Fania Oz-Salzberger and Eli Salzberger

The Secret German Sources of the Israeli Supreme Court

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 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 that 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 unusual 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 most governments,[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 have actually delegated more powers over the years 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,

The Israeli Supreme Court in Jerusalem, 1953. (In the center M. Smoira, President of the Supreme Court accompanied by Supreme Court Justices, S. Asaph, I. Ollshan, S. Cheshin, S. Agranat and M. Silberg.)
Courtesy of the Israel Government Press Office

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 influence 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 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 also 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 illuminate changes in the social and political status of judges and courts. The

findings of our field research may be conducive to broader discussions along these lines.

We begin with the basic statistics and biographical sketches of the first-generation "German" judges of Israel's Supreme Court. We then 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. 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 presented on three levels: a statistical survey of references to German jurisdiction and culture; an analysis of one of the Court's most important decisions in which the German past played a particularly interesting role—the judgment in the case of *Yeredor*; and a perusal of several hidden German fingerprints on Israeli jurisprudence, including the concepts of *Rechtsstaat*, and of an "enlightened public." We conclude with a final observation on the German impact, which takes us back to the enigma we have presented in this introduction.

THE "GERMAN" JUDGES IN THE ISRAELI SUPREME COURT

The German influence on the Israeli Supreme Court has not yet been an issue for discussion or research, despite the large number of judges born and/or educated in Germany.[4] Nearly 50 percent of the Court's first-generation judges were educated in German institutions. They were part of a mass migration that reluctantly left a beloved country and culture in the wake of the Nazi rise to power. They were immediately recognized in their new homeland as a group markedly different in accent and personality from the more numerous east-European immigrants. They even earned a collective nickname—"*Yekkes*."[5] This slang term, which is still alive, has been associated over the years with both positive and negative characteristics, from punctuality to excessive toughness.

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 40 percent of the lawyers in Berlin and in Frankfurt were Jewish. Many of the hundreds of them who immigrated 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 lan-

guage 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, and Moshe Landau was among the few lower-bench Jewish judges.[7]

The establishment of the State of Israel radically changed this. The first Minister of Justice, Felix Rosenblueth (who Hebraized his name to Pinhas Rosen), was 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), Shabtai Rosen, and Haim (Herman) Cohn. The State Comptroller's 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 had joined Mapai [Eretz Yisrael Worker's Party] and acted as legal advisor to the Histadrut [Federation of Jewish Workers]. 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 judges appointed to the Court reflect an interesting cultural equilibrium: two of them were graduates of Austrian or German universities: 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 through his education, in the universities of Krakow and Vienna. He emigrated to Palestine in 1919 and was associated with the General Zionist party. 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" judges, 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 judge, 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 22 years as a judge in the Supreme Court; from 1965 he was the deputy of the 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 made by the Committee for the Appointments of Judges created by this statute.[10] Three of the appointees belonged 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.[11]

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 it twice to continue his studies at the Universities of Cambridge and London. After the establishment of the state, he served as the deputy military prosecutor and as a district court judge. He was appointed to the Supreme Court in 1953, became the Deputy President in 1970, and served as the 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 in 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 29 years, from 1953 to 1982, the last two years as President.

Witkon, a native of Berlin (1910), studied at the Universities of Bonn and Berlin, took 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, and was a Supreme Court justice from 1954 to 1980.

During the 1960s the Court was acquired two more "German" judges, Haim (Herman) Cohn and Benjamin Halevi. Cohn was born in the north-German city of Lübeck (1911) into an orthodox family of Rabbinical stand-

ing. 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 21 years, ultimately as Deputy President.

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, 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.

Statistics tell an interesting story. Although we did not uncover any documented evidence pointing to a deliberate policy of balancing the "German" and the "British American" backgrounds of Supreme Court judges during the first three decades of the State of Israel, nevertheless, the repeated and enduring equilibrium can hardly be considered a mere accident. All in all, 36 percent of the 25 first judges of the Supreme Court (appointed until 1978) were German natives, 40 percent were born in East Europe, 8 percent were born in Britain or the United States, and 16 percent were born in Palestine. As to university studies and degrees, the legal education of 36 percent of the 25 first judges was obtained in German universities (this figure overlaps with, but is not parallel to, the 36 percent German natives), while only 28 percent obtained their education in English or American universities, 12 percent in East Europe, and 20 percent in Palestine-Israel.[12] 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.

