Peripheral Vision: Polish-Jewish Lawyers and Early Israeli Law

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Many of the Zionist immigrants to Palestine in the first half of the twentieth century sought to leave Europe behind them. They would no longer be Jews but Hebrews, part of an ancient-modern nation that would turn its back on its recent past in the Jewish Diaspora. However, the culture of the old countries from which these immigrants came often continued to shape many aspects of their life in Palestine.1 In the interwar period, the

largest contingent of Jewish immigrants to Palestine came from Poland.\(^2\) The Polish influence on twentieth century Zionist culture and politics has already received some scholarly attention.\(^3\) There are studies that discuss the mutual transfer of ideas between Polish nationalism and Zionism in the pre-1918 period.\(^4\) Other studies have examined the effect of Polish nationalist ideology on the ideology and practice of the Zionist Revisionist movement in the interwar period.\(^5\) Elsewhere, it has been argued that the experience of former Jewish members of the Polish Parliament (Sejm) who immigrated to Israel influenced the parliamentary procedure and political discourse of the Israeli Parliament in its early years, and that interwar Polish notions of citizenship influenced Zionist ones.\(^6\)

2. See, for example, Irith Cherniavsky, Be-Or Shinehem: ‘Al ‘Aliyotam shel Yehudey Polin lifney ha-Sho’ah (Tel Aviv: Resling, 2015).


However, whereas the influence of the Polish political experience on Israel has received some attention in the literature, there have been no similar studies on the impact of the Polish legal experience. Much is known about the impact of English law on Israeli law. Some aspects of the impact of American law on Israel have also been traced. Additionally, there have been important studies on German legal influences. Less, however, is known about the East European experience, and the specific experience of Polish-Jewish lawyers who immigrated to Mandatory Palestine and Israel has received almost no scholarly consideration.

One reason for the lack of studies may be definitional problems. It is hard to determine with exactitude who was, or was not, a “Polish Jew,” given that the Second Polish Republic, created after World War I, was composed of territories previously ruled by Germany, Russia, and the

Another definitional problem exists with respect to “Polish law,” because the legal system of the new Polish state created in 1918 was a hybrid entity, combining the legal norms and institutions of the diverse territories from which this state was created. Therefore, the law of central Poland was mostly based on French codes introduced during the Napoleonic Wars with some Russian additions. Law in the northeastern part of the country was Russian. In western Poland, German law was in force, and in the south, Austrian and Hungarian law was in force. During the interwar period, however, a major effort was undertaken to create a unified system of law out of this heterogeneous legacy, based both on general principles common to all the legal systems that Poland inherited, and on comparative studies of the law of other countries; for example, France and Switzerland.

The problems involved in defining “Polish Jew,” and “Polish law” are, however, not insurmountable. For the purposes of this article, I will define “Polish-Jewish lawyers” as those trained in law in pre-World War I and interwar Polish universities (including universities in places such as Vilnius and Lviv, which are no longer part of Poland). I will define “Polish law” as the law taught at these universities in the interwar period, as well as in the period immediately after World War II.

The story I tell here might interest Israeli and Polish legal historians. I believe it can also interest other legal historians, as well as comparative lawyers, first, because it provides an interesting example of the interaction of identity and law. In the last decades, legal historians and sociologists of


12. A Codification Commission established in 1919 was appointed to accomplish this task. It embarked on a process of piecemeal legislation, meant to gradually unify Polish law. Some of the new enactments created by this commission were promulgated before World War II. For example, a Code of Civil Procedure was enacted in 1930, a new criminal code was enacted in 1932, a code dealing with the law of obligations was enacted 1933, and a new commercial code was enacted in 1934. Other enactments (such as codes dealing with property or family law) were only promulgated after 1945. In addition to these codes, legislation dealing with topics such as taxation, labor, and social rights was also enacted during the interwar period. A detailed survey of the various subfields of interwar Polish law is found in Bronisław Helczyński, “The Law in the Reborn State,” in Polish Law Throughout the Ages, ed. Wenceslas J. Wagner (Stanford: Hoover Institute Press, 1970), 139–76. See also Juliusz Bardach, Bogusław Leśniodorski, and Michał Pietrzak, Historia ustroju i prawa polskiego (Warsaw: PWN, 1994), 552–54. It is interesting to note that a similar method of piecemeal replacement of civil law using both the local legal heritage and comparative legal research was also adopted in Israel in the 1950s. See Assaf Likhovski, “Argonauts of the Eastern Mediterranean: Legal Transplants and Signaling,” Theoretical Inquiries in Law 10 (2009): 619–51.
law have begun to explore the impact of various types of identity (ethnic, religious, national, racial) on the professional identity of lawyers. This article augments existing works by discussing a case in which two aspects of the identity of the lawyers analyzed—the ethnic (Jewish) and the educational (Polish)—existed in an uneasy relationship between them, given the impact of anti-Semitism on Polish politics in the first half of the twentieth century. As a result, the influence discussed here was more subconscious and haphazard than in the ordinary situation in which identity influences law.

