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FROM POLITICAL HEBRAISM AND JEWISH LAW TO THE COMPARATIVE PARADIGM

*Amos Israel-Vleeschhouwer**

Abstract: Early modern Political Hebraism was imbedded in Christian-Western faith and tradition and based on the powers of truth, tradition, and experience. A contemporary turn to Jewish law can't be simply based on these bases of power, re-raising three questions – what motivates the turn to Jewish heritage? What justifies its acceptance by out-of-faith-and-tradition audiences? And what are the forms of successful comparative and inspirational projects?

Facing a possible return to a coercive version of the truth and tradition paradigm, promoting religious law as comparative law becomes a political act. A challenging and enriching comparative paradigm transforms tradition-based claims to an account of culture and identity in a multi-cultural matrix; Authoritarian self-evident experience is complemented by facts- and logic-based argument for unique merits and relevance; and a humanistic, scientific, inclusive and reflective comparative discourse challenges the adequacy of simple truth arguments and its abuse in the quest for power.

Realizing the potential of the comparative method, the article concludes with a richer way to use religious law in a comparative historical paradigm. Utilizing the special features of religious diversity and its incongruence in place and time with other social and legal variations, adding the rich religious traditions can considerably contribute to legal research, public discourse, and political accountability.

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I. INTRODUCTION

In this article, I will compare comparative Jewish law to Hebraic Political Studies¹ from a historical perspective, starting with Political Hebraism in Early modern political thought.² I argue that the conditions that enabled Hebraic influence on political thought shaped the practice of doing so, and that change in these conditions coincides with its decline.³ This will be the basis for assessing and analyzing the practice of employing Jewish law in a comparative paradigm.⁴

II. POLITICAL HEBRAISM

What motivated the turn of authors, political leaders, and professionals to Jewish sources? What was the practice of using them? To what extent were they received by its (intended) audiences? And, what were the subsequent legitimacy and discursive power of these sources? I will first discuss ‘classical’ political Hebraism – the use of Jewish sources in early modern European political discourse.

¹ Daniel Elazar, *The Themes of the Jewish Political Studies Review*, in 1 JEWISH POLITICAL STUDIES 1(1989); see also, <http://www.jcpa.org/dje/booksbydje.html>.

² Gordon Schochet, *The Judeo-Christian Tradition as an Imposition: Present at Creation?* In GORDON SCHOCHET, FANIA OZ-SALZBERGER AND MEIRAV JONES (EDS.), POLITICAL HEBRAISM: JUDAIC SOURCES IN EARLY MODERN POLITICAL THOUGHT (Jerusalem - New York: Shalem press, 2008), 259-282; ARTHUR EYFFINGER, GORDON SCHOCHET, AND MEIRAV JONES, FROM THE EDITORS, 3 HEBRAIC POLITICAL STUDIES, 1-4 (2008).

³ Kalman Neuman, *Political Hebraism and the Early ‘Respublica Hebraeorum’: On Defining the Field* in SCHOCHET, OZ-SALZBERG AND JONES, 57-71 (2005); Fania Oz-Slazier, *The Political Thought of John Locke and the Significance of Political Hebraism: Then and Now*, in SCHOCHET, OZ-SALZBERG AND JONES, 231-258 (2006); Jonathan Jacobs, *Return to the Sources: Political Hebraism and the Making of Modern Politics*, 1(3) HEBRAIC POLITICAL STUDIES 328-342 (2006), (Hebraic tradition as reference point, a century later “unheard of”).

⁴ I do not intend to *promote* Political Hebraism, nor legal comparing to Jewish law, which can be ‘negative’ as well as ‘positive’, depending on the values and convictions of the observer. See generally, Carolyn Evans, *The Double-edged Sword: Religious Influences on International Humanitarian Law*, 6 MELBOURNE JOURNAL INTERNATIONAL LAW 1-32 (2005). I will also not discuss whether there is a (unique) Jewish political thought or Jewish jurisprudence, how to identify it, and what its relevance to contemporary issues is. For Levine's attitude, see Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (1997); Idem, *Miranda, Dickerson, and Jewish legal theory: The Constitutional Rule in A Comparative Analytical Framework*, 69 MARYLAND L. REV. 78 (2009).

A. ‘Classic’ Political Hebraism

Early modern political Hebraism – using Jewish sources in early modern political thought - was imbedded in Christian-Western faith and tradition of Europe and the Americas. For many, the bible and religious norms were self-evident truths. People grew up with them as the sole epistemic source for knowledge. The influence of Christian and Jewish law, norms, and concepts on various elements of western polities were based on the powers of truth, tradition, and experience. I’ll discuss them in detail.

1. *The power of truth*

The Old Testament, as part of Jewish and Christian revelation and tradition, had a component of authority. Mined “correctly,” the Bible – and some subsequent sources were perceived to be the word of God for the era and issue at hand, or at least expound the divine political ideal. This quest for truth manifested itself in return to *the* fundamental text. As the New Testament doesn’t include earthly political theory but didn’t dispense with the political theory of the old testament, the latter gained importance.⁵ In 15th-17th century Europe, opening the Bible and reading it in search of God’s word was a religious and *political*-religious act. Reading the Bible was part of a political quest for discursive power, especially in opposition to accepted practice, conceptual hegemony, or opposition to contemporary (religious and political) powers. At least, basing a counterargument on the Bible reduced the hegemonic power’s ability to ignore the argument, and directly engaged audiences and created competition. Hebraism was (also) a political action.

2. *The power of experience and tradition*

Biblical and some other Jewish texts were deemed to be a culmination of the experience of the “old,” “chosen,” often “ideal” people or kingdom. Some biblical political sections have a utopian overtone, and were perceived as having eternal, or at least lasting,

⁵ Note however that using the text does not necessary imply there is one true answer, only that whatever was mined from the Bible, had a ‘truth value’ attached to it.

value for societies.⁶ From Machiavelli's Moses, through the 'Jewish Republic' and the 'Commonwealth of Israel', to Cunaeus's agrarian reforms⁷, writers found political wisdom in the texts, and used its persuasive power in the discourse.

Moreover, the Hebrew texts preserved an early phase in the same political and religious tradition that both the Hebraist and his audience were living in. As such, even if the Jewish experience wasn't considered ideal, it could nevertheless inform the political communal (or theoretical) discourse as reflecting the history of the present.

3. *Religious experience, relevance, and conviction*

Regardless of the content of the texts, when addressing a religious or culturally embedded audience, using divine words gave arguments additional meaning and power. Placed in this context, the political argument became existentially relevant to the listeners' life.

The legitimacy and power of the words combined the mere claim to truth, the practical utility of experience or the cultural power of tradition, and added religious fervor. These dynamics were created by the religious conviction of the user of the Jewish sources, the setting, and context in which the sources were used, or by the (collective) mind of the receiving audience. The audience of 'classic Political Hebraism' was religious, traditional, and imbedded in biblical culture. This is also a fair description of the populations that composed the polities in which, and about which,⁸ the political discourse was held.⁹

⁶ See e.g. the possibility for global jurisdiction (or government) partially based on biblical narrative in Jeremy Wieder, *International Law and Halakhah: Some Preliminary Thoughts*, in WAR AND PEACE IN THE JEWISH TRADITION 239-264 (Lawrence Schiffman and Joel B. Wolowelsky eds., 2007).

⁷ For the three first examples see Lynch; Eyffinger & Bodian; and Remer in SCHOCHET, OZ-SALZBERGER AND JONES, *supra* note 2. For the last example see Eric Nelson, *For The Land Is Mine: The Hebrew Commonwealth and the Rise of Redistribution*, in THE HEBREW REPUBLIC: JEWISH SOURCES AND THE TRANSFORMATION OF EUROPEAN POLITICAL THOUGHT (2011). www.brown.edu/Research/ppw/files/Nelson%20For%20the%20land%20is%20Mine.doc.

⁸ Even though some of the discourse is about humanity, objective political truth, or the world – the Western-Christian-Euro-centeredness of most political discourse and i)nternational relations, qualifies the statement in the text.

⁹ Locke noted that Judaism was unable to spread its messages (especially monotheism), due to its internal restraint on intercultural contact. Christianity carried and spread the message. John Locke, *The Reasonableness of Christianity*, in THE WORKS OF JOHN LOCKE, Vol. 5 (1823), 137-138. Compare MAIMONIDES, LAWS OF KINGS AND THEIR WARS 11, 11; see Amos

B. Enlightenment and the Decline of Hebraism.

Advancing into the enlightenment, the Bible held out for some time as a source of wisdom and tradition. Religious views still had a significant place in education and culture. Prophetic utopia still enchanted people in their quest to build a perfect society in the Americas, and in both upholding and criticizing the regimes in the old world. Societies also recognized the power of norms that proved themselves in history and were ready to be informed by tradition and experience of “old” communities.

However, The world in which this was true has since changed in many ways. Enlightenment dethroned religion and relegated it to the private sphere. The search for truth moved from revelation to science, from God to man, from text to experimental research, and from the past to the present and future. Modernity rejected all meta-narratives and challenged tradition with rationality and the promise of progress. Tradition’s power of cultural claims faded in the face of objectivity, individualism, and universalism (later also multiculturalism).

Motivation, access, and acceptance by the audience were all affected. It is thus no surprise that Political Hebraism disappeared from the scene nor that its place in the tradition of Western political thought was retrospectively underrated.¹⁰ Modern Western readers of political texts did not experience the effects of the usage of Hebraic sources. They could not fathom the utility of using these sources and viewed it as a (primitive) quirk by these scholars, better to be ignored.

Funkenstein, *Nature, History and Masianism in MAIMONIDES* (Tel Aviv: Ministry of Defence, 1983 [Hebrew]), ch. 9.