THE FORMATIVE YEARS

The Republic of Weimar and the Jewish Jurists

It is 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 Moshe Smoira to Haim (Her-

man) 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 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 retain fond memories of the Weimar regime, which he saw as "one of the most democratic constitutions."[13] 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 legal careers 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 religious backgrounds of the judges ranged 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 Weimar Republic, such affinities could comfortably 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 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 judges.

All the judges we examined, with the exception of Landau, studied law (and other disciplines) in at least two German Universities. Of special importance was the University of Berlin, where Rosen, Sussman, and Witkon studied, and the University of Frankfurt-am-Main, where Silberg, Sussman, and Cohn studied. An academic degree, however, was normally obtained at only one institute. 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 in the German universities during the turbulent 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 coercive 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, for example, and imposed heavy sentences on socialists and communists.[14]

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 who was of Jewish descent, for affirming the legality of the Treaty of the Versailles, none of his colleagues at the University of Munich was willing to defend his views. Only a few of them dared to support his right to express such opinions, but they did so on behalf of the principle of academic freedom and with due condemnation of the substance of his "unpatriotic" claim.[15]

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.[16] 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."[17] 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."[18] Indeed, both Witkon and Haim Cohn claimed that they personally had never experienced any sort of anti-Semitism in the

German universities. There was apparently a general sense of comfort and security among the educated Jewish citizens of the Weimar Republic.

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:

> 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.[19]

The anti-Semitic assault against Nawiasky is seen by Cohn in a different light from that of 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 make 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.[20]

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. Jewish legal theorists were

instrumental in the formation of the Republic's labor laws and served as judges in labor courts.[21] This successful older generation provided a natural role model for the Jewish law students at the German 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.[22]

What were Israel's future Supreme Court judges taught, and what were they not taught, at the universities of the Weimar Republic? There was a positive legacy from the Weimarian university life, and, in the following, we will focus on the curricular contents and the theoretical atmosphere of the German law faculties during the relevant period.

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 to be taught within a distinct faculty from the earliest days of the medieval universities. Moreover, the great controversies over the character of German Law and the legal system had, by the early twentieth century, been fully resolved.

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" that is as solid as the natural sciences and whose practitioners simply need to use their technical proficiency to follow fixed procedures.[23] This, of course, was an academic 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.[24] But the university professors were not required to adapt at the rate of the "real world." They generally refused to take new political or philosophical challenges on board. The curriculum was increasingly "historical," and often ignored 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 Judges studied during the 1920s.

Consider, for example, the textbook on the history of German law written by the Heidelberg professor Hans Fehr.[25] A sworn positivist, he considered it 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 achieve a

balance between the "strong individualism" of civil and human rights (a pointedly non-German idea), and a powerful communal and national commitment (which is German through and through). In this system, individuals were answerable for the security and strength of their country, even at the expense of their personal liberty.[26] 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 a 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. The value of Law [*Recht*] is rooted in national existence. The value of the State is rooted in national existence.[27]

The concluding passage of Fehr's textbook in legal history offers 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 intrusions 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 also accounts for the widespread rejection of the new social sciences. Sociology, psychology, economics, and political science were mostly kept out of the curriculum.[28] Law students were not exposed 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 Jewish 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 the "basic norm" [*Grundnorm*], seen as a meta-legal standard. Kelsen did not provide a departure point for a 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 elites to German nationalism, an outcome of Bismarck's historical alliance with the liberals.[30] Academic jurists, like physicians and other scientific practitioners, were especially affected by the process of specialization and professional constriction. The broader cultural interests and the links with art and literature, philosophy, and theology, which had characterized lawyers in the eighteenth and nineteenth century, were significantly diminished.[31]

The success of National Socialism within the law faculty can be attributed to this vacuum. Before Hitler's rise to power, there was little active support for National Socialism among law professors. From 1933, however, academic jurists were second only to the physicians 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.[32]

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 centrist ideologies. German patriotism, an aggressive view of international relations, statism, and contempt for liberal values were widely considered to be politically neutral beliefs. Judge 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.[33]

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 flight from politics" is reminiscent of the definition for legal formalism recently offered by Professor Menachem Mautner of Tel-Aviv University: that jurisdiction might be pursued "while its value-dimension remains concealed and with a small degree of awareness that such a dimension does indeed exist in jurisdiction."[35] 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.

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 jurists committed to liberal

and social-democratic 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 has indeed inherited a complex, and at times contradictory, legacy. A well-known tension may be observed between the outspoken formalism and solid procedural emphasis as represented by Yoel Sussman, and the philosophy of flexibility and creative interpretation expounded by Sussman's great rival Haim Cohn.[35] Another set of fault-lines continues to run between the Supreme Court's sensitivity to individual human rights and its clear state-centered affiliation, and between the Court's commitment to Zionism and its role as a defender of democratic principles. At times, as we will shortly demonstrate, these tendencies have been in danger of colliding. The main point, however, is that they all have German roots. The German legacy of Israel's Supreme Court judges is rich enough to support them all.

