# THE HIDDEN GERMAN SOURCES OF THE ISRAELI SUPREME COURT

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There are several good reasons for the recent mounting interest in the history of Israel's legal and judicial system. Israel is going through an era of enhanced legalization, which is apparent in the stronger emphases on constitutional norms and discourse, in the increasing strength of legal institutions, and in a greater public sense of the powers of litigation. Gone is the traditional contempt for resorting to the court, which characterized the ruling Labor movement during Israel's formative years. The law and the courts have become one of the country's most significant political establishments. The legal professions have acquired unprecedented prestige. Lawyers and judges have become media celebrities as never before. Above all, the Supreme Court of Israel is emerging as the dominant branch of government. It is moving center stage in the collective decision-making process in Israel, affording an unprecedented degree of intervention in the conduct of the other branches of government and, thus, attracting ever greater attention, as well as criticism, from the Israeli media and public.

The question why all this has happened is yet to be answered. On top of the inherent weakness of judicial branches of government everywhere,[1] in Israel the lack of a written constitution could be expected to make the Supreme Court even more fragile and dependent than equivalent institutions elsewhere. Yet a close look at the reaction of the legislative and executive branches of government in Israel to the growing power of the Supreme Court would lead to opposite conclusions. Not only have the other branches refrained from putting up a fight against the rising judicial empire, they

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1 A. Bickel, The Least Dangerous Branch (1962).

actually delegated, over the years, more powers to the courts and enhanced their structural independence.[2]

The present paper is not designed to offer a straightforward solution to this enigma. Instead, it offers a glimpse into the collective biography and intellectual legacy of a distinct group of German-born or German-educated jurists who came to Palestine during the 1930s following the rise of Nazism, reached key positions within the Israeli legal system, and became the founding fathers of the Supreme Court of Israel. We believe that their story may shed new light on the current status of the Court as an institution and on Israeli jurisprudence as a whole. A fascinating example for this path of research has already been set by Pnina Lahav in her study of the English and American impact on Israel's Supreme Court and especially of the legacy of Justice Simon Agranat and his influence on Israeli law.[3] Here we propose to focus on a different and, surprisingly, neglected source of cultural impact on Israeli legal culture. About a half of Israel's first-generation Supreme Court judges came from Germany, where they were raised or educated. The effect of their German origins on the Court and on the broad contours of Israeli jurisprudence merits careful consideration.

A study of the German Jews and their special contribution to Israel's legal and political culture may contribute to the understanding of other aspects of the history and sociology of this young immigrant society. It may enrich our discussion of questions about legal culture, how it is developed and transplanted, how ideas cross conceptual and linguistic borders, and what processes of selection and shifts of meaning are at work. It may shed light on changes in the social and political status of judges and courts. The findings of our field research may be conducive, we hope, to broader discussion along these lines.

We begin with the basic statistics and biographical sketches of the first-generation "German" judges of Israel's Supreme Court (Part I). Then we

2 The structural independence of the judicial branch is discussed by E. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why do We Have an Independent Judiciary?*, 13 Int'l Rev. L. & Econ. 349, 350–52 (1993).

3 See the following publications by Pnina Lahav: *American Influence on Israel's Jurisprudence of Free Speech*, 9 Hastings Const. L.Q. 21(1981); *Ha-oz veha-misra: Beit Hamishpat Ha-elyon ba-asor ha-rishon le-kyumo [The Power and the Office: The Supreme Court During Its First Decade]*, 14 Iyunei Mishpat 479 (1989) (Hebrew) [hereinafter Lahav, *Ha-oz veha-misra*]; *Foundations of Rights Jurisprudence in Israel — Chief Justice Agranat's Legacy*, 24 Isr. L. Rev. 211 (1990); Judgement in Jerusalem: Chief Justice Simon Agranat and the Zionist Century (1991).

turn to examine their collective background as young men in the Weimar Republic and discuss the political and legal setting that affected their formative years (Part II). This is followed by a detailed analysis of the impact of the German-born or German-educated judges on Israel's juridical and jurisprudential culture. This will be done on three levels: a statistical survey of references to German jurisdiction and culture (Part III); an analysis of one of the Court's most important decisions ever, in which the German past played a particularly interesting role — the judgment in the *Yeredor* case (Part IV); and finally a perusal of several hidden German fingerprints on Israeli jurisprudence, including the concepts of *Rechtsstaat* and of *enlightened public* (Part V). We conclude with a final observation on the German impact, which takes us back to the enigma we have presented in this introduction (Part VI).

## I. The "German" Judges of the Israeli Supreme Court

The German influence on the Israeli Supreme Court has so far not been an issue for discussion or research.[4] This is a puzzling oversight. Anyone acquainted with the history of Israel's formative years would know that the "German" presence on the Court, denoted both by the number of judges born in Germany and by the number of judges educated in Germany, is significant and indeed amazing.

Nearly fifty percent of the Court's first-generation justices were educated in German institutions and were perfectly able to pronounce the "*Umlaut*" vowels correctly. Both these criteria are borrowed from Shlomo Erel's light-hearted (but earnest) test for recognizing the "genuine" German-Jewish immigrants who flocked into Palestine during the 1930s. Most of those men and women, who reluctantly left a beloved country and culture in the wake of the Nazi rise to power, were recognized in their new homeland as a group markedly different in accent and personality from the more numerous East

4 For general and, mostly, brief discussions of the contribution of Central European immigrants to the Israeli legal system, see S. Erel, Ha-yekkim: chamishim shnot alyia [The "Yekkim": Fifty Years of German-Speaking Immigration to Israel] (1985) (Hebrew); Y. Gelber, Moledet hadasha [A New Homeland] (1990) (Hebrew). In contrast to our approach, E. Rubinstein, Shoftei eretz [The Judges of the Land] 141 (1980) (Hebrew), claims that "most judges belong to the Jewish East-European cultural sphere, including some of the natives of Germany, whose parents immigrated there from Russia and Poland."

European immigrants. They even earned a collective nickname, "*Yekkes*."[5] This slang term, which is alive to this day, has been associated over the years with both positive and negative characteristics, from punctuality to excessive toughness; what is more important in the present context is that it enabled Hebrew speakers to refer to this particular group of immigrants without resorting to the difficult word "German." In this way could the stereotypical "*Yekke*" features that were considered positive, such as tidiness and assiduity, be disassociated from the brutal "German" characteristics of orderliness and strictness.

The legal profession attracted many German Jews during the late years of the Second Empire and throughout the era of the Weimar Republic. By the time Hitler came to power it was calculated that as many as forty percent of the lawyers in Berlin and in Frankfurt were Jewish. Many of the hundreds of them who emigrated to Palestine during the 1930s were forced to abandon their profession due to language difficulties, strict admission exams, and the tendency of the British Mandate regime to reject Jewish jurists applying for government offices. The immigrants who overcame the language and registration barriers (as well as the prevalent fascination with becoming land-tilling pioneers) went into private practice.[6] Significantly, only a small number of Jewish judges were appointed under the Mandate regime. Gad Frumkin was the sole Jew at the Mandatory Supreme Court. Moshe Landau was amongst the few lower-bench Jewish judges.[7]

The establishment of the State of Israel radically changed the scene. The first Minister of Justice was **Felix Rosenblüth** (who Hebraicized his name to **Pinhas Rosen**), born and educated in Germany. The inner circle formed by Rosen in the Spring and Summer of 1948 to establish the Israeli Ministry of Justice included: **Uri Yadin** (formerly **Rudolf Heinsheimer**), a native of Karlsruhe and a graduate of the University of Berlin who was later to head the legislation department at the Ministry; **Shabtai Rosen**; and **Haim (Her-**

5 Erel, *supra* note 4, at 20. The etymology of "*Yekke*" (which just about rhymes with "acre") is unclear. One feasible explanation derives it from the German word for "jacket," attesting to the quaintly formal attire (by early Zionist standards) of the German immigrants in Palestine.

6 *See* Gelber, *supra* note 4, at 447–49.

7 On the eve of the establishment of the State of Israel, there were merely twenty-two Jewish judges (from a total of sixty-one judges) in the magistrate and district courts of Palestine. See Pinhas Rosen's speech in the Knesset, in *Divrey Haknesset* [Knesset Records], vol. 8, at 1176 (1951).

**man) Cohn**, a native of Lübeck educated at the Universities of Munich, Hamburg and Frankfurt am Main. The State Comptroller Office was staffed almost exclusively by German Jews, headed by the first Israeli State Comptroller, **Siegfried Moses**.

Pinhas Rosen can be held responsible for the numerous appointments of German Jews to the Ministry of Justice and to the judiciary. In an interview with Shlomo Erel after his retirement, Rosen openly admitted that he had preferred German Jews in the legal establishment because they were, in his words, "honest and law-abiding."[8] This statement can be understood not only as praise for the German Jewish immigrants, but also as an intimation of Rosen's view of the ethical stature of the personnel of Israel's other branches of government, most of whom were born east of the River Oder.

Rosen's most important appointment was arguably that of **Moshe Smoira** as the first President of the Israeli Supreme Court.[9] Smoira was born in Königsberg, East Prussia, in 1888. His family was of Ukrainian origin, and his education reflects the Jewish-German synthesis typical of his generation. After studying several subjects in several German universities (including Semitic Languages at Frankfurt am Main and Law at Heidelberg), Smoira was awarded a Doctorate in Jurisprudence from the University of Berlin in 1911. His subsequent biography parallels that of Rosen: both served as young men in the German army during World War One, emigrated to Palestine in 1922, and became partners in the same law firm, Rosen in the Tel Aviv branch and Smoira in the Jerusalem one.[10] Smoira joined *Mapai* (the *Eretz Yisrael* Worker's Party) and acted as legal adviser to the *Histadrut* (the Jewish workers' union federation). He was noted for his knowledge and love of music and poetry, both German and Hebrew. Smoira's appointment to the Supreme Court presidency by his old friend Rosen deeply affected the Court's long lasting "German" character.

The first five justices appointed to the Court reflect an interesting cultural equilibrium. Two of them were graduates of Austrian or German universities:

8 Erel, *supra* note 4, at 187. A similar account is given by Gelber, *supra* note 4, at 447.

9 On the process of this appointment, see Rubinstein, *supra* note 4, at 59–66.

10 The biographical details in this and the following passages are based on the autobiographies and *Festschriften* mentioned in subsequent notes and in Palestine Personelia 1947 (Peretz Cornfeld ed., 1947); Who's Who in World Jewry: A Biographical Dictionary of Outstanding Jews (I.J. Carmin Karpman ed., 1972); Mi va-mi be-yisrael [Who's Who in Israel] (1971) (Hebrew); Mi va-mi bi-yerushalayim [Who's Who in Jerusalem] (I. Ben Zeev ed., 1965) (Hebrew); and Rubinstein, *supra* note 4.

President **Smoira** and **Menachem Dunkelblum**, who was a native of Krakow, Galicia (1889) and thus an Austro-Hungarian subject. Dunkelblum belongs to the group we have defined as "German-Jewish" mainly by virtue of his education at the Universities of Krakow and Vienna. He emigrated to Palestine in 1919 and was associated with the General Zionist party. He was the legal adviser of the Tel Aviv Municipality and of the Zionist Movement. He passed away shortly after his Supreme Court appointment, in 1951. Alongside the two "German" justices there were two appointees who had graduated from British or American universities: **Yitzhak Ulshan**, a native of Kovna, and **Shneor Zalman Cheshin**, born in Palestine. The fifth justice, Rabbi **Simha Asaf**, was not a jurist.

