German Law in Israeli Courts

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Introduction: Alexander the Great as Comparatist

Comparisons constitute a focal point for the perception of cultures, nations, and ourselves. The crux of comparison is the marking of distinctions and similarities. Paradoxically, the scrutiny of differences can yield unifying factors and the affirmation of gaps can build bridges. Law, which is a normative system built on tradition and culture, has long been the object of comparative inquiry.

The comparative study of law can be traced to antiquity. The Talmud tells of a meeting between Alexander the Great and the king of an imaginary state called Katsia.[1] Alexander is interested in the governance of that land and is invited by its monarch to attend a trial dealing with the purchase of a residence. The dispute, which concerns some treasure found in the house, takes an unexpected turn. Both the vendor and the purchaser claim that the treasure-trove belongs to the other: the purchaser argues that as he bought only the house, the treasure ought to be restored to the vendor, while the vendor argues that as he sold the house with its contents, the treasure should stay with the purchaser. The king of Katsia rules that the vendor's son and the purchaser's daughter should marry, with the treasure then becoming part of their common property. Alexander is shocked. In his kingdom, both claimants would have been beheaded, and the treasure would have been awarded to the king. Now it is the turn of the king of Katsia to be shocked. He wonders whether, in view of such a judicial system, the sun and other forces of nature regularly function in that land. Alexander concludes that God bestows his benefits upon this state only through the merit of its animals.

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1 Kazis 1962:20–21.

The concept of justice in the kingdom of Katsia – the "kingdom of the End of the World"[2] or the "kingdom of Utopia" – is indeed utopian.[3] In a normal country,[4] the purchaser would have litigated not over the right to restore a fortune found at his site but over his right to retain it. The vendor, for his part, would have insisted not upon the duty of the purchaser to keep the treasure but on his own right to get it back. While the purchaser of a table who finds in its drawer a treasure might wish to restore the treasure to the vendor, that each of the two parties to the contract in question insists on restoring the treasure to the other and that they require the assistance of the law to accomplish justice makes this story exceptional. Values and concepts of justice are decisively relative,[5] and relativity is tightly tied to comparison, whereby we position ourselves and our perception in relation to others.

Our talmudic tale tells us that justice is a matter of geography and culture, nicely demonstrating that curiosity about different concepts of law and justice has been around since the dawn of humanity. We also learn that the perspective of an "other" can help us perceive a given situation in a new light. Bearing this in mind, we move away from the talmudic era and turn to more modern considerations of comparative law.

First and foremost, comparative law has developed as a functional vehicle. For hundreds of years, colonial rulers imposed their laws on colonies and local decision makers were supported and inspired by foreign solutions. The functional element in comparative law is still operative. In the global village linked by communication, commerce, and politics, judges and legislators make use of legal solutions originating elsewhere to solve local problems.[6]

Alongside the functional role of comparative law, recent years have witnessed a dramatic development in comparative law as a discipline.[7] Pertinent questions of methodology have been raised relating to the defi-

2 Hebrew *kets*, from which the name "Katsia" might be derived, means "end."
3 Almog 2001.
4 In which we can assume rational behavior of agents: Zamir and Medina 2010:11–40.
5 Northrop 1960.
6 Zweigert and Kötz 1998:13–31 (on the functions and aims of comparative law); Watson 1993:16–19 (on the virtues of comparative law).
7 Siems 2014; Samuel 2014.

nition of law and to that of comparisons.[8] Methodology is thus deeply entwined with general issues of gaining knowledge (epistemology).

Israeli Law as a Laboratory of Comparative Law

Israel, a nation of immigrants situated at the center of plural cultural intersections, was exposed from its inception to a variety of cultures, including legal ones. In the Diaspora, Jews are subject to two legal regimes: Jewish law and the law that prevails in their place of residence.[9] The relations between faith and the law of the host nation has long been a preoccupation of Jews. In the State of Israel, which incorporated Jewish law into its national law, a different conflict has emerged. Here, the struggle involves questions of freedom of religion, freedom from religion,[10] and identifying who is a Jew for the purpose of the Law of Return.[11]

The legal map of Israel was not drawn up with the declaration of the State in 1948. Israel's legal norms built up gradually, following its historical path over the past 3000 years. Such a legal patchwork makes Israel an ideal living laboratory for comparatists, for it has borrowed from different legal systems and also from the talmudic tradition. A brief review of the three historical layers of Israeli law may serve to clarify this point.[12]

The Ottoman period

The Land of Israel was under the rule of the Ottoman Empire from 1516 to 1917. During this period, the applicable Ottoman law was based on several systems. Most notable among these was Moslem law, but from the nineteenth century onward Ottoman law began to show a strong orientation towards the French legal system. Nonetheless, matters of personal status were decided in accordance with religious law, which in the case of Jews was rabbinic law, and in the case of Muslims, Islamic law.[13]

8 Zweigert and Kötz 1998:33–47.
9 Novak 2000:1061; Englard 1987:187–188.
10 Novak 2000; Lapidoth 1998; Englard 1987 and 1968; Rubinstein 1967.
11 Law of Return, 5710/1950, 4 LSI 114 (1950) (Isr.). The major conflict stems from the non-recognition of civil marriage in Israel: Bystrov 2012; Novak 2000; Naamani 1963.
12 For the different layers and their absorption into Israeli Law: Friedmann 1975. See also Shachar 1995:1–6.
13 Friedmann 1975:6–19.