GERMAN REFERENCES IN SUPREME COURT JURISDICTION

In this section, we proceed to examine the actual impact of this background on Israeli legal theory and on the Supreme Court's path. This assessment, which is only a preliminary mapping of the terrain, was conducted on three levels on inquiry, using three different methods of research.

First, we 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 judges to German legislation and cases. However, since such statistical survey ignores the qualitative weight of such references, their importance to a specific court decision, and the relative effect of the decision itself on Israeli jurisprudence, we embarked on a second level in which we focused on one particular court decision, known as the *Yeredor* case, which involved the right of the Socialist List to be elected to the Sixth Knesset. It has been described by some as the most important decision in the history of the Court.[36]

Finally, our third level of inquiry opens up a linguistic and conceptual vista, attempting to trace several inherent, hidden or even unconscious influences of the 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 significant transformations on their way into modern Israel.

A Statistical Overview

Beginning 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.[37] 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 on continental sources which complement the British foundations and American influences. Our findings are 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 coupled with an apology for the actual necessity to use German law.[38] The same applies to academic writings: references to German law are rare and brief. Yet the volume of the German echo and its impact on Israeli law is far greater than these bare statistics might suggest.

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 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.[39]

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 may also 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,[40] and to more substantial cases in which the references to German law and history is of great importance and impact.

In 1965, one of the most important, best-known, and most frequently taught Supreme Court rulings of Israeli history was rendered. This epoch-making decision was the Elections Appeal 1/65, *Yeredor v. The Central Elections Committee for the Sixth Knesset*, known as the *Yeredor* case.[41] The opinions reached in this case reveal, we would argue, not only the German legacy

of the Supreme Court, but also its Anglo-American legacy and the complexity of their intertwined impacts.

Briefly, the story is as follows. The Knesset Elections Law[42] provides that every political party that wishes to participate in an election must register with the Central Elections Committee. The law also provides that the Committee must approve of each party's list once several technical requirements, such as the presentation of a roster of 750 supporters and the deposit of a certain sum of money, are fulfilled. 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 entering the elections to the sixth Knesset in 1965. The Elections Committee (headed by Judge Landau of the Supreme Court) refused to admit the Socialist List, on the grounds that: 1) it called for the abolition of the Jewish state and its replacement by a Palestinian democracy; and, 2) the Socialist List included candidates who belonged to an association which was declared illegal by an order of the Minister of Defense. The Socialists thereupon appealed to the Supreme Court of Israel sitting as a court of election appeals.

The case was heard by three judges: 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 had no power to reject a list because of its platform or the identity of its members, and therefore the appeal ought to be allowed.

> Some of those countries [Cohn wrote] 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. All these are not the ways of the State of Israel; its ways are ways of law, and its law is issued or explicitly authorized by the Knesset.[43]

This was a formalistic position, reminiscent of the German Natural Law school, 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* [Constitu-

tion] 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 as 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."[44]

In the majority opinion, the President of the Court, Judge 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 bolster it by alluding to the German example. For this purpose he cited an earlier decision on a similar case, written by his German-born colleague Alfred Witkon:

> 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.[45]

The third judge on the bench, Judge Sussman, concurred with Agranat's decision to dismiss the Socialist List's appeal, but offered a different reasoning. Like Agranat, he invoked 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 in the opinion that our life experience obliges us not to repeat that horrible mistake that we have all witnessed."[46]

Here, for the first time in Israel's legal history, the Supreme Court used the concept of Natural Law in its judgments. And, paradoxically, the judge who introduced this concept was 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.

What is the meaning of this dramatic moment in the history of the Israeli legislature and judicature? The German backgrounds 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 which was banned from running to the Israeli elections in 1965 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 the reformation of the State of Israel into a secular state with equal rights for all its citizens, Jews and Arabs alike. What the Supreme Court in fact did was to 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 requested to apply the *Yeredor* precedent to the Kach party. This time, an extreme right right-wing party, headed by Meir Kahana and representing nationalist Jews bent on irredentism, sought election to the Knesset upon a

racist platform. The Court was asked to decide whether the party ought to be banned for its alleged threat to democracy.[47]

This time, all five judges who heard the case decided to allow the Kach party to take part in the elections. Judge Shamgar, a native of Danzig, Judge Elon, born in Germany, and Judge Beisky, a survivor of the Holocaust, 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 served better by allowing such parties to campaign and be elected.

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. Furthermore, the insertion of Zionism in place of democracy as a unique value worthy of juridical protection, even at the expense of curbing political rights, was now openly acknowledged. No wonder that the 1984 ruling on the Kach party was one of the most publicly controversial decisions in the history of the Supreme Court.

Liberalism, *Rechtsstaat* and an Enlightened Public

Having surveyed the statistics of German references in the Supreme Court decisions, and closely observed the *Yeredor* case, we now move on to the third level of analysis: 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 two-fold: first, that there has been a German effect, subtle and unacknowledged, on Israeli legal and political discourse; and, second, that an understanding of the German origins of our notions of liberty, law, state, and democracy can illuminate Israeli versions of these concepts, which often diverge from 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 which differed substantially from its 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.[48] Our own examination of the Yeredor case may 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.[49] Liberal legislation in its heyday, during the second half of the nineteenth century, indeed acknowledged individual rights, but not on a universal basis. As the historians David Blackbourn and Geoff Eley have recently emphasized, such legislation focused on the rights of the *Burger*, the property-owning private citizen, and not on the political rights of the *Staatsburger*, the fully-fledged politically active citizen. The penal code of the Second Empire and the civil code of 1900 (BGB) defended 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.[50]

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, and 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 the freedoms 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.[51]

We do not argue that the German tradition of nationalist or State-centered liberalism was imported lock, stock, and barrel into Israeli political and judicial culture, but we suggest that the neglect of this factor has left a 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 East 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 Judge Silberg at an interview he gave in 1973: "The essence of democracy is that a citizen does not receive instructions, but undertakes duties."[52]

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 scepter. It does not refrain, nor should it refrain, from invading the sphere of the individual.[53]

This somewhat totalitarian sketch of democracy does not get any better when Judge 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.[54]

Such physical intimacy between the government and the governed 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 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 tag *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 like 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 historical linguistics. 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 are not circulating with a label stating that they were made in Germany. Nor are they necessarily an exclusive German product. Yet such concepts 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 terms, 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.[55] For the purposes of the present paper we have focused on two key concepts: the "*Reichsstaat*" and the "enlightened public."

Recent historical study has pointed at 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 Enlightenment values in the face of a corrupted and reactionary modern Germany.[56]

The Israeli historian Steven Aschheim suggests a correction to Mosse's observation about the Enlightenment commitment, arguing that it 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 toward 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.[57]

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 cases 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 was seen as uniquely German, both within and beyond its native land.[58] 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 *medinat chok* can be associated exclusively with the German tradition.[59]

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 also served a conservative Christian world-view and sometimes became associated with tough and mechanical legalism.[60] It represented a variety of social philosophies, but shared an antagonism toward practical, cynical "politics," be it 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 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.[61] 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 collec-

tivist, elitist, and controlled from within the administrative and academic establishment.

All these German contexts have vanished in the standard Hebrew translation of *Rechtsstaat* into *medinat chok*.[62] To understand this shift of meanings, we need to look beyond German juridical terminology, at the broader importation 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, Judge Haim Cohn told us of the broad spectrum of cultural and artistic experiences on offer to young minds in the 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, free from narrow specialization, harked back to the age of extensive *Bildung*.[63] Cohn was not alone: many anecdotes and fond memories are told about 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.[64]

This leads us to another cluster of key concepts frequently used in present-day Israeli discourse, without any mention of their roots in 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* [the enlightened public].

Judge 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.[65]

A year later Witkon echoed the same ideas in his decision in the case of *Riesenfeld v. Yaakobson*. The judges 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.[66]

In the same year Judge Landau coined the Hebrew term *ha-tzibur ha-na'or* [enlightened public] and demanded that the judge "be a faithful interpreter of the accepted views of the enlightened public, of which he is a member."[67] This test was subsequently adopted by other Supreme Court judges on several occasions,[68] and became part of the Israeli juridical canon. Thirty years later, Judge 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."[69]

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."[70] On this point Barak is following a long tradition, stemming from the German-Jewish Enlightenment, which has 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 the enlightened public, and 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 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."[71] 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, 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.[72] 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 Theodor Adorno, and Max Horkheimer of the Frankfurt School. 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.[73]

This opposition resounded in Weimar culture and art, and it included 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 in either Berlin and Frankfurt or 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.[74]

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 could define, and which the Court must represent.[75] They took for granted the statist and authoritative notion of the *medinat chok* and the cultural, ethnic, and social exclusiveness of *ha-tzibur ha-na'or*.[76]

Jurists, of course, seldom take up the banners of the 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 language 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 generations of Israeli Supreme Court judges were confident through and through. They trusted their intellectual sources, their methods of adjudication, and 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.

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 have been 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. Under 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, practiced law under the British Mandate and as part of its legal system.

The young State of Israel in general, and the Supreme Court in particular, adopted many aspects of the British legal and judicial system. The British influence was supplemented by a strong American orientation, which was boosted by the leadership of Judge (later President) Agranat.[77] 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 splendor and magnificence of English law was for the German jurist a grand and unexpected experience."[78] 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 distinctive 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—but that the admiration of things British, the fascination with "English freedom" and the English system of justice, has 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. 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 toward 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 which emerges from our research is a different one. 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's other branches of government.

In a similar vein, 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 coercing 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 has recently been 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 "retaliatory actions" (which eventually fed the crisis of 1956), Ben-Gurion suggested that the Israeli army would conquer strategic sites in the Jordanian-held West Bank. In the cabinet meeting on 24 May, 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."[79]

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 have gone unrecorded. Some of them are part of an existing oral 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 whose orientation was British and American 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 toward explaining the ascending strength, the unmatched prestige, and the increasingly complicated political standing of the Israeli judiciary, powerfully led by the Supreme Court.

Notes

*The authors are grateful to Justice Haim Cohn, Justice Moshe Landau, Professor Pnina Lahav and Professor Adi Parush for their comments to earlier drafts of this essay.

1. Alexander Bickel, *The Least Dangerous Branch* (Indiana, 1962).

2. The structural independence of the judicial branch is discussed on pp. 350–2 by Eli Salzberger, "A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?" *International Review of Law and Economics*, 13 (1993) 349.

3. See the following publications by Pnina Lahav: "American Influence on Israel's Jurisprudence of Free Speech," *Hastings Constitutional Law Quarterly*, 9 (1981) 21; Lahav, "HaOz v'haMisra: Beit haMishpat haElyon b'Asor haRishon l'Kyumo" [The Power and the Office: The Supreme Court during its First Decade], *Iyunei Mishpat*, 14 (1989) 479 [Hebrew]; "Foundations of Rights Jurisprudence in Israel—Chief Justice Agranat's Legacy," *Israel Law Review*, 24 (1990) 211; *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (Berkeley & Los Angeles, CA, 1991).

4. For general, and mostly brief, discussions of the contribution of Central-European immigrants to the Israeli legal system, see Shlomo Erel, *HaYekkim: Chamishim Shnot Alyia* [The *Yekkim*: Fifty Years of German-Jewish Immigration to Israel] (Jerusalem, 1985) [Hebrew]; Yoav Gelber, *Moledet Khadasha* [A New Homeland] (Tel-Aviv, 1990) [Hebrew]. In contrast to our approach, Eliyakim Rubinstein, *Shoftei Eretz* [The Judges of the Land] (Jerusalem, 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" (p. 141).

5. Erel, *HaYekkim*, 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, *Moledet Khadasha*, 447–9

7. On the eve of the establishment of the State of Israel, there were only 22 Jewish judges (of a total of 61 judges) in the Peace and District courts of Palestine.

See Pinhas Rosen's speech to the Knesset, *Divrei HaKnesset* [Knesset Records], 8 (1951) 1176 [Hebrew].

8. Erel, *HaYekkim*, 187. A similar account is given by Gelber, *Moledet Khadasha*, 447.

9. On the process of this appointment, see Rubinstein, *Shoftei Eretz*, 59–66.

10. The 1953 statute has created an arrangement which is unique of its kind. The appointment of judges in Israel is formally made by the President, but nomination is made by a committee whose members are three Supreme Court judges, two members of the Bar, two Government ministers and two Knesset members (one of whom is traditionally from the opposition).

11. David Goitein, born in England, and Zvi Berinson, a native of Palestine who took his law degree in England.

12. The statistics are taken, with definitional changes, from Rubinstein, *Shoftei Eretz*, 141.

13. HC 5/48 *Lion vs. Gubernick*, *Piskey Din*, 1 (1958) 60. This remark was made in connection with the legality of an Israeli emergency regulation enabling confiscation of private property.

14. The classic general study is Fritz K. Ringer, *The Decline of the German Mandarins: The German Academic Community, 1890–1933* (Cambridge, MA, 1969), esp. Ch. 4; see also Walter Laqueur, *Weimar: A Cultural History, 1918–1933* (London, 1974) 183–9. For a detailed discussion of the juridical establishment see Heinrich Hannover, *Politische Justiz 1918–1933* (Frankfurt-am-Main, 1966) [German].

15. Alice Gallin, *Midwives to Nazism: University Professors in Weimar Germany 1925–1933* (Macon, GA, 1986) 79–85.

16. Donald L. Niewyk, *The Jews in Weimar Germany* (Baton Rouge, LA and London, 1980) Ch. 3; Ringer, *Mandarins*, *passim*; Karl Dietrich Bracher, *The German Dictatorship* (New York, 1970) 165–6.

17. Alfred Witkon, "Zecher l'Yitziat Germania: Madu'a lo Ra'u haYehudim et haKtovet al haKir" [Remembering the Exodus from Germany: Why the Jews did not see the Writing on the Wall], in *Mishpat v'Shiput* [Law and Adjudication] (Jerusalem, 1988) 263 [Hebrew].

18. Moshe Landau, "Devarim l'Zecher Uri Yadin" [In memory of Uri Yadin], in Aharon Barak and T. Spenitz (eds), *Sefer Uri Yadin* (Tel-Aviv, 1990) 1–11 [Hebrew].

19. Haim Cohn, letter to the authors, 8 July 1995 (our translation from the Hebrew); the parentheses are Cohn's, the brackets ours.

20. *Ibid*.

21. See especially Hans-Peter Benoehr, "Der Beitrag deutsch-jüdischer Juristen zum Arbeits und Sozialrecht" [The Contribution of German-Jewish Lawyers to Labor and Social Law], which appears with other relevant articles in a special issue of *Zeitschrift für Relogions- und Geistesgeschichte,* 48(4) (1996) [German].

22. Ernest Hamburger, *Jews, Democracy, and Weimar Germany* (New York, 1972), esp. 21–2; Moshe Zimmermann, "Be'ayot Yesod bi'Historiografia shel Yahadut Weimar" [Basic Problems in the Historiography of Weimar Jewry], in Oded Heil-

bronner (ed), *Yehudei Weimar: Khevra bi'Mashber haModerniut, 1918–1933* [Weimar's Jews: Society in Crisis with Modernity, 1918–1933] (Jerusalem, 1994) 18–53 [Hebrew].

23. See Friedrich Paulsen, *Die deutschen Universitäten und das Universitätsstudium* [The German Universities and University Studies] (Berlin, 1902, rep. Hildesheim, 1966) 504–11 [German].

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

25. Hans Fehr, *Deutsche Rechtsgeschichte* [German Legal History] (Berlin and Leipzig, 1921) [German]. We have used a copy that was probably brought to Palestine by a former German law student and donated to the Haifa University Library.

26. *Ibid*., 348.

27. *Ibid*., 355 [our translation].

28. Ernest Fuchs, *Juristischer Kulturkampf* [Juridical Cultural Conflict] (Karlsruhe, 1912), esp. Chs. 3–4 [German]; see Smend, "Berliner Juristenfakultät" [Berlin Law Faculty, 119 [German].

29. Smend, "Berliner Juristenfakultät," pp. 110–11, 119–20.

30. Helmut Kuhn, "Die deutsche Universität am Vorabend der Machtgreifung" [The German University on the Eve of Coming into Power], in *Die deutsche Universität im Dritten Reich* [The German Universities during the Third Reich] (Munich, 1966) 13–44 [German]; Ringer, *Mandarins*, Ch. 4.

31. Charles McClelland, "Professionalization and Higher Education in Germany," in Konrad H. Jarausch (ed), *The Transformation of Higher Learning 1860–1930* (Chicago, 1983) 306–20.

32. Geoffrey G. Giles, *Students and National Socialism in Germany* (Princeton, NJ, 1985); Hartmut Titze, "Hochschulen" [High Schools], in Dieter Langewiesche and H.E. Tentroth (eds), *Handbuch der deutsche Bildungsgeschichte* [Handbook for German Educational History], v5 (Munich, 1989) 226 [German].

33. Alfred Witkon, "Zecher l'Yitziat Germania," 265.

34. Menachem Mautner, *Yeridat haFormalism v'Aliyat haArachim bi'Mishpat haYisra'eli* [The Decline of Formalism and the Rise of Values in Israeli Jurisdiction] (Tel-Aviv, 1993) 10 [Hebrew]

35. For an analysis of the conceptual differences between Sussman and Cohn, see Michael Sassar, *Haim Cohn, Shofet Elyon* [Haim Cohn, Supreme Court Judge] (Tel-Aviv, 1989) 119, 140, 200 [Hebrew].

36. *Ibid*., 185.

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

38. One example should suffice here: Justice Witkon wrote, in his interpretation of the Israeli Nazi Persecution Disabled Victims Act: "I do think that we can ignore German law, neither its statutes nor its judicial rulings . . . nor would I say that we have the liberty to refute their notion of justice. Even a statute can be unjust and harmful to our emotions . . ." Civil Appeal 815/77 *Liebensohn-Stein v. the Authorized*

Executive according to the Nazi Persecution Disabled Victims Act:, *Piskey Din*, 32(3) (1977) 269–75 [our translation from the Hebrew].

39. Despite some normalization apparent in the Israeli approach to German jurisprudence since the early eighties, the tendency to pass in silence over 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 ones, the absence of the German law is especially conspicuous.

40. CA 375/45 *Alon vs. Melnik*, *Piskey Din*, 10(1), 486.

41. EA 1/65 *Yeredor vs. the Central Elections Committee*, *Piskey Din*, 19(3) (1965) 365. Haim Cohn, who was one of the judges in this case, declared it the most important judgment handed down by him; Sassar, *Haim Cohn*, 189.

42. *Knesset Election Law 1959*, para 63.

43. *Yeredor vs. the Central Elections Committee*, 382. An English translation of Cohn's ruling can be found in Aharon Barak and Ruth Gavison (eds), *Haim Cohn, Selected Essays* (Tel-Aviv, 1992) v2, 384.

44. *Yeredor vs. the Central Elections Committee*, 384.

45. *Ibid*., 388. The citation is taken from Supreme Court case 253/64, *Jiryis vs. the Administrator of the District of Haifa*, *Piskey Din*, 18(4) (1964) 673. Witkon's words are cited also in the decision on freedom of expression, written by Judge Moshe Landau, which we mentioned earlier: FH 9/77 *The Electricity Company vs*. Ha'Aretz *newspaper*, *Piskey Din*, 32(4) (1977) 337. See also Witkon, *Mishpat vi'Shiput* [Law and Rulings], 173.

46. *Yeredor vs. the Central Elections Committee*, 390.

47. Elections Appeal 2/84, *Neiman vs. the Chair of the Central Elections Committee to the Eleventh Knesset*, *Piskey Din*, 39(2) (1984) 225.

48. Lahav, "HaOz v'haMisra," 480.

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

50. David Blackbourn and Geoff Eley, *The Peculiarities of German History: Bourgeois Society and Politics in Nineteenth-Century Germany* (Oxford, 1984) 190–4.

51. See Sheehan, *German Liberalism*, 189*ff*; on the attitude of German Jews to Kant, see Peter Gay, *Freud, Jews and Other Germans: Masters and Victims in Modernist Culture* (New York, 1978) 117–19.

52. The interview was made with Abraham Haim Elchanani for his book, *Yerushalayim vi'Anashim Ba* [Jerusalem and Its People] (Jerusalem, 1973) 418–22 [Hebrew].

53. *Ibid*., 422.

54. *Ibid*.

55. 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. See Melvin Richter, "Reconstructing the History of Political Languages: Pocock, Skinner and the *Geschichtliche Grundbegriffe* [Historical Principles]," *History and Theory*, 29 (1989) 38–70.

56. George L. Mosse, *German Jews beyond Judaism* (Bloomington, IN, 1985).

57. Steven Aschheim, *Yehudei Germania Me'ever la'Bildung ve'Liberalism: haTechiya haYehudit haRadikalit bi'Republikat Weimar* [German Jews beyond *Bildung* and Liberalism: The Radical Jewish Revival in the Weimar Republic] (Ramat-Gan, Israel, 1995) [Hebrew].

58. Ernst W. Böckenförde, "Entstehung und Wandel des Rechtsstaatsbegriffs" [The Origin of Change in the Concept of the Constitutional State], in Ernst W. Böckenförde, *Staat, Gesellschaft und Freiheit* [State, Society, and Freedom] (Frankfurt-am-Main, 1976) [Hebrew]; James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton, NJ, 1990) 95*ff*.

59. On the appearance of the concept of *medinat chok* in Supreme Court rulings, see, for example, Judge Asher's ruling on p. 778 of Cr.A 596/73 *Mahamid vs. The State of Israel*, *Piskey Din*, 28(1) (1973) 773. 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, *HaYekim*, 187).

60. Ringer, *Mandarins*, 114–15, 124.

61. Whitman, *Legacy of Roman Law*, 96–8.

62. Translation is never fully transparent. The Hebrew translation of the English term "rule of law" into *shilton ha-khok* 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 *khok* comes closer to the formalistic and legalistic meaning, while the broader concept is denoted by another word, *mishpat*. This has led Professor Leon Shelef to propose an alternative Hebrew rendering, *marut ha-mishpat*. See Shelef, "Mi'Shilton haKhok li'Marut haMishpat: Hirhurim v'Ir'urim al Musag Yesod" [From *Legal Rule* to *the Legitimacy of Authority*: Reflection and Re-evaluation on a B Concept], *Iyunei Mishpat*, 17 (1996) 559 [Hebrew]. In the same vein, the German term *Recht* may be closer to the Hebrew *mishpat*, while *khok* correlates more closely to *Gesetz*. Nevertheless, the German *Rechtsstaat* connotes a narrower legalistic meaning than the English "rule of law."

63. *cf*. Sassar, *Haim Cohn*, 43, 240. And yet, as we have argued earlier, the taste for "general culture" no longer led the way to serious intellectual encounters and interdisciplinary approaches within academic teaching and research.

64. See for example Witkon, *Mishpat vi'Shiput*, 59.

65. Witkon, "HaMishpat b'Eretz Mitpatachat" [Law in a Developing Country], in Haim Cohn (ed), *Sefer Yovel li'Pinchas Rosen* [Jubilee Book to Pinhas Rosen] (Jerusalem, 1962) 66–85, esp. pp. 82–4 [Hebrew]. *cf*. Cohn, "Al Alfred Vitkon" [About Alfred Witkon], a memorial address reprinted in Witkon, *Mishpat vi'Shiput*, 16–7 [Hebrew].

66. See p. 1026 in CA 337/62, *Riesenfeld vs. Yaakobson*, *Piskey Din*, 17, (1962)1009.

67. See p. 1335 in CA 461/62, *Zim, Israeli Shipping Company vs. Maziar*, *Piskey Din*, 17 (1962) 1319.

68. President Agranat is famous for joining Justice Landau in extending the enlightened public test from private law to public law in the High Court case of HC 58/68 *Shalit vs. The Minister of Interior*, *Piskey Din*, 23(2) (1968) 477; see p. 600. For Landau's use of the test in the same decision, see p. 520.

69. HC 693/91 *Efrat vs. The Population Registrar, Piskey Din*.

70. P. 693 in Barak, "HaTsibur Hana'or," *Sefer Landau*, v2, 677–697 [Hebrew]. 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 (Barak, "Shitat haMishpat b'Yisrael, Masorta v'Tarbuta" [The Juridical System in Israel, Tradition and Culture], *Hapraklit*, 40, 197–217, esp. 201 [Hebrew].

71. See p. 305 in HC 79/355, 370, 391, 373, *Katlan vs. The Prison Service*, *Piskey Din*, 34(3), 294 [our translation].

72. Ernst Cassirer, *The Philosophy of the Enlightenment* (Berlin, 1932; English translation: Princeton, NJ, 1952).

73. A later disciple of the Frankfurt School, Jürgen Habermas, attempted to rescue some central aspects of the Enlightenment from his teachers' critique by re-applying the concept of "public." See Theodor W. Adorno and Max Horkheimer, *Dialectic of Enlightenment* (1947; English translation: New York, 1972); Jürgen Habermas, *The Structural Transformation of the Public Sphere* (1971; English translation: Cambridge, MA, 1989).

74. 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."

75. 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 pp. 351–2 in CA 4/66 *Peretz vs. Helmut*, *Piskey Din*, 20(4) (1966) 337. We are grateful to Professor Adi Parush for this qualifying reference.

76. *cf*. Dan Avnon, "'HaTzibur Hana'or': Yehudi v'Demokrati o Liberali v'Demokrati?" ['The Enlightened Public': Jewish and Democratic or Liberal and Democratic?], *Mishpat u'Memshal*, 3 (1996) 417–51 [Hebrew].

77. See especially Lahav, "HaOz v'HaMisra."

78. Cohn, "Al Alfred Vitkon," 15.

79. Yemima Rosenthal (ed), *Te'udot li'Midiniut haKhutz shel Midinat Yisrael* [Foreign Policy Documents in the State of Israel], v8: 1953, published by the Israeli State Archive (Jerusalem, 1953) 413 [Hebrew], quoted in a book review of this volume by Benny Morris, *Yedi'ot Ahronot*, 5 July 1996, 29–30 [Hebrew].