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Collective Rights vs. Political Autonomy: Comments on *Sovereignty and Religious Freedom*

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Sovereignty and Religious Freedom—Simon Rabinovitch's ambitious, elegant, and important book—challenges foundational assumptions of modern Jewish historiography. Received accounts date Jewish modernity to the rise of the modern state and the concomitant dissolution of corporate Jewish autonomy. In these accounts, the modern state—which ostensibly demands exclusive sovereignty—is credited or (more often) blamed for decimating traditional foundations of diasporic Jewish community.[1] Unlike the corporate polities of the Middle Ages, the modern state dispenses with intermediary bodies, treating citizens as undifferentiated individuals with equal standing before the law. Under this new dispensation, the Jewish community loses both its formal legal status and its ability to coerce via informal channels. The formally egalitarian idiom of individual rights supplants a patchwork regime of disabilities and privileges, with the result that Judaism is transformed into a private religious confession. For historians who subscribe to this narrative, notable instances of modern group rights—e.g., the minority rights treaties after World War I—are geographically delimited deviations from an otherwise unidirectional retreat from corporate jurisdiction. In short, generations of historians have taught us that modern Judaism's defining trait is its private, voluntary character. Indeed, understood legally, there is no such thing as a "Jewish community." What looks to the casual observer like a collective body is actually an aggregate of individuals exercising the right to voluntary association.

In a bold move, Rabinovitch resists the stark binary at the heart of this periodization. Taking a seemingly innocent observation—namely, that many states afford legal standing to Jewish communities—as a point of departure, Rabinovitch makes the provocative claim that corporate autonomy never died. As the Jewish case demonstrates, group rights persist in different locales and in different kinds of

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[1] For canonical histories of Jewish emancipation, see Salo W. Baron, *Ghetto and Emancipation*, in The Menorah Treasury (Leo W. Schwarz ed., 1966); Jacob Katz, Out of the Ghetto (1973). For a more critical account, see David Sorkin, Jewish Emancipation (2019).

states. "The point is that Jewish collective rights—and indeed all collective rights—continue in modern liberal democratic states to the present day and often take surprising forms."[2] Amplifying the claims of theorists such as Will Kymlicka, Rabinovitch demonstrates that liberalism is not inimical to certain kinds of group rights.[3] Indeed, Rabinovitch goes so far as to ascribe full-fledged "sovereignty" to the communities bearing said rights. To substantiate this claim, Rabinovitch marshals evidence from legal history, surveying cases in which secular courts were forced to adjudicate questions surrounding family law, who is a Jew, and eruvin. This gripping narrative takes the reader on a whirlwind tour that extends beyond the usual suspects (Israel and the United States) to encompass Jewish legal controversies in countries including Finland, Russia, Algeria, and South Africa. The global sweep is meant to highlight the pervasive tension between the individual and the collective, which cuts across regions and regime types. In this vein, Rabinovitch challenges the post-World War II bifurcation "of Jewish collective rights through political sovereignty in a nation-state and individual rights in liberal democracies."[4] From a legal standpoint, Israel is not exceptional. Both in Israel and in the diaspora, Rabinovitch argues, individual conscience clashes with the prerogatives of the group, leading to thorny legal quandaries. Nor is "sovereignty" the exclusive province of Israeli Jews. The international legal cases surveyed offer "a vivid demonstration of the persistence of Jewish sovereignty outside the nation-state framework."[5] The richness of this comparative method allows Rabinovitch to illustrate the varied forms that group membership and jurisdiction take in modernity, beyond citizenship in a Jewish nation-state.

Sovereignty and Religious Freedom offers a powerful critique of Israeli exceptionalism. As Rabinovitch demonstrates, the nation-state is not the only framework that allows modern Jews to organize as a legal collective. Rabinovitch's meticulously researched global survey complicates the binaries that have flattened our understanding of modern Jewish politics. I find this challenge to the pretensions of the nation-state both convincing and salutary. Yet I still wonder whether the forms of legal recognition described merit the term "sovereignty," which traditionally designates a singular and ultimate power.[6] Except for Israel, the Jewish communities whose collective rights Rabinovitch enumerates lack anything resembling sovereign power. More importantly, I doubt that the persistence of group rights on paper invalidates the central contention of emancipation historiography—namely, that the rise of the modern state remade Judaism in ways that severely compromised the prospects for communal autonomy.