¹⁰ For other explanations see Oz-Salzberger, Jones and Schochet’s separate contributions in SCHOCHET, OZ-SALZBERGER, AND JONES, *supra* note 2.

C. Hebraisms in the 20th Century

By the end of the 20th-century, religion resurged in the public sphere.¹¹ The meta-narrative of modernity itself has been replaced.¹² However, religion found itself in a different environment. Religious claims to truth, tradition, or experience were respected, but within a variety of other voices and claims, as part of a multi-cultural discourse. The global scene, indifferent to Judaic culture or Christian tradition, replaced the European/western-American arena. In the multi-cultural and post-modern discourse, even the Bible doesn't enjoy special status and has to compete in a cacophony of voices in order to be heard. The rapid development of political, economic, and other social structures reduced the directly apparent relevance of the experience of old texts.¹³ Modern theories of hermeneutics raised reservations to one-voiced truths.¹⁴ For out-of tradition audiences, the truth of scripture or religious/national tradition has no power. Even most believers in most faiths – sincerely believing their sacred texts and following them – recognize that for out-of-faith-and-tradition, Hebraism requires new bases for a claim to be heard.

Reflecting on these processes, most of the end-20th-century Hebraism placed its project in a semi-classical setting. The main audience targeted by these projects is the Christian-imbedded Western audience and, more recently, Jewish – mainly Israeli and American – audiences. These in-tradition Hebraisms operate in a global, non-traditional, skeptical, interdependent context. So even inside the Jewish community – certainly in the Christian or Western context – neither motivation to use Hebraic sources nor acceptance of Hebraic

¹¹ See Scott Thomas, *The Global Resurgence of Religion, International Law and International Society*, in RELIGION AND INTERNATIONAL LAW, 321-338 (Mark Janis & Carolyn Evans, eds. 2004); SUSANE H. RUDOLPH AND JAMES PISCATORI, TRANSNATIONAL RELIGION AND FADING STATES (Jacob Neusner ed. 1997), JACOB NEUSNER, GOD'S RULE: THE POLITICS OF WORLD RELIGIONS (2003); PETER BEYER, RELIGION AND GLOBALIZATION (2000); HUGO HECLO, *Religion Returns to the Public Square: Faith and Policy in America* (Hugh Heclo and Wilfred M. McClay, eds. 2003).

¹² Frederick M. Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the end of Modernity*, 54 DEPAUL L. REV. 1197, 1197-1235 (2005); Suzanne Last Stone, *Judaism and Postmodernism*, 14 CARDOZO L. REV. 1681, 1681-1712 (1993); Zeev W. Falk, *Jewish Religious Law in the Modern (and Postmodern) World*, JUDISCHES RECHT, available at http://www.juedisches-recht.de/rec_postmodernist.php (last accessed July 2019).

¹³ Yedidya Stern, נִגְשׁוֹת,

¹⁴ See Ze'ev Lev, *Hermeneutics in Contemporary Jewish Thought* (Jerusalem: Magness, 2006) [hebrew].)

political thought can be taken for granted. New sources of power must be tapped. I'll explore these practices briefly.

1. *Political and public political Hebraisms*

Two leaders who used political Hebraism, Martin Luther King and David Ben-Gurion,¹⁵ based their use of Jewish sources on embeddedness in Hebraic/Christian traditions.

Rev. Dr. Martin Luther King's message, strongly based on Biblical sources, came from his own embeddedness in the tradition and targeted his traditional religious devoted communities. It is however very significant that his message appealed to a broader – even global – audience, albeit the use of the Bible probably mainly resonated within Christian and Jewish audiences.¹⁶ Many other civil rights movement's leaders also utilized biblical imagery in sermons, and these themes were central in the freedom songs of the civil rights movement.¹⁷ These can and should be compared to politically themed sermons in Jewish communities, especially those that call for action and attempt to guide it.¹⁸

David Ben-Gurion, Zionist leader and first prime minister of the state of Israel, systematically used the Bible, relying on the cultural proficiency of his audience in Jewish sources, and on the common Zionist mission to create a Jewish national state based on tradition, but not on the Jewish religion.¹⁹ He used biblical quotes to intertwine the renewal of the Jewish polity with adherence to the prophets' moral guidance. His political nemesis, Menachem Begin, also referred to the Bible repeatedly, finding resonance mainly with traditional and religious audiences. While Begin employed its power of truth and

¹⁵ Arthur Eyffinger & Gordon Shochet *From the Editor*, 1 HEBRAIC POLITICAL STUDIES 5 (2005).

¹⁶ Mahatma Gandhi was another leader that succeeded to globally promote universal ideas, which were based on particular, local, culture.

¹⁷ It continues, in a different way, a generation later. See President Barack H. Obama, Speech at Selma, Alabama, (Mar. 4, 2007) (invoking Joshua and the promised land).

¹⁸ Marc Saperstein's work on sermons in wartime is fascinating. MARC SAPERSTEIN, JEWISH PREACHING IN TIMES OF WAR 1800-2001 (Oxford: Littman Library of Jewish Civilization, 2008).

¹⁹ NOA MANDEL-LEVI, OLD LANGUAGE IN NEW REALITY: FUSION OF HORIZONS IN PUBLIC TEXTS OF THE LEADERS OF THE ZIONIST SOCIALIST MOVEMENT (Hebrew University of Jerusalem, 2008). (According to Mandel-Levi, in more than 400 public texts of Ben-Gurion (1910-1972) he uses the Bible 30% of the time; of which 90% after 1948. She also analyses A.D. Gordon and Berl Catzenelson).

tradition in the old sense, Ben Gurion used the Bible's cultural power differently.

I think that for Ben Gurion personally, the biblical prophets conveyed true universal visions of justice, which he sought to prove on merits. But Mandel-Levi argues that for the secular labor movement, political leaders, truth, and tradition didn't disappear but changed. The "truth" of the divine message changed to a message carrying the power of *authenticity*. She convincingly shows that the base of power of 'tradition' undergoes a change of focus from the past – the traditional power base of tradition – to the present and future. Gadamer suggested that 'fusion of the horizons' occurs when one experiences the '*process* of tradition' as an act of transmission.²⁰ Dialogue with the text is based on seeing a "true" element in the text leading to a keen dialogue with it, checking the relevance, and striving towards a synthesis.²¹

2. *Jewish based political activism*

Jewish communal activism and Jewish-inspired individual activists experience Jewish sources as justifying life choices and as inspiring them. Broader political impact, and the out-of-faith co-operation, indicate the idea's universal value. Jewish sources are part of the self-identity of the community/activist in two ways. Heschel's Jewish identity directed his political actions (in the civil rights movement). For others, Jewish inspired political action is part of fostering a commitment to Jewish identity and communities.²² Jewish social activism in the global context many times combines both motivations.²³

²⁰ See generally HANS-GEORG GADAMER, TRUTH AND METHOD (New York: Crossroad, 1989).

²¹ MENACHEM (MENI) MAUTNER, LAW AND CULTURE 3 (2008).

²² See e.g., <http://utzedek.org/about-us/our-vision/>; ATALYA OMER, DAYS OF AWE: REIMAGINING JEWISHNESS IN SOLIDARITY WITH PALESTINIANS (University of Chicago Press, 2019); <https://www.thejc.com/judaism/features/the-israeli-woman-rabbi-who-is-redreaming-jerusalem-1.494810>; <https://studiodov.wixsite.com/kehilat-zion>.

²³ Tevel Betzedek uses Jewish sources and knowledge to inspire (mainly Jewish) volunteers to activism, but also to foster Jewish identity in its Jewish volunteers. See <http://www.tevelbtzedek.org>. Similarly, Habad promotes the Noahide laws in (Christian) American and universal contexts both as a universal mission and as an inherently Jewish action to bring the Messiah. See YISHAK KRAUSS, THE SEVENTH: MESSIANISM IN THE LAST GENERATION OF HABAD 4-7 (Tel-Aviv: Yedioth Ahronot Books, 2007) [Hebrew].

3. *Academic-based Hebraisms*

Judaic studies can be perceived as antagonistic to classic political Hebraism. The doubt raised by research as to the truth value of the sources, the historical accuracy of their supposed context, and the accuracy of the experience reported in the sources reduced the powers of truth, tradition, and experience. Recognition of multiple voices inside religion, in the Bible and in other sources, informs and engages broader audiences, but gives less power, because the powers of truth and tradition are inherently lower. The multiple voices of biblical and rabbinic discourse can also generate more adaptive and inspirational power, foster innovation, and engage various groups to identify with a diverse national identity but threatens conservative nationalist or religious factions. Therefore, there is no correlation (or inverse relationship) between academic acceptance and promotion of political thought and the acceptance of these expressions in the community of faith.²⁴

Departments of Jewish studies are also facilitating Hebraism by (a) dispersing Jewish political knowledge, offering accessibility and availability, and (b) by analyzing Jewish sources with modern tools of research and presenting them in terms of political theory and history, showing their relevance. Even if a text relates a culture-specific political insight, discovering its historically relevant context may enable adapting it to other contexts and cultures. Neglecting research might lead to false political messages by connecting a solution to the wrong problem and context, or by missing an important political insight. 20th-century projects on the Jewish political tradition include Elazar's *Jewish Political Studies Review*,²⁵ the five-volume project *The Jewish Political Tradition*,²⁶ and Shalem's institute Political Hebraism project.

Joseph David recognized differences between global and Israel-oriented Jewish political writing – in Academia and public

²⁴ Rabbi Henkin criticized Prof. Aviezer Ravitsky in his book review published in *Akdamot* 8 (2000), 179-182 [Hebrew]; see also the correspondence between Yoske Ahituv and Harav Avi Rontski published in *Meimad* 16 (1999), 16-20 [Hebrew].

²⁵ *Supra* note 1.