The British period

The Land of Israel was under British rule from 1917 to 1948 and, between 1922 and 1947, under a British Mandate. The British rulers kept Turkish law in force but declared that in a case of lacuna, resort should be made to English common law.[14] In practice, English law gradually replaced Turkish law as the prevailing legal system. The field of personal status, however, did not change: religious law remained applicable.[15] The effect of English law was striking, leaving an impact that can be felt to this day.

The State of Israel (since 1948)

The basic principle upon the establishment of the State was to continue to apply the law that was hitherto in force.[16] Thus, English law remained the main source of Israeli law, and religious law remained in force in matters of personal status. This reflected the position of Israeli law from 1948 to 1970. During these years, which may be regarded as the first era of Israeli law in the independent State of Israel, the impact of English law was still palpable.[17] In the second era, however, which began in the early 1970s,[18] the Israeli Parliament, the Knesset, began to initiate legislation,[19] mainly in private and commercial law, which to a great extent was inspired by continental law.[20]

Israeli law, then, is a hybrid system crafted from different sources, namely, Turkish law, rabbinic law, English law, continental law, and laws enacted by the Knesset.[21]

During the Mandate period, law professors who had been trained in continental Europe needed to re-educate themselves about the prevail-

14 Rivlin 2012:787–788.
15 Friedmann 1975:20–72.
16 Law and Administration Ordinance 5708/1948, 1 LSI 7, § 11 (1948) (Isr.).
17 Shalev 1995:112.
18 Friedmann 1975:93–123.
19 See, e.g., Contracts Law (General Part), 5733/1973, 27 LSI 117 (1973) (Isr.); Contracts Law (Remedies for Breach of Contract), 5731/1970, 25 LSI 11 (1970) (Isr.); Standard Contracts Law, 5743/1982, 37 LSI 6 (1982) (Isr.).
20 Cohen 2008b:51, 53; Shalev 1995:114.
21 Rivlin 2012. Another source to be mentioned is conventions relating to the unification of private law, such as the Hague Convention relating to the Uniform Law of International Sale. This was adopted in Israel as such, but it also inspired the legislation of the Sale Law, 5728/1968, 22 LSI 107 (1968) (Isr.); Friedmann 1975:99–100.

ing English system, and thus were exposed to both legal structures. Today, most Israeli legal scholars acquire basic legal training in Israel and complete their advanced studies in the United States. Comparative law, a popular subject in EU member states thanks to the unification process and the consequent structuring of unifying legal tools, is less discussed in North America.[22] Such a training trajectory, which limits access to the continental tradition, has meant that comparative law is not a major part of the contemporary Israeli Faculties of Law curriculum. Because the Israeli system draws upon an array of foreign sources, however, comparative material is continuously infused into Israeli legal training.

Such a range of foreign influences virtually guarantees that a given system will contain contradictory elements, and Israeli law demonstrates this well. For instance, Israeli internal law includes religious law, which reflects patriarchal notions. This raises the dilemma of different values (e.g., freedom of religion versus equality). Thus we witness a conflict between constitutional principles and standing religious[23] law, which is protected from interference by an Israeli Basic Law.[24] Other contradictions stem from the fact that the Israeli system was shaped by two legal cultures, to which I shall now turn.

Two Major Western Legal Systems

Legal systems can be compared fruitfully from two perspectives: concepts and institutions on the one hand, and specific doctrines on the other. A doctrine is best considered as it functions within the legal system as a whole. In that regard, one ought to examine the manner in which rules are created and prioritized (case law vs. codification); evidentiary and procedural methods of deciphering truth (inquisitorial vs. adversarial); interrelations between institutions (the judiciary and legislative branches); interplay among judges (e.g., the role of binding precedent); and modes of interpretation.

22 The pioneering work in this area was von Mehren 1957. Gordley and von Mehren (2006) continued this line of research. The unification process is relevant to the US as well (see, e.g., the Uniform Commercial Code and the Restatements of the law), but it is not coupled with the same cultural and linguistic differences as those applying in Europe.

23 Sapir and Statman 2009.

24 Basic Law: Human Dignity and Liberty 5752/1992, SH No. 1391, p. 150, § 10 (Isr.). Israel does not have a formal constitution, but human rights are defined as constitutional by virtue of the Basic Law: Human Dignity and Liberty.

Western culture produced two major legal traditions: civil law, the basis of which is Roman law, and common law.[25] Continental Europe is the cradle of the civil law tradition,[26] while England is the mother country of the common law.[27] I shall not dwell here on the concept of tradition, which largely concerns the reflection of the continuous past in the present.[28] Rather, I shall simply sketch, briefly and in broad strokes, how these two legal systems diverge.

Institutional legal sources

The continental system relies heavily on statutory law; the common law system, for its part, consists mainly of laws created by judges. The status of judges in civil law systems is secondary (in several civil law systems, judges' names are not included in the legal reports, and minority opinions are not published).[29] In the common law tradition, by contrast, judges occupy an elevated position: their names form an integral part of the court's decision; dissenting opinions are recorded, and courts are sometimes called by the name of the presiding judge (e.g., the Warren Court in the United States Supreme Court).

Interpretation

Continental law attaches much weight to jurisprudence and legal scholarship; common law, by contrast, grants a great deal of importance to case law, by adherence to the principle of precedent, which may be binding on lower courts and sometimes even on the very court that rendered the decision.[30]

25 Glenn 2014:116–154, 205–248.
26 Merryman and Pérez-Perdomo 2007:6–14; Glenn 2014:121–124.
27 Baker 2000; Glenn 2014:205–215.
28 Glenn 2014:1–26.
29 Merryman and Pérez-Perdomo 2007:34–38.
30 In England, the *ratio decidendi* of the decisions of the House of Lords (now the Supreme Court) and those of the Court of Appeal is binding on the lower courts. The Court of Appeal is bound by its own decisions. The House of Lords used to be bound by its own decisions: *London Tramways Co. v. London County Council* [1898] AC 375; Dworkin 1962. Since the House of Lords Practice Statement (Judicial Precedent) [1966] 1 WLR 1234, this is no longer the case; Maher and Litt 1981.