The topos from which Rabinovitch dissents finds canonical expression in classic works of emancipation historiography. Consider, for example, "Ghetto

[2] Simon Rabinovitch, Sovereignty and Religious Freedom: A Jewish History 6 (2024).
[3] See Will Kymlicka, Multicultural Citizenship (1995).
[4] Rabinovitch, *supra* note 2, at 228.
[5] *Id.* at 17.
[6] For a critical account, see Wendy Brown, Walled States, Waning Sovereignty (2010).

and Emancipation," the 1928 essay in which Salo Baron famously criticized the "lachrymose theory" of Jewish history.[7] Against the self-congratulatory tendencies of modern Jewish historiography, Baron took a more skeptical approach when assessing the supposed benefits of emancipation (or legal enfranchisement). According to Baron, accession to equal citizenship did not inaugurate an unprecedented, liberatory utopia for Jews. Indeed, Jews flourished in earlier periods, such as the Middle Ages, even though they lacked equal rights. Baron enumerates demographic and economic determinants of medieval Jewish flourishing. Yet his revisionist argument rests largely on a claim about the far-reaching—and not always positive—consequences of the rise of modern state forms. Flirting with a kind of political determinism, Baron ascribes agency to the state itself, whose inner logic demands a radical transformation of Jewish existence. "Emancipation was a necessity even more for the modern State than for Jewry," Baron contends, because the modern state cannot abide autonomous corporations.[8] According to Baron, the modern state, which enfranchised the Jews, reduced what was formerly an organic national membership to an attenuated private religion. Judged against this benchmark, emancipation constitutes a loss—the loss of national autonomy—rather than a liberation. From Baron's perspective, equal rights cannot compensate for the decimation of Jewish self-government, the loss of a "distinctive kind of territory and State."[9] In this sense, the purported conflict between the modern state and diasporic Jewish autonomy is key to Baron's deflationary account.

Clearly, as Rabinovitch demonstrates, received accounts of the state's unitary logic are overstated. Emancipation did not signal the death knell for Jewish legal personality. Jews retained certain kinds of collective rights even in characteristically modern, centralized states. Yet—having offered a crucial corrective to the prediction that collective rights were fated to disappear—Rabinovitch risks downplaying another key insight from emancipation historiography. The scholars who crafted the narratives that Rabinovitch criticizes can still teach us important lessons about the near existential significance of variations in state forms. Historians who date the advent of Jewish modernity to Emancipation recognized that formal legal standing, in and of itself, has limited explanatory power and must be supplemented with political analysis. On Baron's rendition of diasporic history, the hegemonic state form in a given period determines whether Jews define themselves as a nationality or a religious community.[10] In this sense, the *kind* of state in which Jews lived proves more consequential than whether they enjoyed formal equality with other residents. On a basic level, the refusal of lachrymosity reflects deep skepticism about the political significance and explanatory power of formal rights. If Jews were better off in the Middle Ages when they lacked equal rights and suffered from legal disabilities, then formal equality is not inherently

[7] Baron, *supra* note 1, at 63.
[8] *Id.* at 60.
[9] *Id.* at 55.
[10] Salo Baron, *Nationalism and Intolerance*, 16 The Menorah Journal 503-15 (1929).

emancipatory. Although it may sound paradoxical, accounts that treat enfranchisement as an epochal break ascribe greater significance to the state structures that make equal rights conceivable (or inconceivable) than to the rights themselves. Recalling these insights, I worry that the emphasis on legal (as opposed to political) history leads Rabinovitch to inflate the significance of the group rights that remain on the books in liberal states. By "inflation," I mean the ascription of "sovereignty" to groups which enjoy formal legal standing but whose autonomous jurisdiction and political power are negligible. The interactive map which appears in the book's conclusion richly documents the diverse legal regimes to which contemporary Jews are subject. But—absent political analysis—can a map of this kind tell us whether Jews in Iran or Finland enjoy meaningful forms of self-determination?