²⁶ 1 MICHAEL WALZER, *THE JEWISH POLITICAL TRADITION XXI-XXXI* (Michael Walzer, Menachem Lorberbaum, Noam Zohar, eds. 2000). See also, *id.* at XXXI-XXXXI

discourse.²⁷ A similar distinction can be made between political scientists and Jewish studies scholars,²⁸ as well as differences in the way both groups write for Jewish/Israeli,²⁹ western, or global audiences. Thus, Lorberbaum's book on the limits of law in Hebrew seeks to influence the political culture and debate in Israel, while the English version explicitly targets other religious traditions and general political thought.³⁰ Addressing Jewish audiences in Israel³¹ and worldwide, the powers of national tradition and national cultural heritage are invoked. Identity and heritage (and even faith) is invoked to promote engagement, even in those that do not accept their authority.³²

Public intellectuals like Rabbi Jonathan Sacks, Robert Cover, Michael Walzer, Daniel Elazar, and David Novak used Hebraic sources to tackle real-world problems. Having the idea and having political power, the turn to Hebraic sources serves to add discursive power³³ to the introduction of unique ideas³⁴ that arose in the Jewish tradition and experience.³⁵ Having proved the idea's relevance, they re-engage the problem intellectually, omitting truth-based and tradition-based claims. However, they do rely on the resonance of the

²⁷ Jossi David, *Between the Bible and the Holocaust: Three sources for Jewish Perspectives on Mass Destruction*, in Sohail H. Hashmi, *ETHICS AND WEAPONS OF MASS DESTRUCTION* 385, n. 2 (Steven P. Lee, ed. 2004).

²⁸ Numerous others dealt with Jewish political thought in the same manner, as public intellectuals, including Aviezer Ravitski, Eliezer Schweid, Uriel Simon. The political Hebraism of Yeshayahu Leibovits merits a separate treatment.

²⁹ See Daniel Polisar, *President's Message*, SHALEM CENTER at <http://www.shalemcenter.org.il>; Mission statements and editorial foreword in *Hebraic Political Studies*, volumes 1 (2005) and 3 (2008) (Arthur Effinger & Gordon Shochet, eds.).

³⁰ MENACHEM LORBERBAUM, *POLITICS AND THE LIMITS OF LAW: SECULARIZING THE POLITICAL IN MEDIEVAL JEWISH THOUGHT XII* (Stanford, CA: Stanford University press, 2001).

³¹ In the Hebrew edition of Michael Walzer *Just and Unjust Wars*, he points to the need to reengage religious sources in the Israeli political discourse; DANIEL FREIDMAN, *DID YOU MURDER AND INHERIT?* (Tel Aviv: Dvir, 2000) [Hebrew].

³² See generally HANNOCH DAGAN, *UNJUST ENRICHMENT* (Cambridge: Cambridge University Press, 1998).

³³ MICHAEL WALZER, *JUST AND UNJUST WARS* 5 (1977), ("citing classic sources ... when there is a need for a specially strong or clear argument.")

³⁴ See e.g., *The Shabbat* (Walzer, *supra* note 33, at 193-195), the idea of covenant (See Daniel Elazar; *supra* note 1; DAVID NOVAK, *COVENANTAL RIGHTS: A STUDY IN JEWISH POLITICAL THEORY* (Princeton: Princeton University Rights, 2000)).

³⁵ MICHAEL WALZER, *SPHERES OF JUSTICE* 71-74, 86 (New York: Basic Books, 1983). Here, he mentions social security, public goods, mutuality and the gift relationship in medieval Jewish communities in an argument against the minimal state, promoting equal education and medical care.

sources vis-à-vis their audiences,³⁶ as did Pope John Paul II and Pope Francis when addressing global audiences. Still, being academic, these projects seem to underutilize and perhaps discount the power of religious commitment and religious-based relevance.³⁷

Another arguable form of academic political Hebraism is indirect. People from Jewish descent, themselves Jewish or not, had a disproportionate impact in the 20th-century.³⁸ The creation of the State of Israel, its existence, and the discourses in and about it, opened multiple possibilities for utilizing Jewish sources. An interesting kind of Hebraism is seeking to predict Israel's actions by understanding its culture-specific political thought.³⁹

III. THE JEWISH LAW PROJECT: IDENTITY, CULTURE AND COMPARATIVE LAW

The modern "Jewish law" movement started as an academic society in December 1917 in Moscow, striving to distill a modern law for a future Jewish state, based on the Jewish legal tradition. The leading secularized Jewish Russian jurists wanted the law to be culturally Jewish, expressing in law the Jewish identity of the then-imagined state. Some rabbis in the 20th Century were engaged in a parallel effort to adapt traditional Jewish religious norms to the modern environments in their various local legal systems. Some of them

³⁶ See also AARON WILDAVSKY, *MOSES AS A POLITICAL LEADER* (Israel: Shalem Press, 2005).

³⁷ The Jewish Political Tradition project explicitly excludes "detached scholarly" approaches (Walzer, *supra* note 35, at i); Compare MENACHEM LORBERBAUM, *THE RELIGIOUS ASPECT OF PHILOSOPHY OF HALACHA*, NEW STUDIES IN PHILOSOPHY OF HALACHA, 97 (Jerusalem: Magness, 2008) [Hebrew] (promoting the religious aspect of the philosophy of law).

³⁸ See generally YURI SLEZKINE, *THE JEWISH CENTURY* (Princeton: Princeton University Press, 2004); REUT Yael PAZ, *A GATEWAY BETWEEN A DISTANT GOD AND A CRUEL WORLD: THE CONTRIBUTION OF JEWISH GERMAN-SPEAKING SCHOLARS TO INTERNATIONAL LAW*, LEIDEN (Martinus Nijhoff, ed. 2012); MURRAY FRIEDMAN, *THE NEO-CONSERVATIVES REVOLUTION: JEWISH INTELLECTUALS AND THE SHAPING OF PUBLIC POLICY* (Cambridge University Press, 2005). Consider Jewish prominence in the 1917 revolution and the 1968 French student movement, and more. Biblical imagery is used in literature, in the performing arts, in the fine arts, in the movie industry and mass communications. Arts and journalism seem to take the role of the classical prophets and preachers, using imageries (including biblical ones) to create political consciousness, criticism and resonance in a semi-religious way.

³⁹ Guy Roberts, *Jewish Sources of and Views on the Laws of War*, 37 NAVAL L. REV. 221, 221-223 (1988); Warner D. Farr, *The Third Temple's Holy Of Holies: Israel's Nuclear Weapons* (1999), <http://www.au.af.mil/au/awc/awcgate/cpc-pubs/farr.html>.

sought to adapt the religious law to the future state of Israel as a mainly religious challenge. In 1948, with the creation of the state of Israel, there was no comprehensive proposal for Jewish-law-based legislation for the state of Israel, even though there arguably was a political option for its acceptance, had it been ready. With the establishment of the state, decline of pioneering ideology, and third-generation secularization, the comprehensive Israeli civil legislation in the late '70s was only marginally informed by Jewish law. The political change in 1977 from the labor party to the right-wing-traditional-religious coalition strengthened a renewed effort for Jewish-based legislation, resulting in the basic (constitutional) law referring the courts to "the principles of liberty, justice, equity and peace of the Israelite heritage" to fill legal lacunae. The effort invokes the national heritage and enhancing the Jewish identity of society and state. The formulation accepted by the parliament attests that inherent truth due to divine sources were replaced with merits, (religious) tradition replaced with national cultural heritage, and Religious inspiration was replaced by an emphasis on intellectual, rational-legal discourse.

This law didn't have any significant impact on Israeli jurisprudence. Judges that used Jewish law continued to do so based on their Zionist and religious agendas. Other judges weren't convinced. The modern, scientific, future-and-change-oriented Israeli society didn't assign the Jewish law powers of "truth," nor saw it as part of its "tradition." Law didn't need religion as a source of authority, basing itself instead of on philosophy and political processes, arranged and formulated according to analytical and conceptual criteria. The non-religious public sphere barely let religious voices to be heard in public and political processes, and even those were mainly translated into general rational formulations and arguments. The cultural importance of the identity of Israeli society became debatable.⁴⁰

The resurgence of Jewish law in US legal scholarship, education, and practice in the years 1980-2000 (and maybe till 2010), should be seen in the context of the rise of legal pluralism and multiculturalism and was notably executed within the framework of comparative law. In this framework – religious traditions are heard as part of respect for multiple traditions and judged on their relative

⁴⁰ Aryeh Edre'i, *Why Do We Need Jewish Law*, 25 TEL AVIV L. REV. 467, 467-487 (2002) [Hebrew]; Leon Shelef, *Jewish Legal Formalism and the Values Of the Jewish Legal Heritage*, 25 TEL AVIV L. REV., 489, 489-502 (2002) [Hebrew].

merits in a diverse, multi-vocal debate. There is no pre-conceived credit given to tradition; certainly, no powers of truth are assumed. The power of experience is diminished due to the quick-changing realities and competition with evidence-based legal arguments.⁴¹ Post-modern discourse challenged the simplistic usage of any source claiming authority. Still, the Jewish legal traditions command attention in major comparative efforts.⁴² It is different enough from the Western legal culture to encourage interest⁴³ and similar enough to enable comparison.⁴⁴ It is ancient and contains ongoing and evolving institutions, jurisprudence, and political thought. It holds a rich collection of opinions, values, and interests covering two thousand years of experience.⁴⁵ Indeed, Israeli supreme court Justice Solberg coined the expression “Utilitarian Jewish law” (*“Mishpat Ivri Letoeler”*). Clear separation of Church and state and the lack of threat from the Jewish minority enabled sincere, interesting and invigorating discussions of Jewish-based comparative jurisprudence in the US, but less so in Israel.