General setup

The continental system is built upon codes, namely, statutory law, made up of principles and rules set out in an orderly fashion. As against this, common law is casuistic and inductive.[31]

Across societies, these differences remain real, although some of their sharpness has faded. We find "continental" attributes in common law as well as "common law" attributes in continental systems. Furthermore, the creation of the European Union called for the formulating of overarching principles that apply to all member states, and it has been argued that the principle of binding precedent has been implicitly implanted into the jurisdiction of the European Courts.[32] In the sphere of private law, one finds common binding directives. Moreover, with regard to the substantive contents of the rules, the numerous working groups on European private law, for example,[33] reflect the understanding that even in the presence of structural differences among systems, their substantive similarities are strong enough to allow for a unified European law.[34] Moreover, countering the casuistic tradition, one can find today in UK scholarship discussions on "abstract" notions such as obligations and legal acts.[35]

Nonetheless, the basic differences between continental and common law remain. We can say that the legal history of Israel has yielded a "mixed system,"[36] featuring hybrid traits and a strong inclination towards common law culture. With that in mind, let us examine the fate of German law in Israeli courts across our period of concern.

31 There is a vast literature on the distinctions between common law and civil law. See, e.g., von Mehren and Gordley 1977; Zweigert and Kötz 1998; and Rogowski 1996, which includes a collection of essays on the subject.

32 Civitarese 2015; McAuliffe 2013.

33 The main projects are: UNIDROIT 1994 (UNIDROIT Principles of International Commercial Contracts); Lando and Beale 2000 (The Lando Commission's Principles of European Contract Law: PECL); von Bar et al. 2009 (The Draft Common Frame of Reference [DCFR]; see Zimmermann 2012); Schulze and Stuyck 2011 (The European Commission on an Optional Instrument on European Contract Law: FS EC). See also Jansen 2013:496–500; Zimmermann 2006; Kötz 1996.

34 See Zimmermann 1995; Weyers 1997; Basedow 1998; Hartkamp et al. 1998.

35 Tettenborn 1984; Getzler 1997; Ibbetson 1999. See also Burrows 2013.

36 Cohen 2001.

German Law in Israeli Courts

As noted above, many justices in the nascent State of Israel were educated abroad. Their consequent familiarity with foreign legal systems made them natural comparatists.[37] Many of these jurists had had a continental legal education, or had at least some contact with the German culture, so borrowing from the civil law tradition in a system oriented towards common law came quite easily to them.

Israeli law moved gradually towards continental law, just as it moved gradually towards German rules and concepts. While investigating the impact of German-born justices on Israeli jurisprudence, Salzberger and Oz-Salzberger conducted a statistical survey on German references in Israeli Supreme Court decisions.[38] Only a handful of references to German legal material was found in the period up to the 1970s,[39] some of which were accompanied by apologies that such reference was made at all.[40]

These findings are in line with an empirical survey of overall references made at the Israeli Supreme Court. The number of references to continental law has been minimal, totaling around 0.5% per year of all Court references. The majority of these pertain to internal and common law (about 20% of the total annual references). Moreover, in the first decades of the State of Israel, when the presence of German-born justices was quite notable, the number of German references was higher but never rose above 2% of the annual total.[41] In the following years (not included in the survey), a normalization process occurred whereby German sources were referred to as a matter of course and scores

37 Markesinis and Fedtke 2005 (advocating the use of comparative law as an adjudicative tool and describing the process American justices underwent, from local to foreign inspiration).

38 Salzberger and Oz-Salzberger 1998.

39 *Ibid.* The authors found fifty-five references to German sources.

40 E.g., CA 815/77 *Levinson-Stein v. The Legal Authority to Enforce the Victim of Nazi Prosecution Act*, 32(3) PD 269, 275 (1978) (Isr.).

41 Shachar, Harris, and Gross 1996:151–154. See also the following continuing surveys: Shachar 2008, which refers to the years 1995–2004 and verifies the conclusions of the first article, relying on a limited number of cases; Gross 2010, which relates to all published cases and shows a decline in references to common law sources, and a small decline also in references to continental law (*ibid.*:314).

of German cases were cited by the Supreme Court in nearly all disciplines.[42]

This trend has been strengthened by the German background of some of Israel's leading jurists and by the establishment of strong academic relations between Israel and Germany. From the vantage point of private law, it culminated in the Codification Project, begun in 1984 and yielding numerous statutes and a Bill in 2011,[43] covering – following civil law codes – almost the whole range of private law.

Professor Uri Yadin, head of the legislative department at the Ministry of Justice, initiated the Codification Project. Born and educated in Germany, Yadin sought to pave a new path in the legislative orientation of Israeli private law. Yadin presented his ideas as originating in Israeli jurisprudence, but the changes he proposed were conspicuously colored by his German heritage. It has been suggested that Yadin, concerned about reception of notions originating in a legal system with such a threatening historical background, aimed to downplay the German orientation of his innovations.[44]

Since the inception of the Project, tremendous changes have taken place vis-à-vis Germany and Israel. Scientific, political, and economic relations between the two countries have flourished. Israel considers Germany one of its staunchest allies,[45] and German law is cited without a trace of hesitation.