This balance between the British/American and the Central European backgrounds was maintained in several subsequent rounds of appointments to the Court. The first two additions were **Simon Agranat**, who was born in Louisville, Kentucky, and graduated from the University of Chicago, and **Moshe Silberg**, Lithuanian by birth, an orthodox Jew, and a graduate of the German Universities of Marburg and Frankfurt who emigrated to Palestine in 1929. Silberg served twenty-two years as a justice on the Supreme Court; from 1965 he was Deputy President of the Court.

The next five appointments to the Court were the first to take place in accordance with the Judges Act, 1953, and were made by the Committee for the Appointments of Judges created by this statute.[11] Three of the appointees belong to the "German" group. **Moshe Landau** and **Alfred Witkon (Witkowski)** were born in Germany, although both completed their law studies in Britain. **Yoel (Julius) Sussman**, a native of Poland and a life-long admirer of German culture, was educated at the Universities of Heidelberg, Frankfurt, and Berlin, as well as London and Cambridge. The two other appointees were British by birth or legal education.[12]

11 The 1953 statute has created an arrangement that is unique in kind. The appointment of judges in Israel is made formally by the President, but the nomination is made by a committee whose members are three Supreme Court justices, two members of the Bar, two Government ministers, and two Knesset members (one of whom is traditionally from the Opposition). Thus, all three branches of government, as well as practicing lawyers, are party to the decision-making process, although there is a five to four majority of "non-politicians" (judges and practicing lawyers) on the committee. The latter fact may explain the ongoing "cloning" of the Supreme Court's composition (and the continuing German presence on it).

12 **David Goitein**, born in England, and **Zvi Berenson**, a native of Palestine who took his law degree in England.

The three "German" judges in this group carried special weight in the history of Israel's Supreme Court. **Sussman**, born in Krakow in 1910, studied at the Universities of Frankfurt am Main, Berlin, and Heidelberg, where he received his Doctorate. Arriving in Palestine in 1934, he left twice to continue his studies at the Universities of Cambridge and London. After the establishment of the State, he served as Deputy Military Prosecutor and as a district court judge. He was appointed to the Supreme Court in 1953, became Deputy President in 1970, and served as President of the Court from 1976 to 1980.

**Landau** was born in 1912 to a Zionist family in the city of Danzig, a German enclave in the Baltic region. He received a strongly nationalist German education at the Royal Gymnasium, prior to his legal education in England. Emigrating to Palestine in 1933, he was employed in Smoira's legal firm and then served as the youngest Justice of Peace under the British Mandate regime. His tenure at the Supreme Court lasted twenty-nine years, from 1953 to 1982, including two final years as President.

**Witkon**, a native of Berlin (born in 1910), studied at the Universities of Bonn and Berlin, received his doctoral degree from Freiburg im Breisgau, and pursued further studies in London. He emigrated to Palestine in 1934. In 1948 he was appointed as a district court judge. Witkon's tenure at the Supreme Court lasted from 1954 to 1980.

During the 1960s, the Court was staffed by two more "German" justices, **Haim (Herman) Cohn** and **Benjamin Halevi**, alongside two other justices.[13] Cohn was born in the north German city of Lübeck in 1911 into an orthodox family of rabbinical standing. After a term at the University of Munich in 1929, he pursued an academic and rabbinical course in Jerusalem, returned to Germany to complete his juridical education at the Universities of Hamburg and Frankfurt am Main, and made his final transition to Palestine upon Hitler's rise to power in 1933. Cohn's public career, spanning the formative years of the State of Israel, was exceptional: he was appointed State Attorney in 1948, Director General of the Ministry of Justice in 1949, Minister of Justice in 1952, and Attorney General in 1953. His Supreme Court tenure began in 1960 and lasted twenty-one years, with him ultimately being appointed Deputy President.

13 Galician-born **Yitzhak Kister** (who studied Austro-Hungarian law) and Palestine-born **Eliyahu Mani**. The latter, who graduated in England, was the first justice of Sephardic origin appointed to the Court. This may serve as a reminder that the equilibrium discussed here was confined to the different branches of the Ashkenazi diaspora.

Even during the 1970s, when fewer German-born nominees were available for obvious demographic reasons, three of the ten Supreme Court appointees were still natives of Germany: **Ben-Zion Schershevski** (born in Königsberg in 1907), **Shlomo Asher** (born in 1907), and **Menachem Elon** (formerly **Fetter**, born in 1923) who served on the Supreme Court between 1977 and 1993, the last years as Deputy President of the Court.

The statistics, it seems, tell an interesting story. We have found no documented evidence pointing at a deliberate policy of balancing the "German" and "British/American" backgrounds of Supreme Court justices during the first three decades of the State of Israel, but the repeated and enduring equilibrium can hardly be considered a mere accident. All in all, 36% of the first twenty-five justices of the Supreme Court (appointed until 1978) were German natives; 40% were born in East Europe, 8% were born in Britain or the USA; and 16% were born in Palestine. As to university studies and degrees, the legal education of 36% of the first twenty-five justices was obtained at German universities (this figure overlaps with, but is not parallel to, the 36% German natives), while only 28% obtained their education at English or American universities, 12% in East Europe, and 20% in Palestine-Israel.[14] These numbers are the point of departure in our search for German fingerprints on the legal practice, cultural legacies, and political discourse of the Supreme Court of Israel.

## II. The Formative Years

### *1. The Weimar Republic and the Jewish Jurists*

Is it possible to draw a collective biographical profile of the German-born and German-bred judges of the Israeli Supreme Court? This part of our study focuses on the core group consisting of the first seven "German" judges of the Israeli Supreme Court, from Smoira to Cohn. In our attempt to trace their early years, we have combined autobiographical and biographical materials (most of which are, alas, rather brief and impersonal), along with historical studies of the Weimar Republic and its academic and legal cultures.

With the exception of Moshe Smoira, who was significantly older, the subjects of our research were university students during the Weimar period. All of them witnessed at least part of the stormy history of the Republic. Smoira, however, left Germany early enough (in 1923) to be able to foster

14 The statistics are taken, with definitional changes, from Rubinstein, *supra* note 4, at 141.

fond memories of the Weimar regime, which he saw as "one of the most democratic constitutions."[15] This quote comes from Smoira's sole comment about German law in all of his judgments at the Supreme Court. And, as we shall later observe, even Smoira's colleagues who witnessed the disintegration of the Republic kept a positive view of their life in Germany during the 1920s.

Most of the judges we have examined grew up in non-Zionist homes. They did not form an ideological commitment, nor did they make special plans to emigrate to Palestine. They clearly intended to pursue a legal career in Germany, until history intervened: between 1929 and 1934, these young men became part of a tidal wave of German-Jewish migrants whose Zionist orientation was crystallized very shortly before or during their migration.

The exceptions were Smoira, who left Germany as an ardent Zionist in the early 1920s, and Landau, who was born in Danzig to a Zionist family of Galician origins. Landau's studies in England (Engineering and then Law) were designed to prepare him for "*aliyah*," ideological immigration to Palestine. Nevertheless, Landau's high school education at the Royal Gymnasium of the Free City of Danzig was strongly Germanic, complete with a classicist curriculum and traditional Prussian discipline.[16]

The religious backgrounds of the judges range from strong orthodoxy to almost full assimilation with the non-Jewish surroundings. However, we have not found any correlation between their understanding of their Jewish identity and the vigor of their German identity. In the heyday of the Weimar Republic, such affinities could happily coexist.

In order to examine the possible impact of the German-bred judges on the Supreme Court of Israel, we have focused on their student years, the formative era of apprenticeship — *Bildung* — familiar to readers of Goethe and Musil. We have attempted to probe the intellectual and social cosmos of the German law faculties during the Weimar years and to find which elements of the formal legal education and in the broader political and cultural realities had the most enduring effect on our future Supreme Court justices.

15 High Court [H.C.] 5/48, Lion v. Gubernick, 1 *Piskei Din* [P.D.] 58, 60. This remark was made in connection with the legality of an Israeli emergency regulation enabling confiscation of private property.

16 E. Rubinstein, *Shvil zahav: ledarko shel Moshe Landau ba-mishpat uve-hagshamat ha-ziyonut [Golden Mean: Moshe Landau's Path in Jurisdiction and in Zionist Activity], in* 2(1) Sefer Landau 531–35 (A. Barak & E. Mazuzz eds., 1995) (Hebrew).

All of the judges we have examined, with the exception of Landau, studied Law (and other disciplines) at at least two German universities. Of special importance are the University of Berlin, where Rosen, Sussman, and Witkon studied, and the University of Frankfurt am Main, where Silberg, Sussman, and Cohn studied. The list also includes the Universities of Munich (Smoira and Cohn), Freiburg (Rosen and Witkon), Heidelberg (Smoira and Sussman), Königsberg, Giessen, Marburg, Bonn, and Hamburg. A relatively short sojourn at several universities was customary in the German academic tradition. In order to attend the classes of the most celebrated professors, students frequently moved from one university to another. An academic degree, however, was normally obtained at only one institution. Smoira, for example, spent one semester at Munich, two at Heidelberg, and three at Giessen, where he was awarded a degree. Each of our judges thus acquired a relatively broad acquaintance with German university and city or town life.

What was it like to be a young Jewish law student at the German universities during the stormy years of the Weimar Republic? The general contours of the period are well known. The legal and academic establishment in which most of our young jurists hoped to launch their careers was an interesting combination of stability and disquiet, tradition and change. The Weimar Republic, whose liberal-democratic constitution was drafted by the Jewish jurist Hugo Preuss, drew a great deal of hostility from many German academics. It was based on the Treaty of Versailles, which many Germans regarded as coerced and oppressive, thus marking the Republic itself as illegal or at least morally illegitimate. In retrospect, it is easy to point out how hateful the short-lived Republic was to many of its jurists. Historians often focus on incidents in which judges, lawyers, and professors publicly reviled the regime and its constitution. The Weimar courts of law were lenient toward the right-wing enemies of the Republic and imposed heavy sentences on Socialists and Communists.[17]

Notorious individual cases were certain to draw the attention of young students of Law. When the National Socialists denounced and hounded Hans Nawiasky, a professor of Constitutional Law of Jewish descent, for affirming the legality of the Treaty of Versailles, none of his colleagues at the

17 The classic general study is Fritz K. Ringer, The Decline of the German Mandarins: The German Academic Community, 1890–1933 (1969) (*especially* ch. 4); *see also* Walter Laquer, Weimar: A Cultural History, 1918–1933, at 183–89 (1974). For a detailed discussion of the juridical establishment, see Heinrich Hannover & Elisabeth Hannover-Drück, Politische Justiz 1918–1933 (1966).

University of Munich were willing to defend his views. Only a few of them dared to support his right to express such opinions in the name of the principle of academic freedom, and with due condemnation of the substance of his "unpatriotic" claim.[18]

The Nawiasky affair is often mentioned as a typical example of the public atmosphere in the Weimar period: judges and scholars supporting the anti-democratic political right; liberal and republican voices increasingly silenced; and anti-Semitism constantly on the rise in both popular and academic guises.[19] One could expect such spectacles to become, for young Jewish students, a powerful and painful memory.

Memory, however, is a complex matter. The Weimar recollections of Israel's German-born Supreme Court judges — at least the "official" reminiscences spelled out for public consumption — do not match the common images we have sketched. The subjects of our study have generally maintained a positive, indeed nostalgic, view of their Weimar years. In public addresses, they emphasized the pleasant and comfortable nature of their life in Germany. Thus, Alfred Witkon described the life of the well-established German Jewry as "paradise."[20] Moshe Landau pointed out that in the Weimar era, "the barriers collapsed altogether, the Jews of Germany were progressing in many fields and beginning to occupy key positions in government and academia."[21]

Both Witkon and Haim Cohn claimed that they personally had never experienced any sort of anti-Semitism in the German universities. This is all the more significant, because the Law Faculty of the University of Munich, where Cohn studied, was the birthplace of the National Socialist student movement and, later, the scene of the Nawiasky affair. A letter written to us by Cohn in response to an earlier version of the present paper undermines the conventional historical image of Weimarian anti-Semitism and anti-liberalism:

18 A. Gallin, Midwives to Nazism: University Professors in Weimar Germany 1925–1933, at 79–85 (1986).

19 Donald L. Niewyk, The Jews in Weimar Germany at ch. 3 (1980); Ringer, *supra* note 17, *passim*; Karl Dietrich Bracher, The German Dictatorship 165–66 (1970).