IV. COMPARATIVE LAW AND RELIGIOUS POLITICAL COERCION

Comparative endeavors are based on a clear understanding of the issues at hand (be they theoretical⁴⁶ or realistic), an in-depth analysis of the context, and the options at hand, accounting for their relative pro and cons. Once the comparative relevance of an option is proven, no additional motivation is needed to include them in the comparative analysis. Comparison enables a better understanding of common practices and enhancing their power, as well as refining,

⁴¹ This is based on law and social sciences and law and economics.

⁴² See generally PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (New York: Oxford University Press, 2004); for ethics, see The Ethikon series in comparative ethics (<http://www.ethikon.org/books.htm>).

⁴³ A religious (Jewish) system might have its own language and structure, which comparative efforts must take that into account. See Suzanne Last Stone, *Tolerance and Pluralism in Judaism*, 2 JOURNAL OF HUMAN RIGHTS 105, 105-118 (2003).

⁴⁴ Suzanne Last Stone, *The Pursuit of the Countertext: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARVARD L. REV. 813, 813-894 (1993).

⁴⁵ See generally WALZER, *THINKING POLITICALLY* 183-189 (2007). (analyzing two strands of universalism. After placing the Jewish tradition along with others, Walzer first posits the Jewish option as possible, then offers it is being “better”, “fitting”, and as “doing work.”

⁴⁶ See Susan Last-Stone, *The Emergence of Jewish Law in Postmodernist Legal Theory*, JUEDISCHES RECHT http://www.juedisches-recht.de/rec_postmodernist.php; Robert Cover *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow, Michael Ryan and Austin Sarat, eds., 1995).

reforming, discarding, and changing them.⁴⁷ Comparative law is an intellectual activity, and shouldn't be viewed as directly promoting legal change. Therefore the distinction between theory and practical political thought is important. However hard it is to convince others of the merits of an idea, and however much the accepted idea differs from the idea as it was before its acceptance, the transfer of political structures, institutions, and practices from culture to culture is much more difficult. Only in exactly identical situations, transplants of a solution, concept, or institution are easily possible. In non-identical situations (which are most of the cases), ideas and principles are more easily transferred or translated, while norms behave like biological transplants, requiring anti-rejection medication.⁴⁸

A. Comparative Law: Unique, Transferable, Engaging

Jewish law proved to be a good source of enriching comparative materials. The cost-benefit ratio was positive because Jewish law provided unique, but universally applicable, insights.

Jewish experience enabled a *unique* form of information processing, trial, and error, as well as an intellectual environment (including minority status and persecution as catalysts⁴⁹) in which unique results are possible.⁵⁰ Jewish political expertise resulted from Jews living in a "laboratory of politics."⁵¹ The Jewish diaspora enabled collective Jewish thought to compare political systems, solutions, arguments, and discourses. The movement of active, organized communities, with legal and political institutions, crystalized insights from various political, organizational forms

⁴⁷ Hanoch Dagan, *Remarks on Ownership and Partnership*, 14 BAR ILAN LAW REV. 230, 230-232 (1998).

⁴⁸ See generally ALAN WATSON, *LEGAL TRANSPLANTS* (London: Athens, 1984). Other conceptualizations have been offered, like translation, migration and dialogue - each invokes a whole body of literature on intercultural adaptation and hermeneutics. This literature is relevant for Political Hebraism only to the extent that the comparative effort results in actual cultural transfer.

⁴⁹ See generally LEO STRAUSS, *PERSECUTION AND THE ART OF WRITING* (Chicago: University Of Chicago Press, 1988); PAZ, A GATEWAY; this feature has been discussed in *Hebraic Political Studies*.

⁵⁰ Slezkine, *supra* note 38; SAMUEL LEVINE, *JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY* (Touro Uni. Press, 2019)

⁵¹ Aviezer Ravitsky, *Dat U'medina Bemachshevet Yisrael*, in *JEWISH THOUGHT, HEBREW, JERUSALEM*, ISRAELI INSTITUTE FOR DEMOCRACY (1998).

interacting with them. Placing education at the critical locus of the political, Jewish jurisprudence is arguably education-oriented.⁵²

The variation between communities enabled real-life testing of different communal and inter-communal politics. The Jewish community, as a conglomerate of living communities, also gained vast political experience in difficult and changing environments.⁵³ The relative success⁵⁴ of Jewish international commerce is an example of being first to find solutions to central problems of international commerce.⁵⁵ The Jewish experience is also considered as validating the possibility of bottom-up, self-organized, community-based legal systems.⁵⁶

The success of modern Political Hebraism derives from promoting diverse applications of its insights, as Walzer wrote: “we can learn from each other even if the lesson learned isn’t exactly what the other had in mind.”⁵⁷ Many particular, culture-based ideas of law and political structure can be universally applicable if one is ready to have various implementations of the basic idea. Thus, the biblical principle that the sovereign is required to learn the law (write a personal copy of the Torah) can urge all leaders to learn and be a

⁵² See JONATHAN SACKS, *THE DIGNITY OF DIFFERENCE: HOW TO AVOID THE CLASH OF CIVILIZATIONS* (London: Continuum, 2002). For Rabbi Hartman, see Warren Zev Harvey, *Strangers in our Home: Hartman on Peace with the Palestinians*, in JONATHAN MALINO, *JUDAISM AND MODERNITY: THE RELIGIOUS PHILOSOPHY OF DAVID HARTMAN* 345-358 (Aldershot, Hampshire: Ashgate Publishing, 2004); Finally see Avinoam Rosenak, *Law, Halacha, and Education: New Directions in the Philosophy of Halacha*, 1 *HEBRAIC POLITICAL STUDIES* 343-372 (2006), 343-372; and EDWARD FEINSTEIN, *JEWS AND JUDAISM IN THE 21ST CENTURY* (Woodstock, Ve.: Jewish Light Publishing, 2007).

⁵³ Daniel Elazar, *supra* note 1. See Fanya Oz-Salzberger, *supra* note 2. (The last passage is of particular importance.)

⁵⁴ AVI BEKER, *DIPLOMACY WITHOUT SOVEREIGNTY: THE RESCUE ACTIVITIES OF THE WORLD JEWISH CONGRESS*, 304-318 (Benjamin Pinkus, Ilan Troen, eds, 1988). [Hebrew: English edition, Bialik]; JONATHAN FRANKEL, *BLOOD AND POLITICS: THE DAMASCUS BLOOD LIBEL, THE JEWS AND THE WORLD*, (Jerusalem: Zalman Shazar, 2003); Daniel Gutwein *The Politics Of Jewish Solidarity: Anglo-Jewish Diplomacy And The Moscow Expulsion Of April 1891*, 5 *JEWISH HISTORY* 23-45 (2005).

⁵⁵ Nathan Oman, *Commerce, Religion, and the Rule of Law*, 6(2-3) *J. LAW RELIGION AND STATE* 213-235 (2018).

⁵⁶ Talia Fisher, *The Privatation of Law*, 30 *TEL AVIV L. REV.* 517, 522 (2008) [Hebrew]. (noting that the Jewish experience is not unique, and refereing to e.g. Walter Otto Weyrauch and Maureen Anne Bell, *Autonomous Lawmaking: The Case of the Gypsies*, 103 *YALE L. J.* 323, 323-399 (1993). Shayna M. Sigman, *Kosher Without Law: The Role of Non-Legal Sanctions in Overcoming Fraud Within the Kosher Food Industry*, 31 *FLORIDA STATE UNIVERSITY L. REV.* 509, 509-601 (2004). The research assistant was of the Islamic faith, and the article discusses the partial reliance of Muslims on the Jewish ‘Kosher’ certificate as indicating ‘Halal’ food.

⁵⁷ Walzer, *supra* note 45.

committee to shared international cogent just laws.⁵⁸ But it also justifies their commitment to their own particular legal code.⁵⁹

B. The Example of International Law

A good example of the dynamics described above is Jewish and International law. Hebraists - Grotius and John Selden - were at the center of the evolution of modern public international law.⁶⁰ However, enlightenment and globalization challenged the status of religious sources. Vattel, a mere hundred years after the Hebraists, already managed well without divinity or religious texts.⁶¹ Together with Kant's *Perpetual Peace* (1795), international law became based on reason, universal morality, and science. However, there were three good reasons for comparative Jewish efforts to succeed in international law.

First, because this was and probably still is an ideal presentation of a more parochial and western, Judeo-Christian, centered legal discourse.⁶²

Second, as opposed to most national states and legal systems, international law encourages multi-cultural, influence upon itself: "the representation of the main forms of civilization and of the principal legal systems of the world should be assured."⁶³ Therefore "it would be no great leap for international law also to recognize the relevance of religious claims. . . . At the end of the day, these sparks of

⁵⁸ R. Moshe Chalfon from Gerba (Tunisia) proposed that world leaders would study governance at an international school as a condition for any legitimate government role. See Amos Israel-Vleeschhouwer and Dafna Bezalel-Horev, *The International Legal Thought Of Rabbi Chalfon Moshe Hacohen*, 29 DINEI ISRAEL 217, 217-258 (2013).

⁵⁹ Compare Mark J. Sundahl, *The Cape Town Approach: A New Method of Making International Law*, 44 COLOMBIA JOURNAL OF TRANSNATIONAL LAW 339, 339-373(2006).

⁶⁰ Shabbtai Rosenne, *The Influence of Judaism on the Development of International Law: An Assessment*, 5 NETHERLANDS INT'L L. REV. 2, 63-94 (1958) For Selden see JASON P. ROSENBLATT, *RENAISSANCE ENGLAND'S CHIEF RABBI: JOHN SELDEN* (Oxford: Oxford University Press, 2006).

⁶¹ MARK JANIS, *Religion and Literature of International Law*, in RELIGION AND INTERNATIONAL LAW 125 (1958).

⁶² See generally ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL*, (2017).