I have a vivid memory of being a student at Tel Aviv University in the early 1970s, when the Max Planck delegation from Hamburg, headed by Professor Konrad Zweigert, arrived. The host was Professor Zeev Zeltner, then the most distinguished law professor at the Tel Aviv University Faculty of Law. Professor Zeltner had acquired his legal education in Germany and was passionate about forging close scientific relations with that country. There were discussions about a code of civil law and there was the decision to establish academic relations and to send undergraduate and doctoral students to Germany. We have been reaping the fruits of those efforts ever since, and when the Codification Bill was published, a conference was held at the Max Planck Institute

42 Salzberger and Oz-Salzberger 1998:278–279.

43 Draft Bill for the Civil Code Reform, 5771/2011, HH (Gov.) No. 595, p. 700 (Isr.); Cohen 2008a.

44 Shachar 1991:537–557; Salzberger and Oz-Salzberger 1998:277–278.

45 Feldman 1999:338–346.

in Hamburg in 2007 to mark the occasion, followed by the publication of a book.[46]

Thus we have witnessed a clear move from the principles and cases of common law and equity to the code-oriented world of German continental law.[47] But has this self-referential shift had an effect on the Israeli legal culture?

While Israel has expansive statutory law, it relies heavily on judge-created law. Israel adopted into law in its moderate form the principle of binding precedent, according to which decisions of the Supreme Court are binding on lower courts, but the Supreme Court itself is not bound by its own decisions.[48] Courts do cite scholars, as well as comparative material, but mainly as a source of inspiration. In fact, the judiciary has had a major effect on the development of Israeli private law, and even more so on public law. Hence, if the common law system is characterized by a dominance of judges and the civil law system by a dominance of the legislature, Israel still conforms to the contours of the former. In the view of Daniel Friedmann, this tendency has become more conspicuous since the late 1970s. Until then, the Court was rather restrained and balanced, a "classical court" clearly echoing the European legal training of its judges. The delicate balance between the judicial, legislative, and executive branches was carefully preserved. After the Yom Kippur War in 1973, the loss of power in the executive and legislative branches resulted in a dramatic shift in the Court. From being a balanced partner it became the supreme power, critically active in all governmental and legislative spheres – and in the private domain as well. Thus the shift in doctrinal orientation did not mark a conceptual change. Israeli legal culture has retained its common law orientation, and justices in Israel play a strikingly active role even in comparison to other common law jurisdictions.[49] In this way, the coupling of continental transplant and judicial power gave birth to a unique legal phenomenon: continental doctrines and structure have been employed in such a way as to foster the supremacy of the judiciary. The continental transplant of the doctrine of "good faith," embedded mainly in private law, might serve as an example. Let us consider this doctrine now.

46 Siehr and Zimmermann 2008.
47 Cohen 2008a.
48 Basic Law: The Judiciary 5744/1984, SH No. 2, p. 237, § 20 (Isr.).
49 Friedmann 2016:5–47 (classical court period); 51–251 (revolutionary court period); 255–343 (period of partial restraint).

PRIVATE LAW: GOOD FAITH

Application

The introduction of the duty of "good faith," in particular in the stages of pre-contractual negotiations, has been regarded as one of the most radical changes made in Israeli contract law, marking perhaps the strongest deviation from English law.

§ 12(a) of the Israeli Contracts Law[50] states: "In negotiating a contract, a person shall act in customary manner and in good faith." The sanction imposed by § 12(b) for the breach of this duty is monetary: "A party who does not act in customary manner and in good faith shall be liable to pay compensation to the other party for the damage caused to him in consequence of the negotiations or the making of the contract […]."

The wording of § 12 is quite close to the German principle embodied in § 242 of the Bürgerliches Gesetzbuch (BGB). Indeed, scholarly writing in Israel is saturated with references to German law, and Israeli courts have relied extensively on German authorities in shaping its contents.[51]

How do English law and German law differ with respect to the principle of good faith? In German law, negotiations impose a positive duty on the contracting parties. Common law, for its part, holds that the area of negotiations is liability-free.[52] Beyond the seemingly neutral and descriptive categories of tradition, style, and culture, it has been claimed that this divergence reflects different political-cultural characteristics. In other words, while common law is said to be based on individualism and self-reliance, civil law is understood to hold solidarity and collaboration as its core values.[53]

The following example may help to demonstrate this point. Parties negotiate a contract in the belief that the final contract will be concluded shortly. One party breaks off the negotiations. No contract has been made, but the other party claims that she relied on a promise by the

50 Contracts Law (General Part), 5733/1973, 27 LSI 117 (1973) (Isr.).

51 E.g., CA 230/80 *Pnidar v. Castro*, 35(2) PD 713 (1981) (Isr.), where, following German case law, the duty to act in good faith was imposed on an agent of the party to the contract; FH 7/81 *Pnidar v. Castro*, 37(4) PD 673 (1983) (Isr.).

52 Cohen 1995:30–32; 2008a:398–400.

53 Sefton-Green 2006; Hesselink 2014.

retracting party that a contract would eventually be concluded. Does the second party have any cause of action?

In principle, English law would exempt a negotiating party from liability for breaking off negotiations. With some exceptions,[54] freedom from contract allows a party to retract as long as a contract has not been concluded. Under the continental system, the principle of good faith implies that freedom from contract might be curtailed when negotiations reach an advanced stage and where retraction from negotiations is coupled with fault. In such a case, the party that breaks off negotiations might be subject to liability.