20 A. Witkon, *Zecher Leyeziat Germania: Madua lo ra'u ha-yehudim et ha-ktovet al ha-kir [Remembering the Exodus from Germany: Why the Jews Did Not See the Writing on the Wall], in* Mishpat ve-shiput [Law and Adjudication] 263 (1988) (Hebrew).

21 M. Landau, *Devarim le-zecher Uri Yadin [In Memory of Uri Yadin], in* Sefer Uri Yadin 11 (A. Barak & T. Spenitz eds., 1990) (Hebrew).

> It is not true that we [jurists] "hated" the Weimar Republic. Quite the opposite: most of us were rather enthusiastic patriots of the Republic, and ardent supporters of its constitution. [...] The great majority of German judges during the Twenties did their job well; and although some of them (mainly in the lower echelons) were lenient to right-wing offenders and tough on left-wing ones, this cannot justify a [negative] conclusion on the quality of the Republic as a law-abiding country.[22]

The anti-Semitic assault against Nawiasky is seen by Cohn in a different light from the history books:

> As to the Nawiasky affair (we did not attend his lectures, because he was a convert to Christianity), the legal status of the Treaty of Versailles was indeed questionable. Many people (in Munich too, and among the Jews as well) thought that [the Treaty], having been forcibly imposed on Germany, is not binding. The refusal of the Faculty [of Law at Munich] to take a stance is not unreasonable, since its own members were divided on the matter. Yet Nawiasky's [academic] position remained incontestable, until he was ousted by the Nazis.[23]

This testimony falls in line with the evidence showing a general sense of comfort and security among the educated Jewish citizens of the Weimar Republic. Further evidence is supplied by the massive Jewish presence in the judicial establishment and by the accounts of a powerful Jewish-German symbiosis during most of the Weimar period. Numerous Jewish lawyers were in private practice and government employment, and in Prussia (though not in Bavaria), Jewish jurists were promoted to senior offices. Some of the leading law professors were Jews, including Karl Heinsheimer (the uncle of Uri Yadin) in Heidelberg, and James Goldschmidt, Fritz Schulz, and Ernst Rabel in Berlin. Jewish legal theorists, such as the Frankfurt professor Hugo Sinzheimer were instrumental in the formation of the Republic's labor laws and served as judges in labor courts.[24] This successful older generation provided a natural role model for the Jewish law students at the German

22 Haim Cohn, letter to the authors, July 8, 1995 (our translation); the round brackets are Cohn's, the square brackets are ours.

23 *Id.*; brackets as above.

24 See especially the article by Hans-Peter Benöhr, *Der Beitrag deutsch-jüdischer Juristen zum Arbeits- und Sozialrecht*, which appears with other relevant articles in a special issue, Volume 48(4), of *Zeitschrift für Relogions- und Geistesgeschichte* (1996).

universities. These young men and women did not, in general, feel threatened or marginalized. Only the abrupt fall of the Republic and Hitler's rise to power shook many of them into emigration, putting a sudden end to a life of security and ease.[25]

The testimonies of Witkon, Landau, and Cohn, which were not contradicted by any other autobiographical statement of the other judges we have examined, suggest that the student years in Weimar Germany were not badly traumatized by anti-Semitic experiences — at least not to the point that would have made them leave the country prior to the Nazi rise to power. It should, nevertheless, be observed that none of these autobiographical statements is openly apologetic, trying to explain why their writers were among the thousands of German Jews who ignored, as Alfred Witkon put it, "the writing on the wall."[26]

We therefore turn, at this point, to the positive legacy of the Weimarian university life and focus on the curricular contents and the theoretical atmosphere of the German law faculties during the relevant period. What were Israel's future Supreme Court justices taught, and what were they not taught, at the universities of the Weimar Republic? To the best of our knowledge, these questions have not attracted scholarly attention before.

*2. Between Conservatism and Apoliticality, Formalism and Values*

In the 1920s, most German law faculties were bastions of conservatism, in more than one sense. Law itself, of course, was one of the oldest academic disciplines, taught within a distinct faculty from the earliest days of the medieval universities. Moreover, the great controversies over the character of German law and of the German legal system had, by the early twentieth century, been fully resolved. The tense coexistence between Roman law and the Germanic tradition, which had kept German law faculties buzzing since the sixteenth century, finally came to an end during the nineteenth century, mostly in favor of Roman law. The nineteenth century debates between natural lawyers, on the one hand, and historicists and legal positivists, on the other, were also put to rest.

Symbolically, this era of controversy was terminated by the ratification of

25 Ernest Hamburger, Jews, Democracy, and Weimar Germany (1972) (*especially* at 21–22); Moshe Zimmermann, *Beayot yesod be-historiografia shel yahadut Weimar [Basic Problems in the Historiography of Weimar Jewry], in* Yehudei Weimar: chevra be-mashber ha-moderniut, 1918–1933, at 18–53 (Oded Heilbronner ed., 1994) (Hebrew).

26 Witkon, *supra* note 20.

the German Civil Code, *Bürgerliches Gesetzbuch* (BGB), in 1900. This was the outcome of a triumphant legal positivism tinged by German nationalism, which was intended to provide a general codification for the recently united German Empire. To this purpose, jurists working under Bismarck's guidance adapted the tradition of Roman law to the growing industrial and capital-market economy of Wilhelmine Germany. The new economic legislation was based on an individualist, property-oriented liberalism.

As the British historian Michael John has shown, the groundwork for this system of economic liberalism was prepared jointly by "Romanist" jurists and historians. Indeed, the "Romanist" victory was no accident: this frame fitted the age of capital industry far better than its rival, the "Germanist" tradition, with its communal leanings.[27]

The characteristic conservatism of academic jurists during the Weimar period was partly an outcome of the considerable activism of their forebears. One generation earlier, law professors had helped to give constitutional and legal shape to the newly-united Germany, their opinions were willingly heard in courts and in the *Reichstag*, and they were much involved in deciding social and economic issues such as trade and labor laws. Yet this very success brought the academic lawyers out of the public arena in the last years of the Empire. The Courts of Justice Act of 1879 led to increasing formalization and governmental control of legal education, legal counseling, and adjudication. Scholars were no longer required to advise on matters of principle and policy and no longer called to fight social or political battles. Their new role, teaching law and legal procedure, was pointedly apolitical, and they kept clear of social or even philosophical debate.[28]

In Germany this was the age of legal formalism, the notion of the court as the loyal and unimaginative executor of the written law. It was also the age of *Rechtswissenschaft*, the notion of a "legal science," which is as solid as the natural sciences and whose practitioners simply need to use their technical proficiency to follow fixed procedures.[29] This, of course, was an academic

27 Michael John, Politics and the Law in Late Nineteenth-Century Germany: The Origins of the Civil Code (1989).

28 See the survey of Berlin University law professors by Rudolf Smend, *Zur Geschichte der Berliner Juristenfakultät im 20. Jahrhundert, in* Studium Berlinese. Aufsätze und Beiträge zu Problemen der Wissenschaft und zur Geschichte der Friedrichs-Wilhelms-Universität zu Berlin 109–28 (Hans Leussnik et al. eds., 1960).

29 *Cf.* Friedrich Paulsen, Die deutschen Universitäten und das Universitätsstudium 504–11 (1902; rep. Hildesheim, 1966).

luxury: such a "scientific" approach could not work in the real world, where the courts were forced to adjust the interpretation of the laws to the fast-changing circumstances of war, defeat, and constitutional change.[30] But the university professors were not forced to adapt so fast. They generally refused to take new political or philosophical challenges on board. The curriculum was increasingly "historical," often ignoring the philosophical novelties of the previous decades, including the most recent currents in the philosophy of law. This approach was particularly dominant in the University of Berlin, where five future Israeli Supreme Court justices studied during the 1920s.

Consider, for example, the textbook in the history of German law, written by the Heidelberg professor Hans Fehr. The book was published in 1921 and used by German law students during the Weimar period.[31] The general historical survey, which makes up the main part of the book, going from the ancient Germans to the establishment of the Weimar Republic, contains only two chapters on individual thinkers: Immanuel Kant, the key figure of modern German philosophy, and Adam Smith, the prophet of market economy. By contrast, John Locke is mentioned only twice and very briefly. Other liberal thinkers, notably Jeremy Bentham and John Stuart Mill, are not mentioned even once.

The author traces the German legislation concerning "civil rights" and "liberty and equality" mainly to "medieval conceptions of German law." This specific German tradition owes less, he claims, to "revolutionary tendencies and natural law speculations."[32] Thus, the German liberal tradition is clearly distinguished from its French, British, and American equivalents. Fehr favors medieval concepts of corporate liberty to Enlightenment rationalism and individual liberty. He repeatedly describes the successful struggle of the German legal tradition against unworthy Western influences. To Fehr, a sworn positivist, it was particularly important to stress that the parliaments and constitutions of modern Germany hailed back to the ancient Germanic legal tradition. Even the Weimar Constitution, he claimed, sought to balance between the "strong individualism" of civil and human rights, a pointedly non-German idea, and a powerful communal and national com-

30 Nigel G. Foster, German Law and Legal System 23–24 (1993).

31 Hans Fehr, Deutsche Rechtsgeschichte (1921). We have use of a copy that was probably brought to Palestine by a former German law student and donated to the Haifa University Library.

32 *Id.* at 303 (our translation).

mitment, which is German through and through. In this system, individuals are answerable for the security and strength of their country, even at the expense of their personal liberty.[33] Such an outlook, as we shall later observe, was by no means exceptional: Fehr's position was compatible with the mainstream German tradition of liberalism and enlightened progress.

In his dark and ambivalent postscript, Fehr casts doubt on the future of the young Republic and attempts to encourage himself and his readers by reminding them of the historical vigor of the German legal tradition. In the last passages, however, academic prudence gives way to a nationalist outburst:

> History shows that the deepest roots of the Law are national, that they grow on their own accord from the creative soil of the nation, and that most of the input from alien legal systems is merely external and technical. As long as we remain a distinct personality, as long as the majority cannot strangle us in their nets, which are superior only in quantity, as long as the well-being of a nation cannot come from a planned proletariat state, based on the musings of international law. The value of personality is rooted in national existence. The value of Law (*Recht*) is rooted in national existence. The value of the State is rooted in national existence.[34]

The concluding passage of Fehr's textbook in legal history thus offers us a clear insight into the fears and defensiveness of the German legal and academic establishment during the early 1920s. The inherited conservatism of jurists and professors was buttressed by their new fear of "alien" ideas, both Western-liberal and socialist, which had found their way into the Weimar Constitution. Fehr sought to reject these false penetrators in the name of organic nationalism and Germanic communalism. He did not reject liberal ideas as such, but sought to apply them within the German tradition of all-powerful national commitment.

This sense of traditionalist defensiveness accounts for the widespread rejection of the new social sciences. Sociology, Psychology, Economics, and Political Science were mostly kept out of the curriculum.[35] This rejection

33 *Id.* at 348.

34 *Id.* at 355 (our translation).