⁶³ See art. 9 of the ICJ code (available at <http://www.icj-cij.org/>), and art. 8 of the ILC (available at <http://www.un.org/law/ilc/texts/statutfra.htm>). . Article 36(8) of the Rome Statue of the ICC states that: "The States Parties shall, in the selection of judges, take into account the need, . . . for: (i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation". . By the term "legal systems" the drafters did probably not mean a religious legal system. . See WILLIAM P. . GEORGE, *Looking for a Global Ethic? Try International Law*, in RELIGION AND INTERNATIONAL LAW 483-504 (1958).

illumination might help reshape the substance of international law itself.”⁶⁴ However, in practice, influence is restricted to the ‘forms and principal systems’ as represented by states, and the potential of religious traditions enriching international law is underutilized.

Finally, Jewish law, as other religious traditions, has potential relevancy.⁶⁵ The Jewish political tradition offers a particularistic view which is compatible with international co-operation,⁶⁶ and a religious tradition that promotes legal pluralism in a stable global network. Kaplan argues that Jewish experience and tradition have a unique lesson for a globalized society - balancing, even integrating, the individual, the national, and the universal. For many Jews, multiple citizenships and identities do not threaten each other but promote cultural modesty and self-confidence, theoretically enabling an intense national and religious identity without the need to expand or control.⁶⁷ The resilience and perseverance of the dispersed Jewish people can present the Jewish community as a unique possible model of a “globalized (religious, cultural and ethnic) minority community,” which is a growing global phenomenon. This has been considered insightful and inspiring by others, such as the Dalai Lama.⁶⁸

Despite all the above, in this multi-cultural pluralist global world, the voice of Hebraic sources is (almost) not heard. And Jewish law is not an exception. Religions wanting international legal influence went global, creating global interreligious initiatives -

⁶⁴ Perry Dane, *Commentary: Pluralities of Justice, Modalities of Peace: The Role of Law(s) in a Palestinian-Israeli Accommodation*, 32 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 2, 273 (2000).

⁶⁵ James A. R. Nafziger, *The Functions of Religion in the International Legal System*, in RELIGION AND INTERNATIONAL LAW 155-176 (1958); for Jewish law's relevance for American law, See Levine, *Supra* n. 50.

⁶⁶ Walzer, *supra* note 45, at 183-199; Gerald Blidstein, *On Universal Governance in Mamonides's View of Redemption Studies in HALAKHIC AND AGGADIC THOUGHT* 115 (Be'er Sheva: Goldstein-Goren international center for Jewish Thought, 2004) [Hebrew]; *Chosen for Governance? The Political Aspect of the Chosen Israel in Rabbinic Literature* in *Idem* 61 [Hebrew].

⁶⁷ See generally MORDECHAI KAPLAN, JUDAISM AS A CIVILIZATION: TOWARD A RECONSTRUCTION OF AMERICAN-JEWISH LIFE (Philadelphia: Jewish Publication Society of America, 1994). Kaplan also promotes global governance and limited sovereignty, based on Jewish sources and experience. Compare Slezkine, *supra* note 38.

⁶⁸ See ROGER KAMENETZ, THE JEW IN THE LOTUS: A POET'S REDISCOVERY OF JEWISH IDENTITY IN BUDDHIST INDIA (London: HarperOne, 1997) (“the Dalai Lama’s perception of Jews as “survival experts”). GIL Z. HOCHBERG, IN “EDWARD SAID: “THE LAST JEWISH-INTELLECTUAL”, ON IDENTITY, ALTERITY AND THE POLITICS OF MEMORY, SOCIAL TEXT 24, 47-64 (2006) (Here, the author has argued, more hesitantly, regarding the utilization of Palestinian leaders of these insights for *their* plight.)

representing their common interests, ideas, and resources – instead of promoting culture-specific insights.⁶⁹ Religious arguments in international law, and for it, aren't based on particularistic experience or traditions.⁷⁰

C. Three Comparative Threats to The Status of Jewish Law

Using comparative law in a challenging way, and exploring alternative religious forms of communal living, can enrich contemporary political and legal debates. Still, the restriction to one tradition, such as the Judeo-Christian sources, can't be justified anymore. Second, using Jewish sources in a comparative matrix inherently treats the (Jewish) religious contribution as non-unique. Third, engagement of religious sources by modern political discourse, and out-of-faith co-operations with "others," potentially influences the way the religious sources are read and subsequently may impact the internal political discourse in the religious community.⁷¹

D. Coercion and the Additional Role of Comparative Law

In the late 2010s, there is a revival of religiously based political argumentation, but in a different form. Debaters omit the need to

⁶⁹ These initiatives are organized as NGO's. the Parliament of world Religions has a category I observer status at the UN (<http://www.cpwr.org/index.html>). See DAVID CHIDESTER, *CHRISTIANITY: A GLOBAL HISTORY*, (London: HarperOne, 2000); *But see*, Eleanor Nesbitt, *Diversity as ethos in Society: Negotiating Power Relations*, in D. CHIDESTER, J. STONIER AND J. TOBLER (EDS.), *DIVERSITY AS ETHOS: CHALLENGES FOR INTERRELIGIOUS AND INTERCULTURAL EDUCATION* 116-132 (Cape town: Institute for Comparative Religion in Southern Africa, 1999. (all these efforts were initiated and hosted by western traditions/cultures, therefore the diversity is restricted). See Matthew A. Ritter, *Universal Rights Talk/Plurality of Voices: A Philosophical-Theological Hearing*, in *RELIGION AND INTERNATIONAL LAW*, 417-482 (1958).

⁷⁰ W. W. Park, *Spiritual Energy And Secular Power*, in *RELIGION AND INTERNATIONAL LAW*, 259-308 (1958) (Religion has power, not only energy); David Kennedy, *Losing Faith in the Secular: Law, Religion, and the Culture of International Governance*, in *RELIGION AND INTERNATIONAL LAW*, 309-319 (1958); Thomas, *Resurgence of Religion*"; M. H. A. Reisman, *"Islamic Fundamentalism and its Impact on International Law and Politics*, in *RELIGION AND INTERNATIONAL LAW*, 357-383 (1958).

⁷¹ *Compare*, SUMMER B. TWISS, *RELIGION AND HUMAN RIGHTS: A COMPARATIVE PERSPECTIVE*, in *EXPLORATIONS IN GLOBAL ETHICS: COMPARATIVE RELIGIOUS ETHICS AND INTERRELIGIOUS DIALOGUE* 163 (Twiss and Bruce Grelle, eds. 2000). (Interreligious Consensus can be back-translated into the religious traditions in their own language, e.g. without resorting to "rights-talk.")

justify the turn to religious influences, relying instead on political (populist) power, enabling them to do so. Claims for enforcing religious beliefs on others and in the public sphere are again based on portrayed truth, tradition, and experience. Still, each comes with nationalist, separatist, utopic, or fundamentalist twists. Other views are discredited (fake news) or ignored to recreate a context in which truth claims can be made and be accepted by broad audiences. These expressions of religious (and other traditional) are inherently intolerant of other positions, whether in or outside the same religion or tradition.

The second base for religiously based arguments, analytically incompatible with the former, is the demand of inherent self-evident respect for the expression of the (religious) identity of clergy, individuals (cake bakers), and (marriage) officials. Here too, the simplistic, power-based truth and a tradition-based argument are conflictual and coercive. At the same time, a comparative historical view would enable a broader choice of acceptable options and promote discursive mechanisms to resolve a real and sincere conflict.

In Etzioni's terms, all major traditions have a discursive and coercive version and sects.⁷² Thus, the rise of this form of religious-political coercion reinforces the importance of the comparative law paradigm between Jewish and domestic law. Facing this version of the truth and tradition paradigm by political coercion in both Israel and the USA, promoting religious law as comparative law is essential. In a challenging and enriching comparative paradigm, tradition-based claims evolve to account for culture and identity in a multi-cultural matrix; Authoritarian self-evident experience is complemented by facts- and logic-based argument for unique merits and relevance; and a humanistic, scientific, inclusive and reflective discourse challenges the quest for simple truth and its abuse.

The comparative version of religious wisdom is no less religious than its coercive alter ego. Its recognition of other options and traditions, its readiness for accountability in objective terms, doesn't weaken its potential contribution. Arguably, Jewish discourse has more to contribute as a multi-voice, pluralist discourse than has a single, "true" Jewish voice, message, or opinion.⁷³ Taking away the

⁷² Amitai Ezioni, *The Global Importance of Illiberal Moderates*, 19 CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS 3, 369-386 (2006).

⁷³ Even according to those that are convinced it exists and has eternal and contemporary religious and general value. See DAVID HARTMAN, HEART OF MANY ROOMS: CELEBRATING THE MANY VOICES WITHIN JUDAISM (Woodstock, Vermont: Jewish light publishing, 2001);

coercive political powers behind the renewed truth-based expressions would leave these claims much weaker and marginal in the political discourse than can now be imagined.⁷⁴

V. A PROPOSED ROLE FOR RELIGIOUS TRADITIONS IN COMPARATIVE LAW

In order to enhance the comparative method, I offer a special role for religious law in an overall comparative matrix, beyond merely adding another law to the matrix, and beyond some unique content of any specific system.

Religions are epistemic communities and interest groups of a considerable size, which create positions and interact as small highly-ideological organizations.⁷⁵ They are unique Non-State Actors in state and international law,⁷⁶ preserving conceptual independence from the prevailing legal systems.⁷⁷ They predate the states; their essential aspects are not constituted by the state and do not rely upon it. Most religions operate both at an intermediate level between individuals and the state,⁷⁸ and across political borders, enabling reflections on state laws and narratives. Many religions see themselves as total alternative systems for regulating human conduct.⁷⁹ Religion's perceptions of the world, essentially alternative comprehensive Weltanschauungs, are embedded and expressed in language, concepts, institutions, and their

compare NOAM ZOHAR, *ALTERNATIVES IN JEWISH BIOETHICS* (New York: State University of New York press, 1998); See as well, the way Levine, *Supra* n. 50, uses the rich multiplicity of Jewish legal voices.