Israeli case law zealously adopted the concept of good faith and broadened the application of § 12 of the Contracts Law. As already mentioned, under § 12(b) damages provide the sole remedy for breach of the duty of good faith in negotiating a contract. Nevertheless, following German law, the Israeli Supreme Court decided that in certain cases the sanction for breaking off negotiations could be enforcement of contract, imposing expanded liability on a retracting party and creating a de facto contract.[55] This was subsequently applied even in cases where German law would have denied such liability.[56] One could say that the transplant of the duty of good faith proved to be of greater vitality in the transplanted body than in the body of the donor. But was there a price to be paid for the operation?

A Toll for Expanded Liability

As an open standard, the good faith principle is flexible and dependent upon judges' discretion. Good faith occasionally clashes with formal rules imposed by law (e.g., formal requirement of written document).[57] Such conflict reveals the advantages and disadvantages of rules versus standards.[58] Rules are more difficult to create than standards and easier

54 Through the principle of promissory estoppel: Cohen 1998; Baker and Langan 1990:570–573; Peel 2011:109–130.

55 CA 829/80 *Shikun Ovdim v. Zepnik*, 37(1) PD 579 (1983) (Isr.); Cohen 2008a:402.

56 CA 6370/00 *Kal-Binyan v. A.R.M.*, 56(3) PD 289 (2002) (Isr.).

57 Sussman 1976:29; Peel 2011:192, 198.

58 Schlag 1986.

to apply. While rules might be under-inclusive or over-inclusive, they are easy to predict. Standards frequently serve as a corrective to over- or under-inclusiveness, but their application is difficult to predict. Standards give ample discretion to the court, thus creating the potential for uneven application. They enlarge the grey area of uncertainty and may encourage non-compliance with the rules: just as rules create expectations regarding their application, so does deviation create expectations regarding exceptions. Standards create uncertainty both on the part of the judiciary and on that of the contracting parties, thus encouraging litigation.

The issue of applying the court's discretion is not limited to private law. We find its more acute application in public law, where it is reflected in the delineation of powers between the judiciary on the one hand and the legislative and executive branches on the other.[59] The neutral terminology of rules versus standards can be translated into a clash between conservatism and liberalism; archaism and modernity; deregulation and regulation.[60] The same ideology, however, is also embedded within the sphere of private law: free market or welfare state, individualism or collectivism. This plurality of values is well reflected in the decisions of the Israeli Supreme Court.

A comparative study of the application of the standard of good faith shows that Israeli case law (along with that of the Netherlands) is the most revolutionary among European nations.[61] The blessing here is obvious: the Israeli judicial system strives to enhance the standard of moral behavior in the contractual, commercial arena. The sweeping desire to raise moral standards, however, comes at a price. To the uncertainty as to whether a contract has been created at all, another uncertainty has been added, namely, whether, even in the absence of a contract, breaking off negotiations involves a breach of the duty of good faith, and if so, what is the proper remedy. Consequently, almost any negotiation is susceptible to future litigation, the results of which are hardly predictable.[62]

59 Raban 2014:364–389.
60 *Ibid.*
61 Cohen 2008a:402–428.
62 *Ibid.*:428–430.

PUBLIC LAW

General Remarks

The German origin of the principle of good faith made it rather natural during the 1970s for Israeli courts to receive interpretational inspiration from German law. The seminal cases dealing with the duty of good faith relied primarily on German sources. The impact in that regard far exceeds the dry statistics recording reference made to German law. We ought to bear in mind that the public was receptive to such a move at that time. When we revisit the first decades after the establishment of the State of Israel and consider public law, we see a different picture. In Israeli public law specifically, the principles of constitutional law and administrative law were shaped along common law lines.

Nevertheless, the concept of good faith was also adopted in public law and applied even more broadly than in private law, although this was often done without expressly referring to this concept. Thus, in the case of *Peretz v. Kfar Shmaryahu Local Authority*, a petition was submitted against a local government that refused to rent a public hall to residents of the town who wished to hold Reform Jewish services there.[63] The Supreme Court ruled that a public authority could not act prejudicially against a particular group, even though the hall was its "private" property. Since the town government rented the hall out to a variety of organizations, the court found that its refusal to do the same in the case of the Reform community constituted unjustified discrimination. Justice Sussman reasoned that a private person can allow one person to use his property while preventing another from doing so, but a public authority is not free to act arbitrarily even with regard to its private property. Notably, the term "good faith" was not used in this context. Sussman based his reasoning on the idea that the public authority holds its property as a trustee of the public. Yet it is hard to escape the conclusion that a duty of good faith was actually imposed on the public authority. Indeed, in other cases it was explicitly stated that public authorities are bound to use their power and property in good faith vis-à-vis citizens.[64]

63 HCJ 262/62 *Peretz v. The Chairman of the Local Council & Population of Kfar Shmaryahu*, 16 PD 2101)1962((Isr.); Friedmann 2016:21–22.

64 E.g., HCJ 376/81 *Lugassi v. Minister of Communication*, 36(2) PD 449 (1981) (Isr.); HCJ 164/97 *Conterm Ltd. v. Ministry of Finance, Customs and Excise Division*, 52(1) PD 289 (1998) (Isr.).