In short, I encourage Rabinovitch to braid his legal history more tightly with politics—which entanglement might force him to revise or qualify his claims about the extent of diasporic Jewish "sovereignty." There are two political considerations which, to my mind, merit more sustained attention. First, Rabinovitch crafts a rich and meticulous legal taxonomy, but he neglects to undertake a parallel typology of state forms. Are certain kinds of states (e.g. nation-state, multinational state, federation) more amenable to Jewish collective rights? Are collective rights more prevalent—or more generous—in liberal democracies? In non-democratic states? In flawed or partial democracies? Do these rights correlate to effective political power—and, if so, under which state structures? Second, in contrast to the thinkers and activists (e.g. Simon Dubnow) who populate Rabinovitch's first book—*Jewish Rights, National Rites*—the litigants whose stories he now relates do not endorse Jewish autonomy as a *political* demand.[11] Many of the communities surveyed have limited political power and evince no apparent desire to acquire more. Unlike national minorities (e.g. the Basque or the Quebecois), Rabinovitch's Jewish protagonists have not launched campaigns for political independence or secession. In Baron's day, autonomy was still legible as a Jewish political demand. Indeed, "Ghetto and Emancipation" concludes with a call to pursue autonomy within the legal architecture of the modern state system.[12] The communities that populate Rabinovitch's narrative make strategic rights claims to advance concrete policy goals. Yet the notion that French or American Jews would demand an autonomous province is almost inconceivable. Political demands of this kind have been rendered inconceivable, in part, because diaspora Jews have largely internalized the religious self-conception that modern states have imposed upon them. That autonomy has disappeared as a Jewish political demand, I would argue, confirms Baron's claim

[11] Simon Rabinovitch, Jewish Rights, National Rites: Nationalism and Autonomy in Late Imperial and Revolutionary Russia (2014).

[12] Baron, *supra* note 1, at 63. "Autonomy as well as equality must be given its place in the modern State, and much time must pass before these two principles will be fully harmonized and balanced. Perhaps the chief task of this and future generations is to attain that harmony and balance."

about the decisive transformation instigated by the modern state. Rabinovitch has made a critical contribution by demonstrating that group rights did not disappear. To assess the ramifications of modern group rights, however, we must undertake more sustained analysis of the modes of political organization that these rights do or do not facilitate.

Evidence from the cases discussed in *Sovereignty and Religious Freedom* vindicates Baron's point about the priority of state forms to formal legal standing. Read through the lens of political theory—as opposed to legal history—these cases raise questions about whether the formal ascription of rights to a Jewish collective translates into substantive political power or confers a status resembling "sovereignty." I will now examine several cases which Rabinovitch cites as evidence of the persistence of diasporic sovereignty in modern states. On my reading, integrating political considerations into the analysis yields ironic conclusions. In many of the states that grant Jews collective rights, Jews lack meaningful autonomy or political power. By contrast, in countries (such as the United States) where Jews have carved out autonomous zones approaching something akin to self-rule, the rights in question are not collective, in the strict sense.

At first glance, the South African case validates the argument about liberalism's capacity to incorporate group rights. In the Taylor case, civil courts effectively affirmed the communal prerogative to excommunicate a member who failed to comply with Beth Din rulings regarding divorce and child support. The litigation surrounding Adrian Taylor's divorce and subsequent excommunication turns on a conflict between Taylor's individual right to religious freedom and the right of the Jewish community—defined as a collective legal subject—to determine membership criteria. In South Africa, the Beth Din of Johannesburg enjoyed collective rights in the formal legal sense. As Rabinovitch explains, "South Africa's post-apartheid Constitution gives the right of self-determination to religious communities and protects their ecclesiastical bodies with the rights of a juristic person."[13] It would be premature, however, to conclude that the grant of collective rights confers a status akin to sovereignty. Do these rights allow South African Jews to constitute themselves as an independent polity distinct from or even in conflict with the South African government? On the one hand, the South African courts did affirm communal rights to police membership. As Rabinovitch writes, the Taylor case "established that communal autonomy, within limits, could take precedence over the individual rights established in the post-apartheid South African constitution."[14] Yet the autonomy conferred is within clearly defined limits—and the bounds to internal jurisdiction are set by the majority political culture. As Rabinovitch acknowledges, in South Africa, the so-called "sovereignty" of customary law is contingent upon the political aims it advances or subverts. In the Taylor litigation, the courts affirmed communal jurisdiction because the

[13] Rabinovitch, *supra* note 2, at 160.
[14] *Id.* at 163.

community functioned as an advocate for women's rights against a deadbeat dad. In other cases, however, South African courts have sided with individuals against groups when the latter wielded communal authority in a discriminatory fashion. Rabinovitch's survey of South African jurisprudence suggests that affirmations of communal autonomy are opportunistic at best, designed to advance liberal values. The South African example confirms Baron's insight that rights are less consequential than state forms, ideological commitments, and political culture. Although the Johannesburg Beth Din enjoys formal standing as a collective legal subject, its powers of self-determination are constrained by the dominant political culture. In other words, liberal values trump the Jewish community's ostensible sovereignty.