⁷⁴ Madhavi Sunder, *Cultural Dissent*, 54 STANFORD L. REV. 495 (2001); Idem, *Piercing the Veil*, 112 YALE LAW JOURNAL 2, 1399-1472 (2003).

⁷⁵ See E. Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICHIGAN L. REV. 167 (1999).

⁷⁶ BAS ARTS ET. AL., *NON-STATE ACTORS IN INTERNATIONAL RELATIONS* (Philip Alston ed. 2001). See generally PHILIP ALSTON, *NON-STATE ACTORS AND HUMAN RIGHTS* (Alston, ed., Oxford, 2005). Some religions do not meet one or two criteria of the following NSA definition "... non-violent organized group of people, [...] which is [...] not seeking government office", but nevertheless qualify substantially as NSAs.

⁷⁷ Religions were not "established in accordance with legal rules into a legal or juristic person" like corporations, and don't exist 'indefinitely apart, and legally distinct, from the natural persons that make it up'. They certainly don't only possess "those properties which the charter of its creation confers upon it". BLACK'S LAW DICTIONARY (7th ed., 1999).

⁷⁸ G. Frug, *City as a Legal Concept*, 93 HARVARD L. REV. 2, 1057 (1980), (religion as an intermediate level player, presenting a challenge to direct liberal citizenship. Recognition of religious law inherently invokes legal pluralism and comparative law).

⁷⁹ David A. Westbrook, *Islamic International Law and Public International Law: Separate expressions of World Order*, 33 VIRGINIA JOURNAL OF INT'L LAW 1, 819 (1993).

external relations. Religious systems are varied, multi-faceted and dynamic, evolving, developing, and adapting constantly.

Religions and religious laws continuously interact with non-religious legal, cultural, and political systems. Religious individuals, groups, and institutions use existing legal constructs to achieve their goals. These interactions posit religious texts to have invaluable insights into domestic law and lore. The contributions of the legal and non-legal materials might not be congruent or synchronized. Therefore, I will differentiate between the potential of religious materials and that of religious laws.

A. Transnational Dispersion of Religious Law

Many religious communities – e.g., Catholics, Protestants, Muslims, Jews, Hindus, and others - thrive globally. Their spread transgresses national, cultural, and legal borders, creating sub-cultural communities in multiple localities. Whenever religion and secular reign didn't totally overlap throughout history,⁸⁰ the normative and cultural congruence (or lack of it) is a major source of unique information.⁸¹

As well, internal variety is very common in religions - e.g., the Ashkenazi and Sephardi traditions in Jewish law;⁸² the east-west schism in the church;⁸³ the catholic-protestant schism, Sunna-Shi'a-(Sufi) in Islam. Variety also abounds inside each of these traditions and denominations. These inter-religious and intra-religious groupings can serve to see how local law was interpreted and executed by various subgroups of the same culture/religion in the same country. The reasons for variation and coordination can be internal⁸⁴ or

⁸⁰ For comparative history (beyond law), see Bernhard Struck, Kate Ferris & Jacques Revel, *Space and Scale in Transnational History*, 33 THE INTERNATIONAL HISTORY REVIEW 4, 573 (2011).

⁸¹ Including religious law in the comparative matrix might draw attention to the question who or what thinks or produces law within each legal system. Pierre Schlag, *The Problem of the Subject*, 69 TEXAS L. REV. 3, 1627 (1991).

⁸² These originate from disparities between Jewish law in Israel and Babel in the 3rd to 9th century, enhanced in the middle ages due to the separation of communities under Islamic versus Christian regimes and jurisprudence.

⁸³ E.g. why was it the Bulgarian church which, as an institution, decided to save Bulgarian Jews in WW II? (See ALBENA TAVENA, *THE POWER OF CIVIL SOCIETY IN A TIME OF GENOCIDE: PROCEEDINGS OF THE HOLY SYNOD OF THE BULGARIAN ORTHODOX CHURCH ON THE RESCUE OF THE JEWS IN BULGARIA 1940-1945* (Ivanka Gezenko ed. 2005)).

⁸⁴ E.g., The hierarchical Catholic Church supports the subsidiarity principle, and Jewish law support the authority of local Rabbis and recognizes the power of local customs.

external, legal, cultural, or political, as the religious communities are constantly influenced by unifying and diversifying or fragmentizing processes and powers.

Of special interest are religious reactions to (and interactions with) economic, social, technological, and legal conditions and religious system's interactions with different surrounding legal traditions (which might enhance global religious unity or lead to varying local adaptations).⁸⁵

1. Structural analysis of possible contributions

i. Congruence with local norms:

In certain times, issues or localities, we'll find that religious laws or norms vary in congruence with local non-religious law (e.g., a Jewish custom in Germany is different than in Poland, each compatible to the local law), despite the shared religious legal basis which should theoretically prevent variation. The variation might then be attributed to the local norms or to local conditions that influence both local and religious laws. Analysis should reveal the process that created the religious variance and local congruence, placing it in a dynamic historical context.

ii. Incongruence with religious uniformity

In other cases, religious norms (e.g., Islamic or Jewish) are globally uniform and do not vary with local diversifications, seemingly immune to local historical legal processes. This immunity might pose a challenge to some explanations offered for the variation between non-religious legal systems or for legal changes in systems. Analyzing multiple religions (if available) can reveal if it is general religious attribute or attributes of a specific religion which create immunity to the causes of change in the non-religious legal systems.

⁸⁵ Jewish legal controversies about property, torts or contracts can be purely conceptual formalist and normative but have - arguably often - some historical and geographical basis.

iii. Incongruent diversities

There might also be diversity in both state and religious laws but without any apparent geographical or historical congruence. In some cases, the lack of congruence can be explained by lack of synchronization - religious systems have a different tempo of change and adjustment vis-à-vis domestic legal systems. In other cases, migration patterns (of religious members) and border changes should be checked. These considerations also require not to accept congruence (as used in the previous paragraphs) at face value. A congruence might, in fact, attest to a sequential influence or complex interactions if the tempo and migrations are taken into consideration.

More variations are possible. The global similarity in all domestic legal systems, while some or all religious legal systems include variations and sensitivity to local and temporal conditions.⁸⁶ Global uniformity of non-religious systems and a different uniformity of religious systems, in one or more ways.) A unique phenomenon in one system (religious or other), in a certain time or locality.

In all these cases, using religious law, norms, and texts can challenge or confirm theories in ways that comparing to more national or local legal systems can't.⁸⁷ Adding religious laws to comparative matrixes can enable both more robust and more nuanced conclusions regarding the comparative history of legal concepts, norms, and narratives.

B. Intra-national Religious Diversity: Laws, Discourse, and Communities Reveal Legal Processes

Religious communities are organized in social, political, and normative institutions and organizations within each country. This feature enables to utilize an adaptation of religious culture and praxis to domestic legal processes to check the various ways norms, concepts,

⁸⁶ The similarity can be stable, or dynamic – similar changes happening in all non-religious systems at (approximately) the same time. The important part is the similarity between parallel religious legal systems, in opposition to the non-religious ones. Here again one should check alternative explanations, as well as the extent of general or specific difference.

⁸⁷ Dari-Mattiacci, Giuseppe and Guerriero, Carmine, *Law and Culture: A Theory of Comparative Variation in Bona Fide Purchase Rules*, 35 OXFORD JOURNAL OF LEGAL STUDIES 3, 543-574 (2015). Religion, but not religious law, is included as a variable in multiple regression, only to show that other cultural effects have stronger influence on the phenomena, in a law, economics and history paradigm.

and values are accepted, rejected, or adapted. Religious texts can reveal the extent of acceptance of norms, concepts, and values in a given society, and compare parallel legal developments in multiple countries.⁸⁸

The variance between religious communities is an additional bonus. Religious communities differ in their beliefs, norms, organizational structure, size, permeability, form, and extent of institutionalization, attitude towards the state and its laws, and more. Thus, varied religious communities form a fruitful sample for research in a given society and across societies.

1. Religious texts as a peripheral view on law(s)

Religious texts can serve to counter a common tendency to focus on central, hegemonic voices. The complexity of conducting comparative law may lead to a tendency to simplify and to see hegemonic domestic law as representing the whole local legal field of that land or state, missing peripheries, and variations. Religious texts can help to de-bias the analysis. A peripheral view may also reveal that a central norm didn't reach the periphery.

2. Process assessment through religious laws, discourse, and communities.

Religious texts may help to understand legal developments in states, to analyze levels and forms of compliance, and reveal the way law and laws are understood throughout the population.

3. Importance and compliance

Jewish Rabbis regularly assess the relative importance of laws or legal norms to the king or local legal authorities. This is part of their internal consideration if to accept, concede, or cooperate with the non-Jewish norms and authorities – especially if the law contradicts Jewish law. A mere law in the book or law considered less important, invokes less Jewish compliance, whereas important law

⁸⁸ Seemingly similar communities may exist in multiple states which undergo similar legal processes, but have different constitutional, organizational, political (eg, church-state relations) or economic conditions. An analysis of the acceptance (rejection) process can shed light on each state's laws and legal system.

s with high compliance levels were treated accordingly.⁸⁹ Thus, religious texts may reveal aspects of the perception of laws. The representation in religious texts might, however, not represent reality due to various reasons.