35 Ernest Fuchs, Juristischer Kulturkampf (1912) (*especially* chs. 3–4); *cf.* Smend, *supra* note 28, at 119.

was especially noteworthy in the law faculties. Only a few of the professors and the students were acquainted, for example, with the recent path-breaking work of Max Weber. Professors who attempted to introduce Sociology or Economics into legal studies were suspected of covert Socialism, an ideological stance distinctly unpopular with many senior jurists. It is no accident that during the Weimar period, the most original and innovative schools of thought appeared in institutes and "seminars" located outside the regular university departments. Such was the famous case of the Frankfurt School.[36] Most law faculties also steered clear of political-legal activity, which, in the early years of the Republic, under the auspices of the Minister Gustav Radbruch, broke new grounds in labor legislation. The Berlin professors were an exception to this rule, due to their close ties with politicians and civil servants and their pragmatic concept of the law.[37] The curriculum of the Berlin Law Faculty, however, was as traditional as the rest.

Law students were not exposed, therefore, to ardent legal and jurisprudential debates. The dominant approach was that of nineteenth-century legal positivism. The innovations introduced into this approach in our period by the Austrian philosopher Hans Kelsen, who attempted to introduce a discussion of norms and ways of deciding about them, did not change the traditional positivism in the curriculum of German law faculties. Kelsen's work in effect lent support to social and legal conservatism through his concept of a "basic norm" (*Grundnorm*), seen as a meta-legal standard. Kelsen did not provide a departure point for normative critique of the social or legal status quo either from the left or from the right. When National Socialism eventually launched an attack on current positions, it did not stem from legal positivism but from the new anti-liberal statism of the philosopher Carl Schmitt.

The conservatism of German law faculties was, of course, part of a broader context. German universities fostered a conservative outlook for several reasons, among them the power invested in senior professors and the adherence of many members of the educated elite to German nationalism, an outcome of Bismarck's historical alliance with the liberals.[38] Academic jurists, like medics and other scientific practitioners, were especially affected

36 Ringer, *supra* note 17, at 143–48, 228–41; *cf.* Peter Gay, Weimar Culture 38 (1969).

37 Smend, *supra* note 28, at 110–11, 119–20.

38 Helmut Kuhn, *Die deutsche Universität am Vorabend der Machtgreifung, in* Die deutsche Universität im Dritten Reich 13–44 (1966); Ringer, *supra* note 17, ch. 4.

by the process of specialization and professional constriction. The broader cultural interests and the links with art and literature, philosophy and theology, which characterized lawyers in the eighteenth and nineteenth centuries, were significantly diminished.[39]

The success of National Socialism within the law can be attributed to this vacuum. Statistics of Nazi sympathy and affiliation are particularly interesting with regard to the law faculties. Before Hitler's rise to power, there was little active support for National Socialism among law professors. As of 1933, however, academic jurists were second only to the medics in their haste to become members of the Nazi party. The law faculties were also among the first to dismiss Jewish professors during the early years of Hitler's regime.[40]

Despite this range of conservative and anti-liberal trends, the self-image of German law faculties was based upon a myth of apoliticality which was sustained by right wing and center-stage ideologies. German patriotism, an aggressive view of international relations, statism, and contempt for liberal values were widely considered to be politically neutral beliefs. Justice Witkon, in his memoirs, referred to this attitude in terms of the "amoral legalism" that accompanied "the strict adherence to the laws" in Weimar Germany.[41]

What lesson, then, did Witkon and his peers draw from the failure of the Weimar legal and constitutional system? On the face of it, the "amoral legalism" mentioned by Witkon should have been abhorred. The Weimarian flight from politics is reminiscent of the definition for legal formalism recently offered by Professor Menachem Mautner of Tel Aviv University: the idea that jurisdiction might be pursued "while its value-dimension remains concealed and with a small degree of awareness that such a dimension indeed exists in jurisdiction."[42] Yet such an attitude has attracted Mautner's critical attention precisely because it is still a viable way of looking at law and justice in present-day Israel.

39 Charles McClelland, *Professionalisation and Higher Education in Germany, in* The Transformation of Higher Learning 1860–1930, at 306–20 (Konrad H. Jarausch ed., 1983).

40 Geoffrey G. Giles, Students and National Socialism in Germany (1985); Hartmut Titze, *Hochschulen, in* 5 Handbuch der deutsche Bildungsgeschichte 226 (D. Langewiesche & H.-E. Tentroth eds., 1989).

41 Witkon, *supra* note 20, at 265.

42 Menachem Mautner, Yeridat ha-formalism ve-aliyat ha-arachim be-mishpat ha-yisra'eli [The Descent of Formalism and the Rise of Values in Israeli Jurisdiction] 10 (1993) (Hebrew).

The Weimar lesson, it appears, is not a simple one. Legal formalism and apoliticality were preached not only by the German nationalists, but also by the defenders of the Weimar Constitution and by jurists committed to liberal and social-democrat values. The attempt to distinguish between professional ethics and "ideological" values and the wish to keep the latter away from jurisdiction did not lose their respectability as a result of the German catastrophe. Significantly, the downfall of the Weimar Republic did not drive the founding fathers of the Israeli Supreme Court away from the doctrine of legal formalism.

The Israeli Supreme Court indeed inherited a complex and, at times, contradictory legacy. A famous tension was observed between the outspoken formalism and stout procedural emphasis, represented by Yoel Sussman,[43] and the philosophy of flexibility and creative interpretation, expounded by Sussman's great rival Haim Cohn.[44] Another set of fault-lines runs between the Supreme Court's sensitivity to individual human rights and its clear State-centered affiliation, as well as between the Court's Zionist commitment and its role as a defender of democratic principles. At times, as we will shortly demonstrate, these tendencies were in danger of colliding. The main point, however, is that they all had German roots. The German legacy of Israel's Supreme Court justices was rich enough to support them all.

## III. German References in Supreme Court Jurisdiction: A Statistical Overview

Having sketched the substantial German background in the personal and collective biographies of a good half of Israel's Supreme Court judges of the founding generation, we now proceed to assess the actual impact of this background on Israeli legal theory and on the Supreme Court's path. We

43 It is fair to note, however, that Sussman himself — though happy to call himself a "formalist" — pointed out the "narrow, uncreative interpretation typical of the Continental courts"; Y. Sussman, *Tom lev be-dinei chozim — ha-zika la-din ha-germani [Good Faith in Contract Laws — The Link to German Law], in* 6 Iyunei Mishpat 486 (1979) (Hebrew). On the effect of the German reception of Roman Law on the Israeli legal formalism, see Moshe Landau, *Al ha-shamranut be-sidrei ha-din ha-ezrahi [On Conservatism in Civil Law Procedure], in* Sefer Sussman 285–86 (A. Barak et al. eds., 1984) (Hebrew).

44 For an analysis of the conceptual differences between Sussman and Cohn, see Michael Sassar, Haim Cohn shofet elyon [Haim Cohn, Supreme Court Judge] 119, 140, 200 (1989) (Hebrew).

conduct this assessment, which is only a preliminary mapping of the terrain, on three levels of inquiry, using three different methods of research.

On the first level, we have attempted to survey German fingerprints by way of a straightforward listing of the direct references made by the German-born or German-educated Supreme Court justices to German legislation and cases. However, since such statistical survey ignores the qualitative weight of such references, their specific importance within a court decision and the relative effect of the decision itself on Israeli jurisprudence, we have embarked on a second level of inquiry, in which we focus on one particular court decision. That decision, known as the *Yeredor* case, focused on the right of the Socialist List to be elected to the Sixth Knesset. It has been described by some of its makers as the most important decision in the history of the Court.[45] The *Yeredor* case is brought as a test case of exceptional interest. Finally, our third level of inquiry opens up a linguistic and conceptual vista, attempting to trace several inherent, hidden, or even unconscious impacts of German history and culture on Israeli legal and political discourse. We offer an analysis of two concepts commonly used by Israeli jurists, ***medinat chok*** (a State governed by laws) and ***tzibur na'or*** (enlightened public). Both these concepts, we argue, have German origins and have undergone interesting transformations on their way into modern Israel.

Beginning, then, with a statistical account, we examined all references to German law and to German history and culture in the published judgments of the Supreme Court from its foundation until the end of the 1970s.[46] We expected to find a large number of such references, not only because of the relative weight of German-born and German-educated judges, but also because of the conventional view that the Israeli legal system is a mixed one, devised from Continental sources which complement the British foundations and American influences. Our findings were surprising: there are no more than fifty-five such references and citations, most of which involve statutes and precedents from the realm of private law. Some of these references are made with an apology for the actual necessity to use German law.[47] The same

45 *Id.* at 185.

46 The term "published" refers to judgments published in the *Piskei Din* series — the official, but not all-inclusive, publication of the Supreme Court decisions.

47 One example should suffice here: Justice Witkon wrote in his interpretation of the Israeli Nazi Persecution Disabled Victims Act, "I think that we cannot ignore the German law, neither its statutes nor its judicial rulings.... nor would I say that we have the liberty not to accept their notion of justice. Even a statute can be unjust and harmful to our emotions..."

applies to academic writings: references to German law are rare and brief. Yet the magnitude of the German echo and impact on Israeli law is far greater, we argue, than these bare statistics may suggest.

Our findings up to this point fall in line with two recent studies. The first is a project conducted by Yoram Shahar, Ron Harris, and Meron Gross of Tel Aviv University, which includes various statistical examinations of the whole body of (published) Supreme Court decisions. Examining the reference patterns of the judges, the authors point out that the relative portion of references to Continental Law (which includes references to German law) is marginal: an annual average of 0.5 percent from all citations. It also emerges from their study that during the first decades of the State of Israel, in which the German-bred presence at the Court was most substantial, the percentages of Continental references were slightly higher. However, they never exceeded two percent of all references.[48]

The second study, by Yoram Shahar, focused on the private diaries of Uri Yadin, the head of the legislation department at the Ministry of Justice during the early years of the State. It emerges from Shahar's study that the German-born Yadin attempted, with some support from Justice Minister Pinchas Rosen, to steer the developing Israeli legal system away from the heritage of the English Common Law. Yadin presented his legislative innovations as original or as inspired by the Continental legal thinking in general. Yet his proposed reforms in the law of evidence, as well as the introduction of the principle of good faith in civil legislation, resemble the German legal system far more than any other "Continental" setting. It seems that Yadin sought to obscure the German inspiration and direct influence on his proposals. Professor Shahar offers two explanations for this obfuscation: Yadin may have feared public distaste for any German import, or more specifically, he may have anticipated that Israelis would not welcome ideas that originated from a language and legal system accessible to very few jurists.[49]

The tendency to obscure or play down the German influence on Israeli law may also help to understand the small number of references to German legal

Civil Appeal [C.A.] 815/77, Liebensohn-Stein v. Authorised Executive under Nazi Persecution Disabled Victims Act, 32(3) P.D. 269, 275 (our translation).

48 Yoram Shahar et al., *Nohagei histamchut shel beyt ha-mishpat ha-elyon — nituchim kamutiyim [Supreme Court Reference Patterns — Quantitative Analyses]*, 27 Mishpatim 119 (1996) (Hebrew).

49 Y. Shahar, *Yomano Shel Uri Yadin [Uri Yadin's Diary]*, 16 Iyunei Mishpat 537–57 (1992) (Hebrew).

sources and to German culture in the judgments of the Supreme Court and to explain why direct references cannot serve as the sole measure for the German legacy of the Israeli jurisprudence.[50]

One of the most interesting findings of our statistical examination of Supreme Court references to German law and culture is that the justices who have the highest records of such references are not the native German judges, but those who were born elsewhere and graduated from German universities. Yoel Sussman, born in Krakow, holds the record of twenty-three references to German law and culture. Moshe Silberg, a Lithuanian, provides us with ten references. The German-born judges seem to have been less eager to refer to German law and culture: Haim Cohn and Moshe Landau did so seven times each, Alfred Witkon six times, and other natives of Germany only three times.[51]

Haim Cohn told us an anecdote that might lend some support, or at least some color, to these findings. Justice Sussman, according to Cohn, knew all the birthdays of all the German emperors by heart, and he used to greet his colleagues in Court with special mentions of those days. This humorous yet emotional tribute added to Sussman's famous dedication to juridical procedure thus place this East European in a more "German" position (not only in legal orientation and temperament) than that of his German-born colleagues. Such is the power of an adopted cultural identity.