Another reference to German developments occurred in a completely different context. This time, the reference was not to German law or legal concepts but to the political history of Germany. In the early years of the State, the Israeli parliament enacted several statutes dealing with its legislative and executive branches. One of the main statutes regulated elections to the parliament (Knesset). In the 1970s, a seemingly explicit empowerment enabled the Israeli courts to be inspired by German sources in the sphere of private law. No such empowerment, however, was made with regard to public law and constitutional principles. Additionally, Germany has been a highly contested topic in Israel. In the 1950s, fierce political debate raged in Israel as to whether or not the victims of the Holocaust, their families, and the State of Israel as the representative of the Jewish people ought to accept monetary compensation from the German government. The 1960s saw Israel immersed in another political debate regarding the establishment of diplomatic relations with Germany. An action filed to the Supreme Court sitting as the High Court of Justice against the induction of the first German ambassador to Israel was dismissed in a brief judgment stating clearly that this was not a justiciable matter.[65] The first German ambassador to Israel, Rolf Pauls, began his service in 1965. Nearly simultaneously, a seminal constitutional case – *Yeredor* – was tried at the Supreme Court in the political context of election to the Knesset and freedom of expression in the political arena.[66] Making a historical reference to German history and German constitutional law, a majority of judges decided to limit both the political right to be elected and the freedom of political speech.

Fifty years have since elapsed. German relations with Israel have advanced in every respect. Another case of freedom of expression – *Ploni v. Plonit* (Anonymous [m.] v. Anonymous [f.]) – came through the doors of the Israeli Supreme Court, this time in a private context, where the conflicting values revolved around artistic freedom and privacy. The Court made a strong reference to German law, finding it preferable to American case law, and, following in its footsteps, decided

65 HC 186/65 *Reiner v. Prime Minister*, 19(2) PD 485 (1965) (Isr.); Friedmann 2016:314.

66 ElecA 1/65 *Yeredor v. The Chairman of the Central 6th Knesset Elections Committee*, 19(3) PD 365 (1965) (Isr.) (henceforth: *Yeredor*); Friedmann 2016:24; Salzberger and Oz-Salzberger 1998:279–283 (the writers argue that the *Yeredor* case signifies the influence of the German legal legacy on the Israeli judiciary in the sampled years).

that artistic expression and freedom of expression must give way to the right of privacy.[67] This time around, the reception of German law was quite natural. In the case of *Yeredor*, the court used German postwar legal doctrines, following the disastrous outcome of the freedom of action and expression prevailing during the 1930s in Germany, in order to limit freedom of expression. In the case of *Ploni* as well, the Israeli court made use of German law as a tool to limit freedom of expression. In both cases, the German approach was deemed preferable to the American one, which regards freedom of expression as a sacred, almost unlimited principle. At this point, I shall consider these two cases in some depth.

Political Freedom and Defensive Democracy

The *Yeredor* case, which took place in the 1960s, raised the following question: could an Arab slate participate in the election to the Knesset despite the fact that its initiators rejected Israel's territorial integrity and very right to exist? The Elections Committee, headed by Moshe Landau, a Supreme Court Justice and later president of the Israeli Supreme Court, who was born in 1912 in Danzig, then under German control, disqualified the Socialist List. As grounds for the disqualification, the Committee pointed to the above-mentioned views of the slate's initiators. Most of its candidates, the Committee noted, belonged to a group called "al-Ard." During the previous year, that group had been the subject of a case dealing with an application to form an association. In that case, *Jiryis v. Haifa District Commissioner*, Justices Berinson, Witkon, and Landau had found that "[n]o government can be expected, in the name of preserving the freedom of association, to grant its seal of approval to the establishment of a fifth column within the borders of its country."[68]

The statutory law which then governed the subject of elections imposed some formal elements as a prerequisite for an association to qualify as a political party eligible to participate in the elections, but it did not mention substantive principles.[69] Justice Haim Cohn, who was born in Lübeck, Germany, and migrated to Palestine in the 1930s, applied

67 CA 8954/11 *Ploni v. Plonit* (April 4, 2014), Nevo Legal Database (Hebrew) (Isr.) (henceforth: *Ploni*).

68 HCJ 253/64, 18(4) PD 673 (1964) (Isr.):681.

69 The Knesset Election Law, 5719/1959, SH No. 281 p. 114, § 24 (Isr.).

the formal, black-letter law and approved the eligibility of that party as a legitimate player in the elections. His view was that no principle based on natural law could detract from the right to elect or be elected endowed by specific legislation.[70]

Against the dissent of Justice Cohn, Justices Agranat and Sussman affirmed the decision of the Election Committee. Although President Agranat praised Justice Cohn's judgment as instructive and daring, he nevertheless added that denying Israel's right to exist as a Jewish state would stand in absolute contradiction to the history of the Jewish people, including the Holocaust, which proved the urgent need of an independent Jewish state, and to the wars Israel fought for its independence.[71] Justice Sussman, a student of German legal culture who had migrated to Israel in 1934, explained: "Just as a person is not required to consent to another killing him, so a state is not required to be destroyed and expunged from the map."[72]

All three justices cited the example of the Weimar regime in Germany, a democracy that failed to protect itself from a movement that exploited democratic means to destroy democracy. However, Justice Cohn remarked that the principle of "defensive democracy" could not be regarded as part of Israeli positive law, although the Knesset ought to adopt a provision along the lines of Article 21 of the Grundgesetz of the German Federal Republic and enact a law that limits the political power of an association whose purposes are incompatible with Israel's territorial integrity and its existence as a Jewish state.[73]

Diverging from Justice Cohn, the majority relied on the concept of "defensive democracy," developed by German post-war courts, whereby the rule of law is governed by unwritten principles under which a state cannot approve of a political party if its agenda is hostile to the fundaments of the state.[74] The fact that this principle is not explicitly mentioned in the statutory law is of no moment, as it is included in it by way of implication. In the conflict between the human right to elect and be elected and the right of Israel to defend itself, the latter takes precedence. The democratic right to run in elections and be elected to the

70 *Yeredor* (above, note 66):379–382.
71 *Ibid.*:386.
72 *Ibid.*:390.
73 *Ibid.*:383–384. The Israeli parliament indeed adopted such a provision in the 9th amendment to the Basic Law: The Knesset 5718–1958, SH No. 244 p. 69, § 7A (Isr.).
74 *Yeredor* (above, note 66):386–387, 390.

Knesset had to give way when it constituted a clear and present danger to democracy and to the state itself.

During the Supreme Court's revolutionary era, this decision was reversed: the Court abandoned this approach in favor of a radical interpretation of human rights. Presumably, the Court felt at that point that Israel was strong enough both from within and from without. Defense of the collective was pushed to the margins, and *Yeredor* was overruled.[75]

Artistic Freedom and Privacy

The second above-mentioned case concerning freedom of expression, *Ploni*, confronted a different clash of values. In this case, a book that was presented as fiction recounted a love affair between an older married man and a young woman. The young woman upon whom the book's figure was based demanded an injunction against its publication on the ground that the book violated her privacy.[76] The Court decided that the publication of the book would strongly violate the woman's privacy, while non-publication would only moderately injure the author's artistic freedom.[77] Hence, the publication of the book was prohibited, and the author was held liable to compensate his former lover in the sum of NIS 200,000.[78]

In rendering its decision, the Court resorted particularly to a ruling of the federal German constitutional court, which prohibited the publication of a novel entitled *Esra*. The book presented a romance between a fictitious writer and a fictitious actress.[79] An actual actress filed an action claiming that there was a match between her person in reality

75 ElecA 2/84 *Neiman v. Chairman of the Central Elections Committee for the 11th Knesset*, 39(2) PD 225 (1984); Friedmann 2016:24. For a detailed survey, see *ibid.*:65–72.

76 *Ploni* (above, note 67).

77 While freedom of speech and artistic expression are not stated expressly in the Basic Law: Human Dignity and Liberty, these freedoms are the breath of life of democracy: *Ploni* (above, note 67), at sections 53–66. The right to privacy is mentioned expressly in Basic Law: Human Dignity and Liberty, § 7.

78 At the time of the judgment this sum was equivalent to roughly US $50,000. For a review, see Cohen 2016.

79 BVerfGE 119, 1 (Ger.) 61 NJW 39 (2008) (Ger.) (henceforth: *Esra*). Another plaintiff was the actress's mother, but her suit failed because it was decided that there was a fair gap between her person in reality and the literary character. The court ordered the author to delete parts of the book, but as they were

and the character of the heroine as depicted in the novel, which, she asserted, exposed intimate details without her given consent. The German court ruled that the injury violated the core of her right to privacy and prohibited the publication of the book. [80]

In the course of arguments at the Israeli Supreme Court, it was claimed that an American court would not have prohibited such publication, and that Israel ought to follow the American tradition. In all likelihood, an American court would have ruled in favor of freedom of artistic expression. The Israeli court, however, expressed the view that the cultural and legal character of Israel more closely resembles that of Germany and Europe in general than that of the United States.

Freedom of expression in American law is indeed sanctified, and it is doubtful that the competing right to privacy would lead to banning a book. Yet even American law does not grant complete immunity to writers who breach their protagonists' privacy or libel them. The endless controversy on the subject notwithstanding, courts in the United States occasionally impose liability for defamation or invasion of privacy committed in work presented as fiction.[81]

Smith v. Stewart[82] (which was not cited by the Israeli Supreme Court) stands as a conspicuous example. In that case, liability was imposed on Haywood Smith, author of *The Red Hat Club*, a book featured on the *New York Times* bestseller list in 2003, on account of injury to the reputation of the claimant, Vicky Stewart, a longstanding friend of the writer. Despite the heroine's name – SuSu – and the fact that later editions of the book carried a disclaimer stating that the story and its characters were fictional, the court ruled that this book described the life of the plaintiff. The judgment pointed out the similarity between the heroine and the plaintiff, which touched on the heroine's background, employ-

indispensable to the plot, the whole book was withdrawn from publication. For the ruling see Schwartz and Peifer 2010:1932–1937, 1960–1963.

80 The German ruling, which raised a storm in Germany, was delivered by a majority of five to three, and the claim for damages against the author, which was heard separately, was dismissed: *BGH, Urteil v.* 24.11.2009, Az. VI ZR 219/08. The lower court imposed damages of €50,000, but the Court of Appeal overturned the ruling, stressing that the harm sustained by the plaintiff was not so grave as to impose a parallel duty of damages. That would be a further injury to freedom of artistic expression, which had suffered enough by the prohibition on the book's publication.

81 For a summary and a critique of American case law, which suggests imposing limited liability for defamation on fiction writers, see Arnot 2007.

82 *Smith v. Stewart*, 291 Ga. App. 86, 101 (Ga. Ct. App. 2008).

ment, and paramours, as well as the circumstances of her husband's death, and ruled that her depiction as a promiscuous drunk stewardess was injurious. Because the case did not concern a public figure, the court stressed, it was enough that the writer had behaved negligently in her portrayal of the plaintiff in the book. The determination did not relate to the cause of invasion of privacy, as damages on its account were in any case included in the defamation claim. Distribution of the book was not withheld, but the author and the publishers were ordered to pay the plaintiff damages in the amount of $100,000.[83]

A similar approach was taken by the European Court of Human Rights, albeit under different circumstances:[84] an authoress, a Portuguese national, published under a nom de plume a book presenting the life of a particular family. The book, one hundred copies of which were printed and distributed gratis to the author's friends and relations, carried a disclaimer stating that it was the product of the author's imagination and that any similarity between its contents and reality was purely accidental. Relatives of the author submitted a criminal complaint against her for defamation of their reputation and honor. The Portuguese court imposed on her damages in the amount of €53,000 and divided the sum among the injured family members. The European Court of Human Rights confirmed this ruling and determined that the right balance had been struck between freedom of expression and the right to privacy. There was no point in withdrawing the book, because it had not been published for commercial purposes, and in any case its distribution was limited in advance.

Thus, the German court in the *Esra* case banned a non-fiction book disguised as fiction but rejected the imposition of damages on the author. By contrast, the American court did not sanction withdrawal of the book but imposed liability on the author for defamation.[85] The Israeli judgment was the most far-reaching: it followed German law in banning the book and added compensatory damages that German law declined.

83 This ruling drew media criticism. See e.g., Kleiner 2010; Gurr 2009.

84 *Almeida Leitão Bento Fernandes v. Portugal* (Chamber Judgment, 12.03.2015).

85 For a critical review, see Savare 2004 (proposes softened criteria that will balance writers' freedom of artistic expression with the right to reputation of the people upon whom the stories are based: artistic freedom will be limited if the injured person proves intent to defame reputation and manifest similarity between the literary character and the real person); Richards 2012. See also Cohen 2016.

In *Ploni*, we see clearly the distinct courses run by American law on the one hand and European law on the other. It is highly unlikely that contemporary American law would furnish a judgment that rules out publication of a book, as was done by the German and Israeli courts. The Israeli decision itself might be regarded as controversial, but the shift to German law based on cultural identity is exciting and moving.

Conclusion

I began with some remarks regarding comparative law. I then moved to the reception of foreign law, in particular German law, in the Israeli legal system. Since the establishment of the State of Israel, about 200 references have been made to German law by the Israeli Supreme Court (including case law and legislation).[86] Of course, thousands of references have been made to English and American law, but, as noted, the Israeli system is rooted in the common law tradition, and the principles of common law and equity filled its lacunae.[87] The change of orientation and adaptation of continental principles, particularly in the area of private law, saw a growing tendency to resort to German law. Following the legislation of the Israeli Basic Laws in the 1990s, which were viewed as a sort of constitution, more and more references were made to German law in this area. Of the 200 references to German law in the sampled period, about 45% were applied to private law and 35% to constitutional and administrative law.[88] Whereas the doctrines and principles of common law constituted the warp and woof of Israeli law, German law was regarded as foreign, and as such posed special problems:

86 The following data regarding German law references was drawn from a database which includes all of the Israeli Supreme Court decisions between the years 1948 and 2015 that were longer than three pages and were published in the Israeli legal database "Nevo."

87 Resort to common law and equity was abolished in The Foundations of Law Act, 5740/1980, 34 LSI 181, § 2 (1980) (Isr.).

88 Contracts (corporation, labor law): 51 (26.5%); torts: 5 (2.5%); unjust enrichment: 1 (0.5%); intellectual property: 4 (2%); constitutional law: 59 (30.5%); administrative law: 11 (5.5%); criminal law: 23 (12%); procedure: 8 (4%); negotiable instruments: 1 (0.5%); family law and succession: 15 (8%); international law: 4 (2%); taxation: 2 (1%); restrictive covenants: 1 (0.5%).

> The reception of foreign law is a social process … Abstract sets of norms including juridical and meta-juridical conceptions, views, thoughts and ideas evolving around a legal rule, a statutory norm, and the concepts used in it "have to be" screened, filtered, amended, reshaped.[89]

It remains to be seen if, and to what extent, the style, spirit, or language of foreign law will be adopted.[90]

Reception of a foreign law has been conceptualized as a translation process.[91] James Boyd White, among others, has argued that even in the local sphere, every doctrine and every legal text, when applied to a specific situation, undergoes a translation process.[92] The case of a foreign norm, where the legal imagination is more remote and the supporting background is less familiar, amplifies the burden of this process.[93]

The translation process for German law has been particularly challenging. It had to surmount emotional obstacles, to overcome disturbing historical memories, and to bridge a substantial cultural gap. It also raised questions common to all foreign transplants: should one attempt to grasp the compared system from within, or consider it more remotely as a foreign spectator? The more distant regard might limit the applicability of the foreign system, a situation that obtained in our opening tale of Alexander the Great. Yet, the close gaze might yield too many details, leading us into the trap of information cascade,[94] so aptly limned by Jorge Luis Borges in his *Funes the Memorious*:[95] an accident had left Funes equipped with a wondrous memory. He remembered every movement of every leaf on every tree; he recalled every expression his dog ever made. This made Funes utterly miserable. His extraordinary powers of recall prevented him from thinking. Thinking, says Borges, entails knowing the road but forgetting negligible paths. Funes, who could not forget anything, was unable to think.

This point might apply to any theory of decision or knowledge. A full exploration of generalities – those elements that unite us, whether

89 Hirsch 1966, as cited by Foljanty 2015:1.
90 *Ibid.*.
91 This is argued by Foljanty, *ibid.*
92 White 2000.
93 Watson 1993:10–15 (on the challenges and limitations of comparative law).
94 On the problem of information cascade when applying foreign law, see Posner and Sunstein 2006.
95 Borges 1962.

in Berlin or in Jerusalem – demands at once an awareness of details and a commitment to refrain from indulging in them. Borges, Siegfried Lenz, and Amos Oz delight us all, because our cultural similarities outweigh our cultural differences. The case of Israeli law borrowing from German law supports this claim in a different yet equally fascinating domain.

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