4. *Compliance and formal acceptance*

A community might formally accept a norm but ignore it in practice or vice versa – practically adhere without any formal acceptance. Both options are important to our understanding of the acceptance of the law and its long-term impact.⁹⁰

5. *Revealing (grass-root) processes which precede expression in (state) law*

Intra-religious discourses and controversies can reveal processes that precede broader domestic, non-religious, legal moves – whether in jurisprudence or legislation.⁹¹ In some cases, a religious community, which has independent, strong cross-border relations, is a carrier of legal importation/transfer/transplant. In other cases, small, ideological, and committed communities react to bottom-up processes (e.g., technological or cultural changes) before they are evident or strong enough on the national level. Neglecting the signs of the initiation of processes in religious texts might lead to missing them or misrepresenting them.⁹² Processes could start in religious communities due to accidental proximity to a change, a sensitivity or an attenuation to a phenomenon, or an inherent feature of the (specific) religious culture. *E.g.*, Jewish law's tendency to discuss theoretical cases, and not only real cases that appear before rabbis (in legislation

⁸⁹ See SHMUEL SHILO, DINA DEMALCHUTA DINA (1971); Idem, “*Keshedina Demalchuta eino Din*”, 10 JEWISH POLITICAL STUDIES 69-80 (1998) for numerous examples. On due process and fairness see e.g., MICHAEL BROYDE, INFORMING ON OTHERS FOR VIOLATING AMERICAN LAW: A JEWISH LAW VIEW JLaw, www.jlaw.com/Articles/mesiralaw2.html; For moral sensitivity, see e.g., DANIEL B. SINCLAIR, JEWISH BIOMEDICAL LAW: LEGAL AND EXTRA-LEGAL DIMENSIONS (Oxford Univ. Press 2005).

⁹⁰ Amos Israel-Vleeschhouwer, *Jewish Law As Law Of Jews: The Test-Cases Of Genocide And Rape* 26 JEWISH LAW ASSOCIATION STUDIES 70-108 (2016).

⁹¹ HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (Harvard University Press, 1987).

⁹² Compare Benvenisti, *supra* note 75. (religion was omitted in that article); Shana Strauch-Schick, *Reading Aristotle in Mahoza?: Actions and Intentions in Rava's Jurisprudence*, 25 JEWISH LAW ASSOCIATION STUDIES 262-291 (2014) (the equivalent of Aristotelian thought about torts and intent arrived in (Jewish) Sasanian environment in Rava's time (ca 280-350)).

and jurisprudence), sometimes enables a preview on subsequent legal debates.⁹³

6. *Interpretations of national laws in religious communities*

Another use of religious texts is to help understand the way in which state law and legal changes are/were perceived. A single legal change may be explained differently in different states or by various parts of one state's constituency although members of religious communities receive information directly from state sources (publications, media) they are also informed through religious conceptual reformulation,⁹⁴ which is essential for religious integration and compliance.⁹⁵ Most significantly, due to their connections with religious leaders in other countries, they are comparative jurists by necessity. Arguably, as other options are more available to them, accentuating the normative *choices* taken by domestic jurists and legislators.

A community might accept a norm, but base it on alternative reasoning, or accept a cultural value or concept but not the state's operationalization into a legal norm. Jewish reaction to women's human, political, and social rights reveals a complex process. It differs from the state's laws or the processes in the host societies. Jewish law endorsed active voting rights (the right to vote) and largely accepted the daughter's right to inheritance and women's participation in the work market. However, none of these legal moves included an ideological acceptance of gender equality or the concept of "right." On the other hand, some religious discourses embrace the concept of equality, but interpret it in ways which endorse the continuation of intra-communal discrimination of women. Other religious communities accept gender equality in principle but don't implement equality in ritual law or religious leadership as necessary consequence equality.

State reactions to these Religious legal and communal translation, adaptation and rejection of state laws, reflect on the state's

⁹³ E.g., in bioethics, the debates about cloning, in-vitro fertilization, stem-cell research etc. See NOAM ZOHAR, ALTERNATIVES IN JEWISH BIOETHICS (1988).

⁹⁴ Benvenisti, *supra* note 75.

⁹⁵ YOSEF (YOSKE) AHITUV, MASHAVEI RU'ACH: DIVREI HAGUT U'MACHSHAVA 93-102 (Yakir Englander and Avi Sagi, Eds., 2013)

values and laws. In Israel, the state tolerates the religious prohibition of passive voting rights and ultra-orthodox male-only parties run despite the discrimination. The so-called tolerance of states towards discriminating religious practices and norms⁹⁶ creates a negative incentive for innovation and change in the religious legal system. This state behavior may reflect discriminatory tendencies in state practice and civil society way beyond tolerance for religious groups.

In some cases, a legal change is transferred from state law to the community with its rational. In some cases, religious authorities maintain that religious sources already contain this (actually adopted) rational/norm, and the non-religious legislation is portrayed as a religious victory. In other cases, religious communities might adopt (part of) the norm or (part of) the rational to various degrees. The various ways of partial acceptance and adaptations of the law, or arguments which relate to it, can serve to understand better how the legal process was understood by the population, and reflect on the legal rule and process itself.

Rabbi Chalfon Moshe Hacohen was the chief Rabbi of the Island of Gerba in Tunisia in the first half of the last century. Although deeply traditional and opposing any modern reform in his community, he was heavily impressed by the French revolution, its ideology, and its normative consequences.⁹⁷ By comparing Hacohens' perception of French colonial law to rabbis in other French colonies, we can better understand French colonial legal history, its influence, the extent of its popular acceptance, its perception, and its interpretation.

Moreover, in his elaborate proposals for a Jewish state, HaCohen discusses health law, public law, and constitutional issues that reflect knowledge of modern law, institutions, and systems. It is evident that some legal norms and institutions he knows from first hand, probably because he interacted with them or was submitted to them. Regarding other issues, he knows the laws only in general terms, knowing their results in action – but not the exact wording of codes, regulations, nor the argumentation of rulings that bring out these results. In these cases, he may be informed by the media, reading about French culture, values, and laws in Arabic and Hebrew newspapers. In

⁹⁶ Reflected in state reservations to the CEDAW convention, and reservations to the gender equality clauses in the 1966 human rights conventions.

⁹⁷ Israel-Vleeschhouwer and Bezalel-Horev, *supra* note 58; see also Moria Paz, *A Non-Territorial Ethnic Network and the Making of Human Rights Law: The Case of the Alliance Israélite Universelle*, 4 INTERDISCIPLINARY JOURNAL OF HUMAN RIGHTS LAW 1 (2010).

some rare cases, he employs a kind of back-engineering to speculate about the legal institutions or concepts that bring forth the results he appreciates.

C. Unique Potentials of Religious (Legal) Histories and Comparative Religious Texts

Historical accounts of religious cultures offer competing histories of the world, of the laws of host states, and the concept of law. Religious (legal) texts contain the system's history, often in various versions within each religion. Some religions regard their history, especially their legal history, as significant in religious or legal terms (or both). Major controversies and significant schisms in Islam, Judaism, and Christianity are grounded on controversies regarding what happened and how it is perceived.

1. Comparative religious legal history

Comparing religious and non-religious histories can, of course, be very instructive, but also somewhat simplistic. Hegemonic religious, historical accounts tend to downplay intra-religious diversity, offering one historical account, downplaying the effects of surrounding contexts, and ignore inter-religious comparisons. For comparative efforts, the *multiplicity* of historical accounts is critical for rich and “thick” analyses.

2. Comparing legal development in different religions

The laws of usury developed differently in religious cultures. Judaism sought to circumvent the prohibition, while Islam largely embraced it legally.⁹⁸ The inter-religious systemic differences reflect perceptions of the (legal) conditions, interests, and preferences.

⁹⁸ 2 DAVID MISHAN, *JEWISH LEGAL ASPECTS OF THE HETER ISKA ENACTMENT*, KETER – RESEARCH INTO ECONOMY AND JEWISH LAW 405 (Hebrew, 1999); Aviad HaCohen, *Banking without interest or Heter Iska in a Jewish and Democratic State*, 4 SHAAREY MISHPAT LAW JOURNAL 77 (Hebrew, 1999) (the latter includes a Jewish-Islamic comparative legal analysis).

3. *Comparing developments in one religion in multiple conditions and localities*

Religious diversity sheds light on technological, political, and economic conditions that may have influenced local law. Debating extradition of criminal members of the community of faith (or clergy) to non-religious domestic criminal courts, Jewish legal discourse contains a history of the conditions that led to the prohibition to extradite and the changes which (arguably) justify it today.⁹⁹

4. *Histories of law, comparative accounts, and reflectivity in religious texts*

Texts of religious communities contain historical accounts of their surroundings, including historical and legal accounts of the history of domestic laws – its institutions, processes, codification, and jurisprudence. They might give information about the political, social, and institutional backgrounds of legal changes and codifications, the prevalent conditions and contexts, and document alternative legal options that were rejected. Jewish sources analyze legal changes like the enactment of, e.g., labor laws¹⁰⁰ and children's rights¹⁰¹, the establishment and abolition of institutions like courts or ombudsman, and the emergence of legal concepts.

Explicit religious legal analyses of national legal systems are invaluable. A good non-Jewish example is the 2009 change of legal policy of the Vatican, from automatic acceptance of Italian law to establishing a consideration process,¹⁰² a decision that reflects on the Vatican's preferences and on its view of Italian legislation.

⁹⁹ Broyde, *supra* note 89.

¹⁰⁰ See BENJAMIN BROWN, ORGANIZED WORKERS, THE RIGHT TO STRIKE AND THE RENEWAL OF LABOR LAWS, JEWISH LAW: EXPLICIT AND IMPLICIT IDEOLOGICAL CONTEXTS (Hebrew, Avinoam Rosnak & Dafna Shreiber, eds., 2012)

¹⁰¹ See Benyamin Shmueli, *Corporal Punishment of Children According to Jewish Law*, 10 *Plilim* 365 (Hebrew, 2002)

¹⁰² David Willey, *Vatican Divorces from Italian Law*, BBC NEWS (Jan. 2, 2009) <http://news.bbc.co.uk/2/hi/europe/7807501.stm>.