We should add that in the last two decades, some normalization has taken place in the Israeli attitude to German law, as well as other aspects of Germany. There is an increasing willingness to learn and import it, even in the hitherto inadmissible realms of public law and constitutional law. In recent years Supreme Court justices, in particular Yitzhak Zamir and Aharon Barak, have made many references to German law. An unspoken taboo has been lifted.

50 Despite some normalization apparent in the Israeli approach to German jurisprudence since the early 1980s, the tendency to pass over, in silence, German influences is still apparent today. The proposal for a new general part of the Penal Code (1992), as one of its authors, Prof. Mordechai Kremnitzer, has openly admitted, has been strongly influenced by German legislation, but no German sources are mentioned in the official draft. Since this proposal includes detailed comparisons with other Continental systems, such as the Greek, Belgian, French, Swiss, and Icelandic systems, the absence of German law is especially conspicuous.

51 The justices relevant to this discussion served on the Supreme Court for a roughly similar number of years, so the duration of tenure should not significantly affect the quantitative comparison.

## IV. The *Yeredor* Case: A Test-Case of the German Impact on Israeli Juridical Thought

Our statistical account of direct references to German law or history yielded results that are not only meager but also may be misleading. The statistical account gives equal weight to run-of-the-mill Court decisions with regard, for example, to rental laws, which refer to German statutes,[52] and to more substantial cases in which the references to German law and history are of great importance and impact.

An interesting aspect of the German, especially the Weimarian, subtext of the Israeli Supreme Court is that it sometimes crops up in unexpected contexts and in cases to which it is not *prima facie* relevant. One example is Justice Landau's decision in a libel suit filed by the Electricity Company against the newspaper *Ha'aretz*. While dealing with this ordinary case of libel, Landau quite suddenly wrote:

> It is noteworthy that one of the most effective tools used by Hitler and his accessories to obliterate the democratic regime in Weimar Germany was the ruthless defamation of its leaders, without a proper response by the courts.... It can be feared that history will repeat itself.[53]

This mention of Weimar Germany may appear farfetched: this was a private law case, albeit touching on the freedom of expression, that had nothing to do with the government, the State of Israel, or the defense of democracy. Such out-of-context recollections of the German past may demonstrate the extent to which it weighed on the minds of German-born and German-educated Supreme Court judges. It was simply on their minds, constantly and especially when considering the benefits and dangers of the freedom of expression.

And when such questions were indeed brought to touch on the existence and character of the State of Israel, the German past became a momentous source of inspiration. This happened in 1965 in one of the most important, best known, and most frequently taught Supreme Court rulings in Israeli history. This epoch-making decision to which we now turn is the Elections

52 C.A. 375/45, Alon v. Melnik, 10(1) P.D. 486.

53 Further Hearing [F.H.] 9/77, Elec. Co. v. Ha'aretz, 32(3) P.D. 337, 346–47 (our translation). It ought to be mentioned that in this case, neither the Government nor the State was involved at all.

Appeal *Yeredor v. Central Elections Committee for Sixth Knesset*, known as the *Yeredor* case.[54] The opinions reached in this case reveal, we argue, not only the German legacy of the Supreme Court but also its Anglo-American legacy and the complexity of their intertwined impacts. The case therefore offers an excellent test case for the issues discussed here and merits close examination.

Put briefly, the story is as follows. The Knesset Elections Law[55] provides that every political party that wishes to become a candidate in elections has to register with the Central Elections Committee. The Law also provides that the Committee will approve every list that fulfills several technical requirements, such as presenting a list of 750 supporters and depositing a certain sum of money. The Socialist List, a political party associated with Arab and Jewish left-wing groups, applied to the Elections Committee according to this procedure, fulfilling all the technical requirements and seeking approval for the elections to the Sixth Knesset in 1965. The Elections Committee (headed by Justice Landau of the Supreme Court) refused to admit the Socialist List on the grounds that it called for the abolition of the Jewish State and its replacement by a Palestinian democracy and on the grounds that the list included candidates who belonged to an association that had been declared illegal by an order of the Minister of Defense. The Socialist List appealed to the Supreme Court of Israel sitting as a court for elections appeals.

The case was heard by three justices: the "German" Haim Cohn, the "American" Simon Agranat, and the ardent Polish-born Germanophile Yoel Sussman. As it happened, all three chose to respond to the Socialist List appeal by invoking, among other matters, a German perspective.

A two-to-one majority decided against the appeal, and it was Cohn who gave the dissenting opinion. He held that in the absence of an explicit authority in the Elections Act, the Elections Committee has no power to reject a list because of its platform or the identity of its members, and therefore, the appeal ought to be allowed. Cohn wrote:

> In some countries there are values of several kinds, such as state security, or the sanctity of the religion, or the achievements of revolu-

54 Elections Appeal [E.A.] 1/65, Yeredor v. Cent. Elections Comm., 19(3) P.D. 365. Haim Cohn, who was one of the justices in this case, declared it the most important judgment handed down by him; Sassar, *supra* note 44, at 189.

55 Knesset Election Law, 1959, para. 63.

> tion, or the dangers of counter-revolution, that would pardon any crime and atone for any action performed without authority and contrary to the law. Some of those countries have invented for themselves a "natural law" which is superior to any legal norm and annuls it when the need arises, on the grounds that necessity knows no law.[56] All these are not the ways of the State of Israel; its ways are ways of law, and its law is issued or explicitly authorised by the Knesset.[57]

This was a formalistic position, indeed reminiscent of the German school of Natural Law and not at all typical of Cohn's juridical ideology and usual pattern of decision-making.

Yet Cohn proceeded to discuss the desirable (as opposed to the existing) legal situation. And at this point he chose to cite — for the first time in the history of Israel's Supreme Court — from the *Grundgesetz* (Constitution) of the Federal Republic of Germany, which limits the freedom to be elected granted to political parties aiming to violate the fundamentals of a free democracy or to endanger the existence of the Federal Republic of Germany. Cohn also cited judgments of the German Constitutional Court that approved these articles, considering them part of "a fighting democracy." Cohn clearly presented the new German legislation, which stemmed from the lessons learned after the collapse of the Weimar Republic, as a lesson to be learned by Israel: "This is a legislative course that may serve as an example for our own legislature."[58]

In the majority opinion, the President of the Court, Justice Agranat, held that the Elections Committee had the authority to reject the Socialist List. Such authority rested, in his view, on the Declaration of Independence of 1948, which specified the "Nation's Vision" and the "Credo" of the State of Israel. Despite the fact that the Declaration had not been recognized by the courts as a formal legislative instrument in Israeli law, Agranat now presented it as a fundamental constitutional document that ought to guide the interpretation of every piece of legislation. This reasoning is rooted in the American constitutional tradition, but Agranat sought to fortify it by alluding to the German example. To this purpose he cited an earlier decision on a similar case, written by his German-born colleague Alfred Witkon:

56 Cohn uses the ancient Hebrew phrase "*et la'asot haferu ha-tora.*"

57 *Yeredor* at 382. An English translation of Cohn's ruling can be found in H. Cohen, 2 Selected Essays 384 (A. Barak & R. Gavison eds., 1992).

58 *Yeredor* at 384.

> Not infrequently, in the history of well-administrated democracies, have fascist and totalitarian movements risen against them, using the freedom of expression, freedom of the press and freedom of association granted by the state, in order to conduct their destructive activities under their auspices. Whoever has seen this in the days of the Weimar Republic will never forget the lesson.[59]

The third justice on the bench, Justice Sussman, concurred with Agranat's decision to dismiss the Socialist List's appeal, but offered a different reasoning. Like Agranat, he evoked the Weimarian catastrophe. Like Cohn, he made use of judgments from the Federal Republic of Germany. But Sussman's reference is to German court decisions that recognized the existence of an unwritten law, seen as superior to positive legislation and even to the written constitution. Sussman held that

> whether we call these laws "natural law" to show that they reflect the very nature of a state ruled by law, or whether we call them by another name, I am of the opinion that our life experience obliges us not to repeat that horrible mistake that we have all witnessed.[60]

Here, for the first time in Israel's legal history, the Supreme Court used the concept of Natural Law in a judgment. And, paradoxically, the judge who introduced this concept was no other than Sussman, famous for being the champion of legal procedure and the most formalistic of the Supreme Court judges.

It appears that the legal and moral complexity of the *Yeredor* case and the poignant memory of the failure of German democracy to defend itself caused a surprising reversal of jurisprudential character: the formalist Sussman chose to champion natural law to prevent a non-Zionist party from seeking election, while the moralist Cohn opted for a formalistic path to allow the party the right of election.[61]

59 *Yeredor* at 388. The citation is taken from Supreme Court case 253/64, Jiryis v. Adm'r of Dist. of Haifa, 18(4) P.D. 673. In this case, an application by the *Al Ard* Movement (the same group that formed the Socialist Party) to quash a decision denying it the right of association was dismissed. The refusal to register the Movement was on the grounds that its official constitution called for the abolition of the State of Israel. Witkon's words are cited also in the decision on freedom of expression, written by Justice Moshe Landau, which we mentioned earlier; F.H. 9/77, Elec. Co. v. *Ha'aretz*, 32(4) P.D. 337. *See also* Witkon, *supra* note 20, at 173.

60 *Yeredor* at 390.

61 See also Cohn's possibly ironic words on the "flexibility" of his colleague Sussman, who,

What is the meaning of this dramatic moment in the history of the Israeli legislature and judicature? The German past of the Supreme Court judges echoed in the *Yeredor* decision more powerfully than in any other. But the echo was more complicated than one may expect, and the "German face" of the particular decision-makers and of the Supreme Court in general turned out to be multifaceted. On one level, they all seem to have shared the belief that a strong judicial branch must boldly defend a young democracy in its fight against its enemies from within. This conviction was evidently gleaned from the constitutional failure of the Weimar Republic. But from that point onward, the lessons of history become more equivocal.

At first reading, it is easy to overlook the fascinating transformation of the Weimarian lesson in the *Yeredor* case: while courts of law in Weimar had been heavy-handed with the political left and had underestimated the danger coming from the anti-democratic right, the Socialist List that was banned from running in the 1965 Israeli elections was a distinctly left-wing party. It was not an enemy of democracy but an enemy of Zionism. Its platform did not include an assault on democratic government, but a call for reforming the State of Israel into a secular State with equal rights for all its citizens, Jews and Arabs. What the Supreme Court in fact did was transform the defense of democracy — the very gist of the Weimar lesson — into a defense of Zionism and of the Jewish character of the State of Israel. This transformation may well be a defensible one, but the Court did not bother to defend it; the full identification of democracy with Zionism remained unexplained. For all we can tell, it may have even been unconscious.

The transformation of self-defending democracy into court-defended Zionism was completed nineteen years later, when the Supreme Court was called upon to apply the *Yeredor* precedent to the *Kach* Party case. This time, an extreme right-wing party representing nationalist Jews and headed by Meir Kahana sought election to the Knesset on a racist platform. The Court was asked to decide whether the party ought to be banned for its alleged threat to democracy.[62]

"in an hour of need, when it was necessary to act for his country and in defence of democracy... was ready to invent, or to pick from the heavens, a natural supra-constitutional law, only to confront the danger"; H. Cohn, *Me'or panim ba-mishpat [Amiability in Adjudication], in* Sefer Sussman, *supra* note 43, at 21.

62 E.A. 2/84, Neiman v. Chair of Cent. Elections Comm. to Eleventh Knesset, 39(2) P.D. 225.

This time all five justices who heard the case decided to allow the *Kach* Party to take part in the elections. Justice Shamgar, a native of Danzig, Justice Elon, born in Germany, and Justice Beisky, a Holocaust survivor, all upheld the *Yeredor* precedent but refused to apply it to the new case. The Court drew a line between the Socialist List, which had denied Israel's Jewish character, and the *Kach* platform, which gave a racist and anti-democratic interpretation to that Jewish character. The use of the concept of Natural Law to protect Zionism was approved, but it was not extended to defend democracy from political parties canvassing racist views. It was claimed that democracy would be better served by allowing such parties to campaign and be elected.[63]

Thus, in a way, the Israeli judges followed their Weimar colleagues by being heavy-handed with the left and light-handed with the right. It is, therefore, doubtful whether the famous "Weimarian lesson" was learned after all.[64] Furthermore, the insertion of Zionism in place of democracy as a

63 Justice Shamgar, for example, asserted that "the path chosen by the majority [judges] in E.A. 1/65 [*Yeredor v. Central Elections Committee*] was optimal in regard to the Court's authority, and we can clearly infer from their reasoning that under any set of circumstances essentially less radical the Court majority in this case would have avoided a decision banning [the party]" (*Neiman* at 275). Shamgar even advised the legislature to refrain from extending the *Yeredor* precedent to parties seen as endangering democracy: "There are no special problems in legislation which limits the right to participate in the elections for parties wishing to harm the very existence of the State. But as the circle is *widened* to include various types of bodies from which electioneering is to be denied *in advance*, the repercussions of such legislation on our fundamental democratic concepts grow too" (*Yeredor* at 278; emphases in original).

The two other justices sitting on the case joined the decision not to ban the *Kach* Party from running for the Knesset, but rejected the *Yeredor* precedent. Deputy President Ben-Porat accepted Justice Cohn's point from the *Yeredor* case, that the Central Elections Committee was not authorized to ban parties for non-technical reasons. Justice Barak was the only justice in the *Neiman* case to point out the transition from self-defending democracy to court-defended Zionism. He accepted the majority ruling in *Yeredor* that the Elections Committee has the authority to ban a list on the basis of its platform, but claimed that no distinction should be made between a platform denying Israel's right to exist and a platform acknowledging that right but denying Israel's democratic character. In either case, Barak would allow the banning of a party only if there was a realistic possibility that such political views would be put to practice (*Neiman* at 305).

64 It is noteworthy that the American born and educated Justice Agranat was the one to protect the freedom of speech of the extreme left, in his famous ruling in the 1953 *Kol Ha'am* case: H.C. 75/53, Kol Ha'am Co. v. Minister of the Interior, 7 P.D. 871. There Agranat set the "near certainty" test to decide whether a newspaper may be closed down. Yet ten years later, when he wrote the majority opinion in the *Yeredor* case, Agranat

unique value worthy of juridical protection, even at the expense of curbing political rights, was now openly acknowledged. No wonder the 1984 ruling on the *Kach* Party was one of the most publicly controversial decisions in the history of the Supreme Court.

## V. Liberalism, *Rechtsstaat*, and Enlightened Public

We now turn to a third level of analysis. Having surveyed the statistics of German references in the Supreme Court decisions and having looked more closely at the *Yeredor* case, we now move on to a critique of the implicit German effect on some of the fundamental concepts of Israeli legal discourse shaped by the Supreme Court. The argument we will promote is twofold: first, that there *has been* a German effect, subtle and unacknowledged, on Israeli legal and political discourse; second, that an understanding of the German origins of our notions of liberty, law, State, and democracy may shed new light on the Israeli versions of these concepts, which often diverge from the American and Western European equivalents.

Liberalism is a good case in point. A person raised in the German political culture attached meanings to the concept and terminology of civil liberty that differed substantially from the British or American equivalents. In her fascinating study of the early years of the Supreme Court, Pnina Lahav has pointed to "a legal theory based on a mismatch of collectivism and liberalism" and analyzed the use of this confused blend by the Court's first-generation judges.[65] Our own examination of the *Yeredor* case might lead to a similar conclusion. The Supreme Court's liberalism appears, in some cases, to bear distinct marks of nationalism and is powerfully counterbalanced — at times overrun — by collective values.

From a German perspective, however, the blend appears to be far less confused. German liberalism was historically attached to the State, it was often "collectivist," and it was far less individual-oriented than its Western equivalents.[66] Liberal legislation in its heyday, during the second half of the nineteenth century, indeed acknowledged individual rights, but not on a

disregarded his own precedent and the test set by him. Cohn, and not Agranat, was the one to mention the "clear and present danger" test in the context of *Yeredor*, albeit only theoretically (*see Yeredor* at 381).

65 Lahav, *Ha-oz veha-misra, supra* note 3, at 480.

66 *See especially* James J. Sheehan, German Liberalism in the Nineteenth Century (1974).

universal basis. As the historians David Blackbourn and Geoff Eley have recently emphasized, such legislation focused on the rights of the *Bürger*, the property-owning private citizen, and not on the political rights of the *Staatsbürger*, the full-fledged politically active citizen. The penal code of the Second Empire and the civil code of 1900 (BGB) defended the freedom of property with greater enthusiasm than any other individual right. In the spirit of Roman law and according to the tradition of Natural Law, the individual person was conceived first and foremost as a legal entity. Individual liberty was understood primarily in terms of the freedom of contract.[67]

Economic liberalism was not the only doctrine of civic freedom that took shape in nineteenth-century Germany. Another tradition grew alongside it, a collectivist and nationalist liberalism that accentuated shared civic commitments. It was this current of thought, in temporary alliance with socialist ideas, that prompted the pioneering German legislation in the areas of social rights, income security, national and health insurance. This approach, however, neglected other aspects of individual protection. It did not endorse civil rights that could work against the nation-state, such as freedom of thought, expression, and association. It highlighted a concept of "civic duty" borrowed from the moral philosophy of Immanuel Kant and profoundly different from the British and American concept of "civil right." Kant's rationalist theory of freedom was especially prone to nationalist and collectivist interpretations: since Reason is universal, rational human beings were expected to reach similar conclusions and make similar choices in their moral and political life. Freedom, in this tradition, entailed fulfilling one's duties, as dictated by Reason, in the private as well as the public spheres. This accent on collective duty sharply distinguished mainstream nineteenth-century German liberalism from contemporary British and American liberalism, which tended to emphasize the right to a private life free from unnecessary coercion by the State or the community. It may be added that many secularized German Jews embraced Kantian liberalism with enthusiasm.[68]

We do not, of course, wish to argue that the German tradition of nationalist or State-centered liberalism was imported lock, stock, and barrel into Israeli political and judicial culture. We do suggest that its neglect has left a

67 David Blackbourn & Geoff Eley, The Pecularities of German History: Bourgeois Society and Politics in Nineteenth-Century Germany 190–94 (1984).

68 *Cf.* Sheehan, *supra* note 66, at 189; on the attitude of German Jews to Kant, see Peter Gay, Freud, Jews and Other Germans: Masters and Victims in Modernist Culture 117–19 (1978).

significant part of the intellectual landscape of our first Supreme Court judges a *terra incognita* to their posterity. Israelis who inherited the political notions of Eastern European Socialist Zionism or even those trained in the world of British and American liberal democracy would find it difficult to recognize the particular input of the German liberal legacy. Consider, for example, the words of Justice Silberg at an interview he gave in 1973:

> The essence of democracy is that a citizen does not receive instructions, but undertakes duties.[69]

The clear Kantian echo of such phrasing may sound alien to readers associating democracy with civil rights. Even more alien are Silberg's subsequent pronouncements:

> We live in the middle of the twentieth century. We have gone a long way from the "Manchesterian" State, the "laissez-faire, laissez-passer" State of the nineteenth century. In our times even the democratic regime is all encompassing, and it places all branches of life under its sceptre. It does not refrain, nor should it refrain, from invading the sphere of the individual.[70]

This somewhat totalitarian sketch of democracy does not get any better when Justice Silberg assures us that

> [...] under a democratic regime the penetration does not come from the outside and does not fall from above, because the government itself is the flesh and blood of the citizen, residing with him in the same mental climate. This proximity smoothes the sharp edge of the intervention and palliates the hurt of private interests, because "lovers' wounds are true."[71]

Such physical intimacy between the government and the governed, an intimacy bordering (if we take Justice Silberg's metaphors seriously) on violent incest, is not exactly part of today's mainstream notion of liberal democracy, in Israel or elsewhere. We may reject Silberg's definition with a smile or a shudder; but first it would be useful to note that his words come directly from the late nineteenth-century German debate on political and

69 The interview was given to Abraham Haim Elchanani for his book, Yerushalayim ve-anashim ba [Jerusalem and People in It] 418–22 (1973) (Hebrew).

70 *Id.* at 422.

71 *Id.* at 422.

economic liberalism. The 1973 interview with Silberg echoed, uncannily, the pre-1900 debate on the German civil code. It was there that an extreme economic liberalism (associated with the typical German coin *Manchestertum*, the concept of unhampered capital-based industrialization) fought against an interventionist social democracy striving to deepen governmental penetration into social and economic life. Silberg's commitment to that sort of democracy, which would have sounded progressive enough prior to 1933, can be read as a bewildering anti-liberal manifesto in the late twentieth century. Was Silberg aware of this? Probably not.

We are now in the territory of language and the use of language. Our aim is to show that there was a particular set of concepts brought to Palestine by the German-trained immigrants. This glossary was translated into Hebrew, and it was shifted and applied to suit the judicial and political realities in Israel. Of course, such concepts would not be circulating with a tag stating that they were made in Germany. Nor would they necessarily be an exclusive German product. Yet such concepts would carry particular meanings and connotations gleaned from the German past, as we have seen in Silberg's use of the term "democracy," and differ from non-German uses of similar term, exemplified by Lahav's use of the term "liberalism." A detailed linguistic and conceptual analysis of court decisions, academic papers, journalistic writings, and personal memoirs may provide many components of the German glossary.[72] For the purposes of the present paper, we have focused on two key concepts: the "Rechtsstaat" and the "enlightened public."

Recent historical study has pointed to the great importance of the German Enlightenment tradition for the formation of German-Jewish culture and identity in the nineteenth century. Jewish emancipation coincided with the age of Goethe, Schiller, and Humboldt. This has been known as the age of *Bildung*, an untranslatable term denoting the inner creativity and deep self-education of the human spirit. The German Enlightenment fostered moderate humanism and liberalism, to which the Jews were deeply committed. Indeed, the idea of *Bildung* touched on the self-understanding of secularized German Jews with special precision. The historian George Mosse has recently depicted the Weimar Jews as the last standard-bearers of true

72 This approach has been inspired by the work of J.G.A. Pocock and Quentin Skinner, but only loosely so, because our terrain is very different from that of early modern Europe. *Cf.* Melvin Richter, *Reconstructing the History of Political Languages: Pocock, Skinner and the Geschichtliche Grundbegriffe*, 29 Hist. & Theory 38–70 (1989).

Enlightenment values in the face of a corrupted and reactionary modern Germany.[73]

Israeli historian Steven Aschheim offers a correction to Mosse's observation: the Enlightenment commitment, he argues, was not shared by all Weimar Jews. There was a radical intellectual wing, which included Walter Benjamin and Gerschom Scholem, that turned away from enlightened liberalism towards a path of nihilism, messianism, and mysticism. This trend, Aschheim claims, was far more suitable to the prevalent Weimar modernism, which was led by Friedrich Nietzsche into an anti-rational and anti-liberal position.[74]

If Aschheim's contention is true with regard to the Benjamin-Scholem school of thought, it can safely be said that the German-Jewish jurists who laid the foundations of Israel's Supreme Court did not abandon the tradition of *Bildung* and Enlightenment. While Scholem, Buber, and their students made their way to the Hebrew University of Jerusalem, a different circle of Weimar immigrants settled in the Israeli judiciary and other legal circles. They did not subject their liberal legacy, in its particular German contours, to the critical tools developed by the Weimar modernists. Their enlightened and humanist outlook, at times blended with a powerful sense of national commitment, remained unassailable and, in some senses, downright conservative.

An important example is the German concept of "*Rechtsstaat.*" This term, denoting a State governed by laws (literally "a State of law" or "a State of right"), has no exact equivalent in English. It has been part of the German political vocabulary since the nineteenth century, and it was seen as uniquely German both within and beyond its native land.[75] In its Hebrew translation, "*medinat chok,*" it was used in several important Court decisions and has been prevalent in Israel's jurisprudential and political discourse since the 1950s. It was not used exclusively by German-bred judges because it was not clearly distinguished from the Anglo-American term "rule of law." Yet

73 George L. Mosse, German Jews beyond Judaism (1985).

74 Steven Aschheim, Yehudei Germania me'ever la-Bildung vela-liberalism: ha-techiya ha-yehudit ha-radikalit be-republikat Weimar [German Jews beyond Bildung and Liberalism: The Radical Jewish Revival in the Weimar Republic] (1995) (Hebrew).

75 E.-W. Böckenförde, *Entstehung und Wandel des Rechtsstaatsbegriffs, in* Staat, Gesellschaft und Freiheit (1976); James Q. Whitman, The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change 95 (1990).

*medinat chok* can be associated exclusively with the German tradition.[76]

This usage is significant. The Hebrew concept of *medinat chok* is widely used today, invariably in a positive sense. It is considered ideologically and politically neutral. Yet in the German context, things were rather different. The concept of Rechtsstaat was ideologically colored from its early beginnings. In the nineteenth century, despite its strong liberal connotations, it served also a conservative Christian world-view and sometimes became associated with tough and mechanical legalism.[77] It appeared in the writings of R.V. Mohl, K.S. Zachariä, and F.J. Stahl, who represented a variety of social philosophies, but shared an antagonism towards practical, cynical "politics," be they absolutist or revolutionary. The concept of *Rechtsstaat* allowed liberals as well as monarchists to create a new system of legitimacy and to represent the people without granting them full sovereignty. It was enlisted on the side of conservatism, paternalism, or moderate reform.

In nineteenth-century legal theory, the concept of *Rechtsstaat* helped to evade moral and meta-legal discussions of society and State. In the debates touching on the sanctity of private property, the notion of *Rechtsstaat* had a clear anti-socialist resonance. It was, nevertheless, considered an innovative and progressive concept, but not in a sense that promoted democratization or social justice. The novelty of *Rechtsstaat* was linked to a scientific and rationalistic view of constitutional government. It was part of a project that modernized the ancient "German freedom" in a new nationalist context.[78] This idea of national freedom was not about individual liberties, as in the British and American tradition, and not about revolutionary civic emancipation, as in the French experience. It was collectivist, elitist, and controlled from within the administrative and academic establishments.

During the twentieth century, the spectrum of German usage of both "liberalism" and "*Rechtsstaat*" was broader than might be expected. Na-

76 On the appearance of the concept of "*medinat chok*" in Supreme Court rulings, see, for example, Criminal Appeal [Cr.A.] 596/73, Mahamid v. State of Israel, 28(1) P.D. 773, 778 (per Asher, J.); Cr.A. 312/73, Mazrawa v. State of Israel, 28(2) P.D. 805, 809 (per Cohn, J.); H.C. 188/77, Koptic Mutran v. Gov't of Israel, 33(1) P.D. 225, 237, 251 (per Landau, J., Asher, J.). A typical association of this concept with the German-Jewish legacy is Shlomo Erel's claim that "Pinhas Rosen turned Israel, within a very short time, into a State governed by laws [*medinat chok*] and built a judicial system ... free from the transgressions of both the legislature and the executive"; Erel, *supra* note 4, at 187.

77 Ringer, *supra* note 17, at 114–15, 124.

78 Whitman, *supra* note 75, at 96–98.

tionalist jurists, including those who worked under the National Socialist regime, were seen by themselves and by others as loyal servants of the *Rechtsstaat*. Even after the Second World War, the Berlin jurist Rudolf Smend could still praise his colleague Eduard Kohlrausch, a member of Hitler's administration until 1942, for having been "pushed during the era of the Third Reich into the ungrateful role of protecting the remnants of liberal order and *Rechtsstaat*, and stood the test well."[79] Kohlrausch had, indeed, exercised a moderating influence in the Nazi penal law committee (1936–1938), but associating his work with liberalism and the rule of law surely stretches the meanings of these terms a very long way by late twentieth-century standards.

All these German contexts have vanished in the standard Hebrew translation of "*Rechtsstaat*" into "*medinat chok.*"[80] To understand this shift in meaning, we need to gaze beyond German juridical terminology to the broader import of German culture. Indeed, the Weimar Republic was not only a *Rechtsstaat* but also a *Kulturstaat*, and its impact on young men and women went deeper than a mere technical education or terminological apparatus. In an interview with Justice Haim Cohn, he told us of the broad spectrum of cultural and artistic experiences on offer to young minds in Germany of the 1920s. Even law students, he said, had enough time on their hands to enjoy music and art. Academic duties centered on examinations rather than intensive class attendance. Cohn himself, having completed his academic legal training within two or three semesters, was able to attend many lectures in other fields of learning and spent a great deal of time at the theater. Such open-minded student life harked back from the age of narrow specialization to that of extensive *Bildung*.[81] Cohn was not alone: many

79 Smend, *supra* note 28, at 121.

80 Translation is never fully transparent. The Hebrew translation of the English term "rule of law" into "*shilton ha-chok*" is problematic in its own way. The English term "law" denotes both a statute and a broader concept of justice and right. The Hebrew term "*chok*" comes closer to the formalistic and legalistic meaning, while the broader concept is denoted by another word, "*mishpat.*" This has led Professor Leon Sheleff to propose an alternative Hebrew rendering, "*marut ha-mishpat.*" *See* L. Sheleff, *Mi-shilton ha-chok le-marut ha-mishpat: hirhurim ve-ir'urim al musag-yesod [From Shilton Ha-Chok to Marut Ha-Mishpat: Thoughts and Objections on a Key Concept]*, 17 Iyunei Mishpat 559 (1996) (Hebrew). In the same vein, the German term "*Recht*" may be closer to the Hebrew "*mishpat,*" while "*chok*" correlates more closely to "*Gesetz.*" Nevertheless, the German "*Recthsstaat*" connotes a narrower legalistic meaning than the English "rule of law."

81 *Cf.* Sassar, *supra* note 44, at 43, 240. And yet, as we argued earlier, the taste for "general

anecdotes and fond memories are told on the musical, philosophical, and literary tastes of the German-educated judges. We may, therefore, assume that German cultural traditions touched them more deeply than the handful of direct references to Goethe and Schiller may suggest.[82]

This leads us to another cluster of key concepts that are used often enough in present-day Israeli discourse, without any mention of their roots in particularly German ideas of progress and enlightenment. These concepts have enjoyed, in our juridical and political idiom, the same unquestioned prestige as the idea of the *Rechtsstaat*. They are best represented by the term "*ha-tzibur ha-na'or*," or "the enlightened public."

Justice Witkon entered this territory in a 1962 essay discussing "the opinion of the progressive public," which the Court, he argued, ought to represent. This public, in his view, wishes to belong to "the family of enlightened nations" and to share the values of "the entire civilized world." The Court must accordingly defend "the values of civilization," which is constantly progressing, but nevertheless threatened by doubts, primitivism, and religion.[83]

A year later, Witkon echoed the same ideas in his decision in the case of *Riesenfeld v. Yaakobson*. The justices were to decide whether a promise of marriage made by an already married man was a contract breaching the public morality and the general order and, hence, null and void. "It is our duty as judges," Witkon wrote in his decision,

> to express not our private opinions, but what we see as reflecting the public opinion, by which is meant the educated and progressive part of it.... It seems to me that our public [in present-day Israel] wishes to regard itself as part of the family of enlightened nations and to take part in the particular values that shape the entire civilized world. Only rarely, I believe, can a breach be found between our nation's conception of these values and the one accepted in the world at large.[84]

culture" no longer led the way to serious intellectual encounters and interdisciplinary approaches within academic teaching and research.

82 See for example Witkon, *supra* note 20, at 59.

83 A. Witkon, *Ha-mishpat be-eretz mitpatachat [The Law in a Developing Country], in* Sefer Yovel le-Pinchas Rosen 66–85 (Haim Cohn ed., 1962) (Hebrew) (*especially* at 82–84). See also a memorial address to Alfred Witkon, given by H. Cohn, *Al Alfred Witkon [About Alfred Witkon], reprinted in* Mishpat ve-shiput, *supra* note 20, at 16–17.

84 C.A. 337/62, Riesenfeld v. Yaakobson, 17 P.D. 1009, 1026.

In the same year, Justice Landau coined the Hebrew term "*ha-tzibur ha-na'or*" and demanded that the judge "be faithful interpreter of the accepted views of the enlightened public, of which he is a member."[85] This test was subsequently adopted by other Supreme Court judges on several occasions[86] and became part of the Israeli juridical canon. Thirty years later, Justice Aharon Barak was able to quote Landau's words in one of his own decisions, adding that they had become "a general standard, according to which a judge should act while giving normative contents to various aspects of the public ordinance."[87]

In a recent essay dedicated to the Israeli concept of "the enlightened public," Barak celebrates this concept and presents it as one of the fundamental and most powerful metaphors of Israeli jurisdiction. Here is a concept flexible enough, Barak writes, to accommodate both Jewish and universal values, both transitive and permanent ones. There is, he asserts, "no contradiction between "the enlightened public" and the values of the State of Israel as a Jewish State."[88] On this point, Barak is following a long tradition, stemming from the German-Jewish Enlightenment, which sought to accommodate universal and Jewish (and, later, also Zionist) values.

It seems that the Israeli judges, from Witkon to Barak, have overlooked the complex and problematic past of the German concept of enlightened public, as well as that of the *Rechtsstaat*. They did not acknowledge the Weimar critique of the concept of the Enlightenment. In particular, they ignored the exclusive, middle-class, property-owning meaning of the term "enlightened public." This oversight is linked to their avoidance of the legalistic political hazards implicit in the concept of *Rechtsstaat*. Both concepts, even when they are recruited to support liberal and humanist values, incorporate a sense of cultural elitism. "The reasonableness of a secondary legislation," wrote Haim Cohn, "... is measured by the good

85 C.A. 461/62, Zim Co. v. Maziar, 17 P.D. 1319, 1335.

86 Then-President Agranat famously joined Justice Landau in extending the enlightened public test from private law to public law in the High Court case of H.C. 58/68, Shalit v. Minister of Interior, 23(2) P.D. 477, 600; for Landau's use of the test in the same decision, see *id.* at 520.

87 H.C. 693/91, Efrat v. Population Registrar, 47(1) P.D. 749.

88 A. Barak, *Ha-tsibur ha-na'or, in* 2 Sefer Landau, *supra* note 16, at 677, 693. Elsewhere Barak examined the concept of progress as a feature of "western juridical culture," referring to the work of the German jurist Rudolf von Jhering; A. Barak, *Shitat ha-mishpat be-yisrael, masorta ve-tarbuta [The Juridical System in Israel, Its Tradition and Culture]*, 40 Hapraklit 197–217 (Hebrew) (*especially* at 201).

standard acceptable to most persons in a democratic society and in *medinat chok*. And no standard is better or more acceptable than the fundamental standard of human dignity. A free and enlightened society differs from the savage society or from the oppressed society by the measure of dignity allotted to the human being as such."[89] Cohn's use of our key concepts is a clear example of the cultural self-satisfaction typical of Supreme Court discourse. The humanistic principle, authentic in itself, leans on a strong sense of the proximity of inferior societies and unenlightened minorities.

The conceptual framework of "Enlightenment," "progress," "culture," and "civilization," rooted in the rationalist optimism of the eighteenth century, have affected German thought about State and society during the nineteenth century and in the decades preceding and following the Nazi rise to power. The idea of an ever-improving civilization derives from Lessing, Kant, and Hegel. The flag of Enlightenment has been carried into the twentieth century by liberal thinkers such as Ernst Cassirer.[90] Despite its universalistic and humanist precepts, this was a tradition firmly rooted in a particular political sphere, the liberal one, and in a specific social setting, the refined bourgeoisie. This tradition allows "the enlightened public," a group (admittedly a large one) of prosperous and educated citizens, to determine social norms and political values by means of discourse. And public discourse is not a wholly democratic matter: it requires fluency, reasonableness, and cultural orientation.

The German tradition of Enlightenment was subjected to severe criticism almost from its beginning. Herder, Schopenhauer, Marx, and Nietzsche denounced its smug exclusiveness and offered intriguing alternatives to its reliance on reason and progress. Twentieth-century modernism, which flourished during the Weimar years, attacked contemporary uses of Enlightenment as the stronghold of a conceited bourgeoisie. This assault reached its zenith in the writings of the Frankfurt School, Theodor Adorno and Max Horkheimer. Enlightenment, they claimed, shows no understanding of the non-rationalist and non-social parts of human nature. It has nothing to say to persons who remain "unreasonable" and "unenlightened," to those who cannot be part of the "public" or opt out of it, to those who stay away from the Enlightenment's luminous glow.[91]

89 H.C. 79/355, 370, 391, 373, Katlan v. Prison Serv., 34(3) P.D. 294, 305 (our translation).

90 Ernst Cassirer, The Philosophy of the Enlightenment (1932; English trans. 1952).

91 A later disciple of the Frankfurt School, Jürgen Habermas, attempted to rescue some

This opposition resounded in Weimar culture and art, and it had several prominent Jewish leaders: the existentialist Husserl and the critic Benjamin, as well as Buber and Scholem, who were deeply interested in religion and in mysticism. The latter two, who emigrated to Palestine, indeed brought with them to the Hebrew University of Jerusalem a powerful tradition of religious philosophy and the study of folklore and Kabbala. Yet the young law students who became Israel's Supreme Court judges apparently did not belong to these modernist circles, neither in Berlin and Frankfurt nor in Jerusalem. In particular, the powerful critique of the idea of progress put forward by Walter Benjamin is almost wholly absent from the confident progressivism of Israel's Supreme Court.[92]

The Israeli Supreme Court, in other words, uncritically adopted a German conceptual tradition, which is humanist and liberal, yet elitist and socially conservative. Its use of such terms as "the enlightened (or progressive) public" or "the family of enlightened nations" is devoid of any critical awareness. Witkon, Landau, and Cohn knew that the public may at times change and adjust its own principles and demanded that the Court be sensitive to such changes. But they did not seem to recognize the problems inherent in the very idea of an "enlightened public" that the Court can define and that the Court must represent.[93] They took for granted the statist and authoritative notion of medinat chok and the cultural, ethnic, and social exclusiveness of *ha-tzibur ha-na'or*.[94]

Jurists, of course, seldom take up the banners of philosophical or political avant-garde. It is not surprising and, arguably, not deplorable that radical modernism and post-Nietzschean nihilism have been absent from the lan-

central aspects of the Enlightenment from his teachers' critique by re-applying the concept of "public." *See* T.W. Adorno & M. Horkheimer, Dialectic of Enlightenment (1947; English trans. 1972); J. Habermas, The Structural Transformation of the Public Sphere (1971; English trans. 1989).

92 It is fascinating to compare the passages we have quoted from Witkon, Landau, Cohn, and Barak with Benjamin's qualms about Enlightenment and progress in such essays as "The Students' Life" and "On the Concept of History."

93 A possible exception is Justice Schershevski's claim against his colleague Witkon that German history casts doubt on the validity of the educated and progressive public as a reliable moral measure. *See* C.A. 4/66, Peretz v. Helmut, 20(4) P.D. 337, 351–52. We are grateful to Professor Adi Parush for this qualifying reference.

94 *Cf.* Dan Avnon, *"Ha-tzibur ha-na'or": yehudi ve-demokrati o liberali ve-democrati? ["The Enlightened Public": Jewish and Democratic or Liberal and Democratic?]*, 3 Mishpat u-mimshal 417–51 (1996) (Hebrew).

guage and reasoning of Israel's Supreme Court. Still, it is useful to note that such critiques of Enlightenment and even the self-irony inherent in Voltaire's rationalist optimism were never part of the Court's legacy. The first generation of Israeli Supreme Court judges was confident through and through. They trusted their intellectual sources, their methods of adjudication, the essential validity of political Zionism. Their German heritage did not encompass the Weimarian cultural skepticism. It did, however, furnish them with a nationalist brand of liberalism supported by a strong sense of being enlightened, civilized, and right.

## VI. By Way of Conclusion

The traits we have discussed are by no means the only set of cultural influences at work in the Israeli Supreme Court. They were complemented and, to some degree, counterbalanced by other ideas. We would, therefore, like to conclude this paper by mentioning yet another aspect of the German origins of the Court: the pronounced anglophilia of some of its leading members.

The effects of the British legal and juridical system on Israeli law are well known. During the British Mandate, Palestine was ruled by a corpus of Ottoman and British laws and adjudicated by a system of courts supervised by the British executive. The first generation of Israeli judges, including the immigrants from Germany, had practiced law under the British Mandate and as part of its legal system. Those years were formative years no less than the periods they spent as students in Weimar. As we have seen, Justice Witkon was qualified at the English Bar, Landau and Sussman studied in England, and Landau served as a justice of the peace under the Mandate rule.

The young State of Israel, in general, and the Supreme Court, in particular, adopted many aspects of the British legal and judicial system. An interesting example is the doctrine of the binding precedent, which was taken up by some of the "German" judges and declined by others.[95] The British influence

95 The Court was required to decide whether it is to be bound by its own precedents, before the word of the legislature was given on this matter. In H.C. 287/51, Re'em v. Minister of Finance, 8 P.D. 494, five justices — Agranat, Silberg, Guiten, Landau, and Berenson — decided unanimously to adopt the British rule regarding the binding precedent. A few years later, in H.C. 176/54, Yehoshua v. Appeal Comm. under the Disabled Law

was supplemented by strong American orientation, which was boosted by the leadership of Justice (later President) Agranat.[96] The number of references to American rulings grew over the years, especially after the American Law Reports series was purchased for the Israeli Supreme Court library.

In his beautiful obituary for Alfred Witkon, Haim Cohn described how his colleague "went to England to acquire English legal education as provisions for the road to Palestine." And yet "England was for him not merely a springboard, but some sort of regeneration: the discovery of the splendour and magnificence of English law was for the German jurist a grand and unexpected experience."[97] Cohn goes on to depict the conspicuous figure of Witkon, the neat barrister, stalking the streets of Jerusalem in the 1930s. But the revelation experienced by Witkon in London was by no means unusual. It was, indeed, a distinctly German experience.

Our point is that the English (and American) juridical impact was not only an outcome of historical accident, namely, the meeting between German-trained and British jurists in Mandatory Palestine. The admiration of things British, the fascination with "English freedom" and the English system of justice, have been a basic feature of liberal Germans since the age of Lessing and Schiller. The English model affected the thinkers of the German Enlightenment, the nineteenth-century German liberals, and the authors of the Weimar Constitution. England intrigued Heine and Brecht. It even attracted the Nazis. German anglophilia traveled with emigrants, exiles, and fugitives to the United States and also to Palestine. The collapse of the Weimar Republic in particular paved the way towards the constitutional forms of British and American models of liberal democracy.

The anglophilia of Israel's "German" Supreme Court judges was more than a private preference. It sheds light on a very public aspect of Israeli legal history. Jurists often distinguish between two main legal systems, the Continental and the Anglo-American. As long as this distinction is maintained, it is clear that the British and American legacy dominates the Israeli legal system. But the distinction that emerges from our research is a different one.

(Restitution & Rehabilitation), 9 P.D.617, Justice Witkon refused to accept this ruling and its binding force. In 1957, the legislature accepted Witkon's view in the Courts Law, 1957, which proclaims that the Supreme Court is not to be bound by its own precedents.

96 *See especially* Lahav, *Ha-oz veha-misra, supra* note 3.

97 H. Cohn, *Al Alfred Vitkon [About Alfred Witkon], reprinted in* Mishpat ve-shiput, *supra* note 20, at 15.

The Israeli judiciary, we argue, created a shared heritage of liberalism, which incorporated both Central European and Anglo-American elements. This complex liberalism indeed carried nationalistic traits, but it was, nevertheless (and perhaps for this very reason), able to face and sometimes to oppose the distinctly East European non-liberal tradition of Israel in other branches of government.

It appears that the struggles on the political form and style of the young State of Israel were played out, to some degree, in accordance with the participants' countries and cultures of origin. The legislative and executive parts of the Israeli government harked back to an East European political legacy, which was socialist in ideology and centralist in style. This tradition was personified by David Ben-Gurion, and some of its features lasted well into the 1980s. The judiciary, on the other hand, attracted graduates of German universities, who were sometimes faced with the challenge of coaxing or forcing the Russian-born and Polish-born politicians into liberal constitutional norms. We have already mentioned Pinhas Rosen's rather amazing open acknowledgment of the ethical edge ascribed to the "German" jurists.

It is not easy to prove that such struggles indeed took place. The official documents are naturally discreet. Yet in a batch of 1950s cabinet protocols that recently were opened to the public, a telling exchange can be found. In 1953, when the government debated illegal border-crossings from Egypt and Jordan and its own policy of "retaliation actions" (which eventually fed the crisis of 1956), Ben-Gurion suggested that the Israeli army conquer strategic sites in the Jordanian-held West Bank. In a cabinet meeting on May 24, the Prime Minister denounced "comrades from among the Zionists of Germany" who opposed this militant line of action. The protocol goes on to record the response of Minister Peretz Naphtali, a native of Berlin, who told Ben-Gurion that "he was proud to be a German Zionist even if it implies being a lover of peace."[98]

Such anecdotes should not be taken too far. A systematic perusal of the political and cultural exchanges between Israel's "German" and "East European" founding parents is beyond our scope. We can only suspect that many similar incidents went unrecorded. Some of them are part of an existing oral

98 Yemima Rosenthal ed., 8 Teudot le-mediniut ha-chutz shel medinat yisrael [Documents on the Foreign Affairs Policy of the State of Israel] 413 (1953), quoted in a book review by Benny Morris, *Yediot Aharonot*, 5.7.1996, pages 29–30.

lore that will be recorded, one hopes, before it is too late. Only then can a good, unofficial history of early Israeli political culture be written.

The pact between the German-trained judges of the Supreme Court and their colleagues of British and American orientation is one of the major factors in the development of an independent judicial branch in Israel, with a style substantially different from that of the other branches of government. The "German" nationalist liberalism, which fostered a strong affiliation with the Zionist national program, stabilized the Supreme Court within the consensual matrix, while also helping it to redefine this matrix along constitutional and liberal lines.

Perhaps all this goes some way towards explaining the ascending strength, the unmatched prestige, and the increasingly complicated political standing of the Israeli judiciary, powerfully led by the Supreme Court.