In Kiryas Joel, by contrast—arguably the example of maximal diasporic autonomy in modern Jewry—the rights in question are not actually collective. It is no surprise that Kiryas Joel features prominently in the book's opening chapter, "Jewish Sovereignty and Citizenship in the Modern World." For this Haredi municipality in upstate New York confounds received expectations about state modernization and the fate of traditional groups under liberalism. In Kiryas Joel, Satmar Hasidim used statutes surrounding property ownership and municipal incorporation to create a homogenous enclave in which local government and religious authority are deeply entwined in ways which have provoked internal and external opposition. Rabinovitch characterizes Kiryas Joel as "a vivid demonstration of the persistence of Jewish sovereignty outside the nation-state framework."[15] To my mind, however, the claim for sovereignty is overstated. Subject to state and federal law, Kiryas Joel is not a sovereign polity. Granted, the Satmar wield impressive political clout, which they have used to craft a more extensive and encompassing form of autonomy than the Johannesburg Beth Din. Yet the unprecedented scope of Haredi autonomy does not warrant the collapse of distinctions between a local municipality and a sovereign state.

My point is not to enforce a definitional orthodoxy or quibble over semantics. Rather, I aim to foreground the surprising ways in which legal rights intersect (or fail to intersect) with political agency. According to Rabinovitch, Kiryas Joel demonstrates "the persistence of collective rights" in contravention to prevailing accounts of Jewish modernization.[16] On closer inspection, however, Kiryas Joel actually confirms the priority of state forms and political culture to rights. As Rabinovitch concedes, "collective rights" is something of a misnomer—the Satmar do not constitute a recognized, collective legal subject in American law. "Do the Satmar Jews hold 'collective rights' in what is today Palm Tree? De jure, no, as theoretically New York state law does not view the town's residents as having any rights distinct from those in neighboring Monroe."[17] In other words, the Satmar achieved their purported sovereignty "without any explicit state

[15] *Id.* at 17.
[16] *Id.* at 18.
[17] *Id.* at 29.

recognition of collective legal rights."[18] To borrow a phrase that Rabinovitch uses elsewhere in the book, the Kiryas Joel case is best understood as illustrating how power can be accrued via an aggregate of individual rights—"the individual rights held by collections of individuals."[19] The Satmar case challenges the notion that autonomy is a function of collective rights. In the absence of legally recognized collective rights, we must look elsewhere to explain how the Satmar managed to secure wide latitude for self-rule. As David Myers and Nomi Stolzenberg have argued, the seeming anomaly of Kiryas Joel is consistent with other self-segregating religious communities, reflecting the idiosyncrasies of American liberalism, capitalism, and religious freedom jurisprudence.[20] If anything, Kiryas Joel illustrates the extreme deference that American capitalism accords to property ownership. In short, Kiryas Joel is hardly a textbook case of the tenacity of collective rights in modernity.

The tension between collective rights as a legal status and autonomy as a political demand is most palpable in the controversies surrounding the construction of an eruv in Quebec. In Chapter Four, Rabinovitch revisits legal conflicts that arose when neighbors objected to the Haredi community's construction of an eruv. Disgruntled neighbors sued on the grounds that the structure created a religious ghetto and violated norms of religious freedom (which require maintaining a secular public sphere). After the municipality removed the eruv, the case made its way to Quebec superior court, which affirmed the right of the Hasidic community to establish an eruv. Significantly, Julius Grey, the lawyer representing the Hasidim, chose not to couch his arguments in favor of the eruv in the idiom of collective rights. "Grey argued in court, however, that the Outremont eruv case was not about group rights or public space but was rather a matter of the government's constitutional obligation to accommodate individual freedom of conscience."[21] Whether strategic or principled, the decision to frame the eruv defense in terms of individual rights inspires doubts, yet again, about the liberal state's ability to recognize group rights. These doubts are amplified by the companion case from Outremont which Rabinovitch cites in the chapter. In the latter case, a condominium committee challenged the right of Jewish residents to build a sukkah on their balcony. As Rabinovitch acknowledges, this case was decided on grounds of "personal autonomy of belief"—as opposed to collective rights.[22] "What made the Outremont sukkah case (generally known as the Amselem case) so significant in Canadian law was that it laid out a definition of religion—as an individual belief—for use in Canadian courts."[23] Read

[18] *Id.* at 17.
[19] *Id.* at 223.
[20] Nomi M. Stolzenberg and David N. Myers, American Shtetl: The Making of Kiryas Joel, A Hasidic Village in Upstate New York (2021).
[21] Rabinovitch, *supra* note 2, at 189.
[22] *Id.* at 195.
[23] *Id.* at 194-5.

through a political lens, the Outremont cases illustrate the obstacles to asserting collective rights in liberal states, rather than their persistence.