5. *Communal or religious legal views of a specific norm*

Religious texts commonly contain histories of a specific norm – its origins, enactment, application, and interpretation (and eventual decline or change). Local religious texts preserve information of “insiders” - intimate knowledge attained by proximity and experience, which may differ from the formal or official version. Religious traditions also provide the perspective of “outsiders.”¹⁰³ Religious texts might suffer from the disadvantages of both perspectives, but also their utility.

Religious texts also react to state-norms and interact with them (in action and in the books). State norms influence the interactions between community members and interactions between members and non-members. The accumulated experience of interacting with the norm reveals aspects that are not otherwise available. Jewish and non-Jewish legal records reflect interactions with domestic authorities regarding the norm’s application and interpretation.¹⁰⁴

6. *Broad historical theories and the histories of ideas*

Religious texts contain multiple theories and readings about “history,” about the history of the world,¹⁰⁵ human life, and welfare, about ideas (e.g., “law,” “justice,” “just law”), institutions, concepts, and systems. Some of the ideas contained in the religious texts are unique to all religious views (e.g., that history has a direction or logic); some are specific to a religious culture (e.g., history leads to catastrophe or redemption) but others may reflect the zeitgeist.

¹⁰³ See e.g., Benjamin C Wolf, *Note: Resolving the Conflict Between Jewish and Secular Estate Law*, 37 HOFSTRA L. REV. 4, 1171(2009).

¹⁰⁴ e.g., JAY BERKOVITZ, *PROTOCOLS OF JUSTICE: THE PINKAS OF THE METZ RABBINIC COURT, 1771–1789* (Leiden, Brill, 2014); *IDEM*, *LAW’S DOMINION: JEWISH COMMUNITY, RELIGION, AND FAMILY IN EARLY MODERN METZ* (Leiden, Brill, 2019); AMNON COHEN, *JEW IN THE ISLAMIC COURT: SOCIETY, ECONOMY AND COMMUNITY IN OTTOMAN JERUSALEM* (Jerusalem, Sanjek Press, 2003).

¹⁰⁵ Reading these histories might enrich our trans-cultural historic outlook.

VI. CONCLUDING THOUGHTS

Posing comparative and contextual methods in opposition to monistic, isolationist, anti-relativist claims for divine eternal truth is in no way to be perceived as an external attack on the purity of religion. Jewish religious texts contain comparisons to “others,” be it as a self-affirmative comparison,¹⁰⁶ a challenging comparison,¹⁰⁷ or as part of defining Jewish national identity.¹⁰⁸

Moreover, some argue that in the complex matrix suggested above, any religion totally loses its unique contribution to human culture, in addition to losing its voice as the carrier of its divine message. I would argue that Diachronic and synchronic intra-religious and inter-religious comparative analyses can “tag” insights and contributions as unique to the religious perspective or experience and even to a single religion. Complex systems can drown voices in a cacophony of noise but can embolden some voices to carry their unique message to the whole human society.¹⁰⁹

¹⁰⁶ Deuteronomy (4, 5-8):

I have taught you decrees and laws [...] Observe them carefully, for this will show your wisdom and understanding to the nations, who will hear about all these decrees and say, “Surely this great nation is a wise and understanding people.” [...] And what other nation is so great as to have such righteous decrees and laws as this body of laws I am setting before you today?

Id.; Maimonides: *Laws of Idolatry* 1, 1-3 (explains laws of idolatry by a historical account).

¹⁰⁷ Rabbi Nissim Girundi (Spain, 1315-1376) writes in one of his homilies (*Drashot haRan* 11):

all peoples need governance, [...] and Israel needs it just as any other nation. [...] It might be that these two legal systems (Jewish law and king’s law, A.I.) will lead to different results, [...]. God separated these two systems, and because the role of the religious judges is religious, god commanded to appoint a king. In religious law [...] “due process” is so stringent that many criminals will not be punished, and social order will totally collapse [...]. And the king can maintain order as he sees fit. From this exposition it follows that Jewish and other kings are appointed for the same reason [...]. Therefore if you see a religious law that is not practical, know it might be more oriented towards a religious goal than towards social correction, which is the king’s role [...]. And therefore it might be found that some laws and jurisprudence of the nations will be closer to social justice and order, than what appears in the laws of the tora [...].

Id.

¹⁰⁸ DANIEL BOYARIN, *BORDERLINES: THE PARTITION OF JUDAEAN-CHRISTIANITY* (Philadelphia: University of Philadelphia Press, 2004); DANIEL BOYARIN, *THE JEWISH GOSPELS: THE STORY OF THE JEWISH CHRIST*, (The New Press, 2012).

¹⁰⁹ EMANUEL LEVINAS, *IN THE TIME OF NATIONS* 3 (1994).

The proposed enhancement of Comparative law is presented as a supplement to the struggle of the comparative method with power-based monistic, isolationist views.

Instead of enforcing a certain sacred past or imagined future destiny, it reveals the multiplicity and evolving beauty of the world and humanity. It challenges the admitted power of the religious experience of obedience of revealed divine truth, with the revelation of the amazing complex cognitive, social and religious processes in which humanity explores the betterment of the world.¹¹⁰ In this exciting human effort, the comparison reveals the important role of humble, pious religious attempts to balance innovation and reservation, adaptation and conservation, and combining them in distilling the religious way for each place, time, and person.

The wonder of revealed divine truth is met by the no less wondrous divinely created human diversity and the splendor of the richness of religious traditions and experiences.¹¹¹

Comparative law is not about comparative truths, but about the truths of the comparative paradigm. It is not about relativistic normativity but about norms to which people can relate.

¹¹⁰ This extension is offered, with appreciation, as a tribute to Prof. Levine's work.

¹¹¹ This presentation of the project combines the two views of Jewish law - as law (Levine) and as Halakha (Saiman) – as offered by Michael Helfand, *From Doctrine to Devotion: The Jewish Comparative Law Project*, 67 AM. J. COMP. L. 685 (2019).

APPENDIX

Figure 1. Structural potential of religious dispersion:

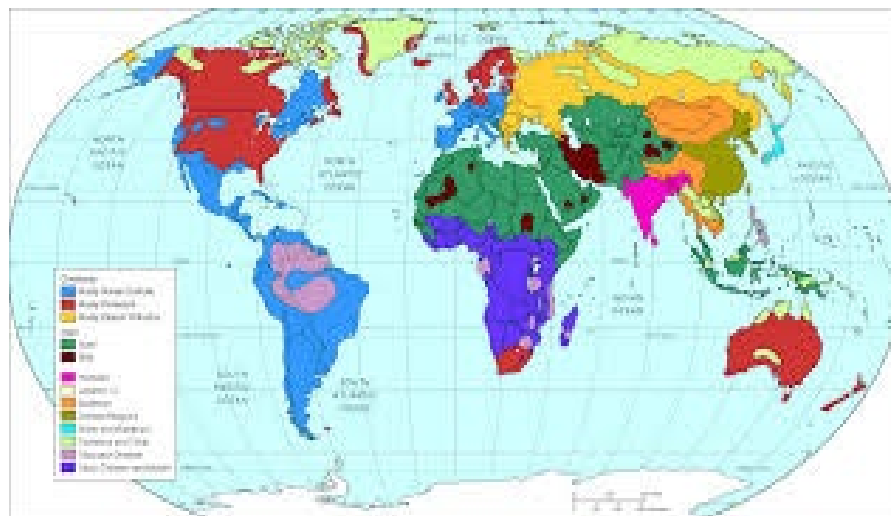


Figure 2. Example of intra-national religious dispersion (US):

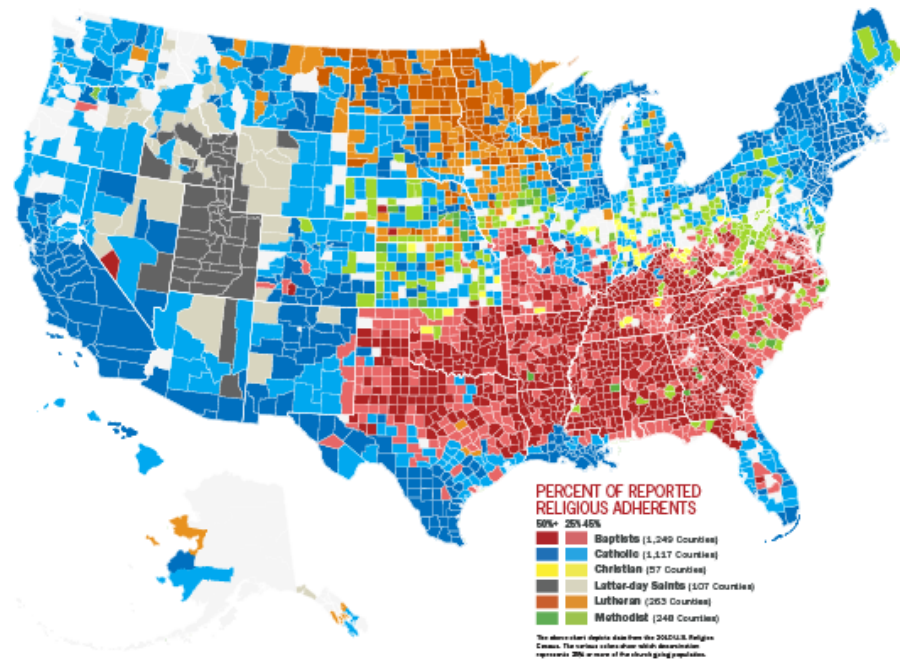


Figure 3. Example of intra-national and cross-national dispersion:

