem ve-loḥem*, ed. Ḥaya Frumer (Jerusalem: Erez, 2008), 343–48.

change. Examples abound of concrete ways in which the ideas of Shaḥal and his followers played out in the practical application of halakhah in their communities.<sup>50</sup> The rest of this article, however, will focus on some of the theories of halakhic change, following the spirit of Shaḥal's "holy rebellion."

One of the earliest attempts among *ha-Po'el ha-Mizraḥi* leaders to address the subject of legal change was laid out in 1929, by a colleague of Shaḥal named Yeshayahu Shapira in an article called "You Shall Do the Right and the Good."<sup>51</sup> Known as "Admor ha-Ḥalutz" [The Pioneer Rebbe], Shapira shared an East European hasidic background with Shaḥal, and is also considered one of the founders of *ha-Po'el ha-Mizraḥi*. In the article, Shapira took issue with a common criticism of the anti-Zionist Orthodox against *ha-Po'el ha-Mizraḥi*. Given their iconoclastic ideology of a dynamic Torah, Shaḥal, Shapira, and others like them were often criticized in general terms by other Orthodox Jews as being too similar to Reform thinkers.<sup>52</sup> In this article, however, Shapira took issue with a specific critique. In line with their expansive interpretation of "Torah," and their belief that national revival was its primary goal, members of *ha-Po'el ha-Mizraḥi* considered manual labor in Palestine to be the will of God. The anti-Zionist Orthodox criticized this position on the basis that manual labor was not formally listed among the 613 commandments. Shapira rejected the premises of the critique. To live a full religious life, he wrote, it was not enough to observe the formal explicit rules; one had to look to the "intention of the Torah," which included national independence brought

50 For primary sources on this topic, see Refael Auerbach, Shimon Weiser, and Shemuel Emanuel, eds., *The Kibbutz and Jewish Religious Law* (Jerusalem: Kevutsat Sha'alvim, 1984). See also Alexander Kaye, "The Etrog Exception: Religious Socialism and Torah Law," in *Be Fruitful! The Etrog in Jewish Art, Culture, and History*, ed. Warren Klein, Sharon Liberman Mintz, and Joshua Teplitsky (Jerusalem: Mineged Press, 2022), 226–37; Kaye, "Religion, Law, and the Dynamics of Intellectual Transmission"; Fishman, *Judaism and Modernization on the Religious Kibbutz*.

51 The article was originally entitled "In Light of Clarification," but was generally republished under the title "You shall do the right and the good," after the quotation from Deut 6:18 that plays a central role in this short but influential piece. Shabtai Don-Yehia, "Ve-asita ha-yashar ve-ha-tov," in *Admor ha-ḥaluts: Aliyato shel R. Yeshayahu Shapira* (Tel Aviv: Moreshet, 1961), 151–57.

52 See, for example, the fears of Pinhas Rosenblit in Benadmon, *Rebellion and Creativity*, 232. See also the critique of Rabbi Moshe Zvi Neria against Leibowitz discussed in Asher Cohen, *The Talit and the Flag: Religious Zionism and the Concept of a Torah State 1947–1953* (Jerusalem: Yad Yitshak Ben-Tsvi, 1998); Kaye, "Eliezer Goldman and the Origins of Meta-Halacha."



about through manual labor. From a jurisprudential perspective, there is nothing new in the claim that the law includes unlegislated legal principles alongside black-letter rules.<sup>53</sup> Indeed, within the halakhic tradition itself, there is much precedent for this kind of thinking. Shapira's position was notable, however, because of the degree of his emphasis on this idea. The legal move of placing great weight on unwritten Torah values, sometimes even giving them precedence to black-letter law, became a hallmark of the revolutionary attitude of *ha-Po'el ha-Mizraḥi*.

Shapira's expansive understanding of Torah was perhaps related to his political stance in Mandate Palestine. He was one of only six people who signed the earliest manifesto of *B'rit Shalom*, and he continued to defend the new organization from ongoing attacks in the press.<sup>54</sup> *B'rit Shalom* was a pacifist Jewish group, made up of followers of Aḥad Ha'am, which called for bi-national cooperation between Arabs and Jews in British Palestine. As a general rule, the *Mizraḥi* movement and other religious parties in the Yishuv wanted Zionism to remain purely pragmatic and political, and resisted the campaign of Aḥad Ha'am and those associated with him to turn Zionism into a movement for the cultural and spiritual revival of the Jewish people.<sup>55</sup> Some leaders of *ha-Po'el ha-Mizraḥi* provided the exception to this rule. As mentioned above, in the crucial battle over Jewish "culture" in the Zionist movement, Shaḥal severely criticized the position of *Mizraḥi*

53 A classical formulation is that of Ronald Dworkin's distinction between rules and principles. Dworkin's critique of legal positivism nicely encapsulates Shapira's critique of the positivism of the anti-Zionist Orthodox: "[Positivism's] central notion of a single fundamental test for law forces us to miss the important roles of these standards that are not rules." Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 22.

54 Zohar Maor, "Metinut politit mi-yamin li-smol: Me-Rabbi Binyamin ve-'ad ha-yom," *Zehuyot* 1 (2011): 56, discusses the affinity between Shapira and *B'rit Shalom*. *Do'ar Ha-Yom*, April 11, 1926, 4. In responding to criticism of that manifesto, Shapira wrote in very Aḥad Ha'am-ian terms: "Do not mock too much the goal of peace of the prophets of Israel. We are returning to our birthplace in the name of justice, and in its name we want to build a home here for ourselves. We want to be purified from all the filth of exile and its injuries, and to form for ourselves here a perfected way of life, based on the right, the truth, and peace. Let us not draw a sword in the sanctity of our lives as we establish it." *Ha-arets*, April 20, 1926, 2.

55 Aviezer Ravitzky, *Messianism, Zionism, and Jewish Religious Radicalism* (Chicago: University of Chicago Press, 1996), explains the theological and political basis for the position of *Mizraḥi* and other religious parties.

and expressed sympathy for Aḥad Ha'am.<sup>56</sup> Some years later, Shapira joined with Aḥad Ha'am's followers in founding *B'rit Shalom*. These positions were anomalous among religious Jews at the time, but they make more sense once we recognize that *ha-Po'el ha-Mizraḥi's* expansive definition of Torah and its belief in its organic connection to the entire nation has obvious affinities with Aḥad Ha'am's legacy.

Shapira's approach to halakhic interpretation and change was not limited to people who, like him and Shaḥal, grew out of an Eastern European hasidic background. They also found an audience among West European Jews. Shapira's article was translated into German almost immediately after its first publication by Yeshayahu Leibowitz.<sup>57</sup> Leibowitz at the time was a twenty-six-year-old leader of the German chapter of *ha-Po'el ha-Mizraḥi*, and his religious and halakhic philosophy was deeply influenced by that of Shaḥal and Shapira. Like Shaḥal, he faulted the limited Orthodox approach to Torah, which was "not a living Torah," but limited to a purely intellectual practice, "existing artificially to the side of the true existence of life."<sup>58</sup> This meant that the Orthodox "cut themselves off from the questions that interest our generation."<sup>59</sup> Torah, for Leibowitz, had to be all-encompassing, recognizing the "eternal mutual influence between life, learning and law."<sup>60</sup> Like Shaḥal, he criticized the Hirschian approach to Judaism, accusing it of creating a "new spiritual ghetto."<sup>61</sup> He, too, preferred the motto of *ha-Po'el ha-Mizraḥi*, *Torah va-Avodah*, which he took to represent a more expansive definition of Torah, "as study, commandment and way of life."<sup>62</sup>

Leibowitz's goal was to incorporate Torah into the context of the revival of an independent Jewish national life. "People, land and language," he wrote,

56 The intellectual associations between Shaḥal and Aḥad Ha'am have been observed by Eliezer Goldman, who noted that Shaḥal had channeled Aḥad Ha'am with his use of the term "national spirit." Eliezer Goldman, *Expositions and Inquiries: Jewish Thought in Past and Present*, ed. Daniel Statman and Avi Sagi (Jerusalem: Magnes Press, 1996), 328 ff.

57 For bibliographical details of this translation, see Fishman, "Ha-ḥatirah," fn. 10.

58 Quoted in Fishman, "Ha-ḥatirah," 123.

59 Quoted in Fishman, "Ha-ḥatirah," 123.

60 Quoted in Fishman, "Ha-ḥatirah," 126.

61 Quoted in Fishman, "Ha-ḥatirah," 123.

62 Quoted in Fishman, "Ha-ḥatirah," 125.

are “prerequisites for any renaissance of the Torah.”<sup>63</sup> For Leibowitz, the Torah had to be “redeemed by our efforts” —the efforts of religious Zionist youth.<sup>64</sup> This required getting away from the idea of Torah as “a hardened complex of halakhah that is closed off in itself,” and committing to a revival of the vitality of the oral Torah, which is responsive to the needs of the community. This entailed the creation of a new kind of independent Jewish society, exactly as Shaḥal had envisioned. Influenced by the sociological terminology of his day, Leibowitz followed the distinction between *Gesellschaft* (formal institutionalized society) and *Gemeinschaft* (dynamic community based on personal interactions).<sup>65</sup> “The sovereignty of Torah is destined to remain lip service,” he wrote, without the establishment of “a Jewish national, cultural and social *Gemeinschaft*, which stands independently.”<sup>66</sup> That social context “can be the basis for Torah as a value that includes Jewish culture and enlightenment and as a force that shapes man in his fullness.”<sup>67</sup> As for Shaḥal, so for Leibowitz in his early years: the connection between law and the nation in its particular circumstances, the expansive meaning of “Torah,” and the call for revolutionary legal interpretation growing organically out of national life are pillars of a national religious ideology framed in jurisprudential terms.

Examples of the attitude to halakhah set by these early thinkers proliferate among their colleagues and followers of later generations. Yeshayahu Bernstein, a slightly younger contemporary of Shaḥal and another founder of *ha-Po’el ha-Mizraḥi*, set out a similar position. “We cannot find the answer to the question of the ordering of social life according to the Torah in the rules and laws alone, without understanding their spirit,” he wrote, “which is the spirit of the higher justice of the giver of the Torah, the source of good and

63 Quoted in Fishman, “Ha-ḥatirah,” 125.

64 Quoted in Fishman, “Ha-ḥatirah,” 127.

65 This distinction was coined by the German sociologist Ferdinand Tönnies and was used widely among later Germanophone thinkers such as Max Weber.

66 Quoted in Fishman, “Ha-ḥatirah,” 124. In fact, in his early life Leibowitz wanted halakhah to be determined by a democratic process, which would ensure that it was directly connected to the life of the people. Moshe Hellinger, “A Clearly Democratic Religious-Zionist Philosophy: The Early Thought of Yeshayahu Leibowitz,” *Journal of Jewish Thought and Philosophy* 16 (2008): 253–82. And for the generally critical approach to rabbinical authority among many *ha-Po’el ha-Mizraḥi* thinkers, see Fishman, *Judaism and Modernization on the Religious Kibbutz*, chap. 8; Kaye, “Religion, Law, and the Dynamics of Intellectual Transmission.”

67 Quoted in Fishman, “Ha-ḥatirah,” 124.

decisive justice.”<sup>68</sup> In the following generation, Aharon Nahlon, a scholar of Jewish history and a member of the religious kibbutz movement, took up the theme: “The question is whether the 613 commandments are the only things that obligate us . . . [or whether] a life of Torah mean[s] that all matters of life are governed by principles for which the commandments are only the legal expression.”<sup>69</sup> In the same generation, another religious kibbutz member, philosopher Eliezer Goldman, wrote extensively about this approach to legal interpretation. Establishing a more structured jurisprudence of halakhah, Goldman coined the term “meta-halakhah” to describe values in the Torah beyond specific rules.<sup>70</sup> The annals of *ha-Po’el ha-Mizraḥi* contain many more such examples, which would benefit from a lengthier analysis.

In one of her earliest articles, Prof. Last Stone explored the place in law of “utopian ideal and social order,” which are “in tension with one another, yet are interactive and interdependent.”<sup>71</sup> She offered an appreciation, and also a critique, of Robert Cover’s attempt to apply Jewish approaches to this tension to American legal theory. Along the way, she provided a compelling survey of the way the tension between utopian justice and institutional authority is addressed in rabbinical writing, and addressed Jewish attempts to create “a more organic synthesis between the utopian ideal and the need for institutional order.”<sup>72</sup> *Ha-Po’el ha-Mizraḥi* and the religious kibbutz movement are a part of that story. Unlike much historical rabbinical writing on law and politics, which often remained abstract and hypothetical, the legal writing of Shaḥal and his followers took place in the context of a religious community that was utopian in its ideals and at the same time thoroughly pragmatic about the institutional requirements of new societies. It was a community that bridged iconoclasm and tradition, and it did so through the medium of law. The jurisprudential questions underpinning its ideology—What is the definition of “law”? Is the primary subject of law the individual or the nation? How does legal change occur?—are the means through which this

68 Quoted in Benadmon, *Rebellion and Creativity*, 231.

69 Quoted in Benadmon, *Rebellion and Creativity*, 230.

70 On Goldman’s “meta-halakhah,” see Kaye, “Eliezer Goldman and the Origins of Meta-Halacha.”

71 Suzanne Last Stone, “In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory,” *Harvard Law Review* 106 (1993): 892.

72 Stone, “In Pursuit,” 889.

paradoxical bridging takes place. As Prof. Last Stone put it, "Jewish law is not only a legal system; it is the life work of a religious community."<sup>73</sup> Shaḥal would have wholeheartedly agreed.

73 Stone, "In Pursuit," 894.