Indeed, the recourse to a belief-centered definition of religion reflects the obstacles that liberalism poses to assertions of minority sovereignty. Here, I disagree with Rabinovitch, who interprets the presence of an eruv as a challenge to the liberal discourse of individual rights: "the eruv became a symbol for the clash of competing sovereignties."[24] Yet the categories afforded by Canadian law resist this ascription of sovereignty to Quebecois Jews. On the evidence of the court transcripts, neither the Hasidim nor the Canadian government perceived the eruv as a threat to Canadian sovereignty. To defend the erection of Jewish structures in the Canadian public sphere, both Jews and the courts adopted a liberal definition of religion as a matter of individual, private belief. Rabinovitch contends that "the Hasidim in Outremont believe that they have a right, as a group, to erect an eruv."[25] Assuming that Rabinovitch is correct—the Hasidim believe that they possess collective rights—their belief is of little practical consequence. For the right in question is neither legible as a collective right nor is it enshrined as such in Canadian law. The legal struggles of Canadian Jews reflect the convoluted strategies to which collectives have recourse in liberal states. In a country like Canada, which imposes a religious identity on Jews and defines religious freedom as an individual right, litigants must translate communal practices into an individualist idiom. Rather than a story about the persistence of collective rights in modernity, this episode illustrates the mismatch between the state's legal categories and minority self-definition.

More importantly, the religious nature of the identity, which is legible to the state, limits what Canadian Jews can desire or demand. The comparative modesty of Jewish political demands is especially striking in the Quebec context. As Rabinovitch notes, "Debates about integration in Quebec always exist as subcategories of the ongoing struggle—for and against—Quebecois nationalism and Quebec sovereignty."[26] Unlike the Quebecois nationalists, who wage an ongoing political campaign for independence, the Hasidim assert the right, as an aggregate of private individuals, to practice their religion. Quebec nationalists expressly demand a form of self-determination—while the Hasidism do not. Here, the contrast with historical traditions of Jewish diaspora nationalism—movements whose demands were akin to those of the Quebecois—is especially striking. Even in a state committed to multiculturalism, Jewish autonomy in the political sense does not register as a viable or legitimate demand. Unfolding against the backdrop of a nationalist movement for regional autonomy, the Outremont cases illustrate the transformation of Jewish identity wrought by the liberal state. Canadian Jews—who have internalized the identity of a religious minority—neither want nor demand political independence. In this sense, the cases which Rabinovitch

[24] *Id.* at 200.
[25] *Id.* at 189.
[26] *Id.* at 185.

adduces as evidence of diasporic sovereignty actually reflect autonomy's demise as a political desideratum in liberal states.

Sovereignty and Religious Freedom offers an important corrective to reigning narratives of Jewish modernization. Thanks to Rabinovitch's careful and comprehensive analysis, we can no longer assume that collective rights are unattainable for Jews (and other minorities) in modernity. The range of available legal statuses is much broader than canonical historiography has led us to believe. Nor are collective rights the exclusive preserve of citizens in a Jewish nation-state. Alert to the myriad rights regimes that modern states afford to Jews, we must ask a further question: How meaningful are these rights in practice? Do rights on paper—whether individual or collective—protect Jews from harm and enable them to flourish? A close examination of the cases surveyed reveals that collective rights are not always empowering—nor do individual rights invariably erode community. Of course, Rabinovitch is well aware that the annals of Jewish modernity are replete with ironic twists and unanticipated consequences. Indeed, *Sovereignty and Religious Freedom* derives its power from the challenge it poses to teleological narratives and binary periodization. It is no longer credible to depict the arc of Jewish modernity as an inevitable progression toward voluntary association (in countries other than the State of Israel). Yet the challenge to received historiographical assumptions should extend to the meaning and significance of rights themselves.

Read against the grain, Rabinovitch's case studies resist the correlation between collective rights and sovereignty (or autonomy) that recurs throughout the book. The formal legal status of a given Jewish community does not provide a reliable indicator of that community's agency or independence. There are no constants here, I would argue, because the practical implications of a given rights regime are contingent upon the broader political context (i.e. state forms, ideology, and political culture). In this sense, Baron's insight about the priority of state forms still obtains. Different types of states afford radically different possibilities for Jewish identity, practice, and self-organization—and the concrete realization of a given rights regime is determined by these political factors. This insight gains renewed urgency at a moment when Jews in many countries (Israel foremost among them) are engaged in a struggle over whether our polities will remain democratic—and, if so, what form democracy will take.

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