Second, and more broadly, this article provides an example of a relatively under-studied topic in comparative law scholarship: periphery-to-periphery legal transplants. There is now a large body of literature by comparative lawyers, sociologists of law, and legal historians on legal transplants and their history. One type of discussion of legal transplants focuses on transplants as an example of the autonomy (or lack thereof) of law, and the relationship of law and society. Other discussions compare legal diffusion and the diffusion of scientific, technological, cultural, and administrative ideas; discusses the relationship of transplants to


14. Echoing the semantic debate in intellectual history about the notion of influence (see note 3), comparative law scholars debate the exact terms that should be used to designate the process of the movement of legal ideas across boundaries. Some of the terms used are “adaptation,” “borrowing,” “circulation,” “diffusion,” “entanglement,” “influence,” “migration,” “reception,” “transfer,” and “transplantation.” In this article, I use the term “transplantation” simply because it is one of the most prevalent terms to designate this process. The term “periphery” is also problematic. There are various types of “peripheries,” for example, territories distant from state capitals, or from centers of empires, but also whole states that are politically or culturally marginal. In addition, the concept of “periphery” is relational, and thus changes its meaning depending on the “core” and “periphery” discussed (this sometimes leads to a discussion of a third type of category: semi-periphery).

economic development; or analyzes the motivations of countries and actors involved in the process of transplantation.\(^\text{16}\)

Whatever type of question the current literature examines, the history of legal transplants is often told as a story of influence by a legal center (or core, or metropole) on a legal periphery (a province, a colony, or a country far from political or cultural cores).\(^\text{17}\) However, the relationship between center and periphery, capital and province, empire and colony, is sometimes more complex. Peripheries were often places of experimentation in fields such as literary studies or the social sciences, and in empire/postcolonial studies, the notion of “provincializing the empire,” which seeks to shift scholarly attention to peripheries, has therefore long been commonplace.\(^\text{18}\)


\(^{17}\) See, for example, Duncan Kennedy, “Three Globalizations of Law and Legal Thought: 1850–2000,” in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (New York: Cambridge University Press, 2006), 19–73. Kennedy does acknowledge that sometimes legal ideas created in peripheries can be imported back to the center, as was the case with nineteenth century American constitutional law, which was exported after 1945 to places such as Germany. However, his account seems to imply that the process will only occur once the periphery becomes the center of a new empire. Some additional examples of histories of legal transplants that are also based on the conventional model are “Histories of Legal Transplantations,” *Theoretical Inquiries in Law* 10 (2009): 299–743; Holger Spamann, “Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law,” *Brigham Young University Law Review* 6 (2009): 1813–78; Thomas Duve, ed. *Entanglements in Legal History: Conceptual Approaches*, (Frankfurt am Main: Max Planck Institute for European Legal History, 2014); and Heikki Pihlajamäki, “Comparative Contexts in Legal History: Are We All Comparatists Now?” *Seqüência: Estudos Jurídicos e Políticos* 70 (2015): 57, 64–65. For brief critiques of the conventional core/periphery model, see Yves Dezalay and Bryant Garth, “The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars,” in *Adapting Legal Cultures*, 241, 246; and Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2nd ed. (Cambridge: Cambridge University Press, 2006), 50–51.

What about law? Peripheries were sometimes also laboratories of legal innovation. A well-known example of legal innovation in the colonies is the codification of English law first undertaken in nineteenth century India, then in places influenced by the Indian codes, such as the African colonies of British Empire, and only later in the United Kingdom itself.19 Another example is found in the history of forensic science in the British Empire.20 Some recent works on the history of international law scholarship have also shifted the focus of analysis to the study of knowledge produced in peripheries such as Eastern Europe, Latin America, or India.21 Similar works explore the history of jurisprudence, procedure, or property law.22 The conventional, unidirectional, model of transplantation from center to periphery thus obscures the complexity of the actual history of legal transplantation by ignoring the fact that the circulation of legal knowledge sometimes occurred between peripheries, or even from peripheries to centers.

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An analysis of the history of Polish–Israeli legal interaction adds another case study to the relatively small number of existing works that focus on periphery-to-periphery legal transplants. One specific aspect of this case study was that the process of transplantation was especially evident in constitutional law. In this area of law, transplantation seems to be more common than in other areas.\textsuperscript{23} The process of constitutional drafting is often one of eclectic bricolage of provisions taken from various systems.\textsuperscript{24} Therefore, it is also easier to find cases of periphery-to-periphery transplants in this specific legal field.\textsuperscript{25} However, even in this area of law,


the constitutional models of some core legal systems (those of the United States, France, the United Kingdom, and Germany) were historically the source of most worldwide constitutional borrowing.26

In the case discussed in this article, constitutional influence was partly the result of the fact that interwar Poland provided Israeli lawyers with a model that was more modern than the older models offered by English or American constitutional law. It was also the result of the fact that Polish constitutional law was more relevant to the constitutional regime of the new Israeli state than the law of countries such as the United States. Israel was a political entity in which the ethnic majority’s religion played an important role in defining the nation, and, therefore, the state.27 Poland, as well as another state created in the interwar period in the European periphery, Ireland, therefore provided Israelis working on drafts of their constitution with an example of a state in which the religion of the majority was explicitly recognized by the constitution.28


The story discussed here thus shows that the unexplored history of interwar constitutional innovation in the states of the European periphery, and its subsequent impact on post-World War II postcolonial states, deserves more scholarly interest.29 Studying this period might lead to a better history, and periodization scheme, of constitutional innovation, and to a better understanding of the way new constitutional ideas then traveled around the globe.30

Some of the models and precedents that will be discussed in this article had no direct practical impact. After Israeli independence in 1948, Israelis attempted to create a constitution for the new state, but these attempts were abandoned in 1950, and today, Israel is one of the only countries in the world that does not have a single-document written constitution.31 As I will show in this article, however, even this very fact, which makes Israeli constitutional law rather unique, was partly the result of Polish constitutional history precedents.

I discuss four Polish-Israeli lawyers in this article: Yitzhak Kister, a Supreme Court justice who occasionally relied on Polish legal texts in deciding cases; Apolinary Hartglas, a government lawyer who used Polish law (and more generally continental law, to which the Polish legal system belongs) as a way to critique Israeli law; and two lawmakers, Yochanan Bader, who used constitutional provisions taken from the 1921 Polish Constitution in his


30. A pioneering unpublished article by Tom Ginsburg and James Melton notes the importance of studying constitutional innovations (in their case, the creation of new constitutional rights), and also notes the need for a more accurate periodization scheme of the spread of such innovations. Ginsburg and Melton, however, do not see the interwar period as an important period of constitutional creativity in the specific area that they study, that of constitutional rights. See Ginsburg and Melton, “Innovation in Constitutional Rights.” See also Daniel N. Rockmore, Chen Fang, Nicholas J. Foti, Tom Ginsburg, and David C. Krakauer, “The Cultural Evolution of National Constitutions,” https://arxiv.org/pdf/1711.06899.pdf (accessed December 24, 2017) (for a similar attitude to the interwar period). The methodology used in such works is based on quantitative analysis of explicit constitutional provisions found in formal constitutional documents. One of the problems of such an approach is that it ignores other relevant repositories of constitutional ideas such as constitutional drafts, or discussions of constitutional law in unofficial texts such as newspapers and academic periodicals.

proposal for Israel’s constitution, and Zorach Warhaftig, who used precedents taken from Polish constitutional history in his work as one of the central architects of the Israeli constitutional regime in the period immediately after Israeli independence. I chose to discuss these particular four figures because, out of the many Polish-Israeli lawyers I examined, the works of these individuals contained interesting traces of Polish legal thought. Another reason for focusing on them is that their specific careers (as a judge, government lawyer, and members of Parliament) illustrate different facets of the impact of Polish law in Israel.32

Four Lawyers: Four Uses of Polish Law

Jews comprised approximately 10% of the population of Poland in the decades before World War II, and they played an important role in the legal profession there.33 In 1910, the proportion of Jewish lawyers in western Galicia (then still part of the Austro-Hungarian Empire) was 53%, rising to 61% in the eastern part of the province. In Congress Poland, too, Jews were disproportionately represented in the legal profession. They were also disproportionately represented in some areas of the legal profession in interwar Poland. In the late 1920s, approximately 40% of the students of the law faculty of the Jagiellonian University in Kraków were Jewish.34 By 1931, approximately 40% of the lawyers in private practice


34. Mariusz Kulczykowski, Żydzi—studienci Uniwersytetu Jagiellońskiego w drugiej Rzeczypospolitej (1918–1939) (Kraków: Polska Akademia Umiejętności, 2004), 66, 478. On Jewish student in interwar Polish universities see generally, Natalia Aleksiuń,
in Poland were Jews (3,185 out of 8,022 advocates).\textsuperscript{35} Jewish lawyers were mainly to be found in private practice because they were mostly barred from state employment. Therefore, in 1923, out of 3,430 Polish judges, public prosecutors, and court officials, only approximately 4\% were Jews.\textsuperscript{36} Likewise, there were very few Jewish professors, including law professors, in Polish universities.\textsuperscript{37}

In the middle of the 1930s, economic conditions in Poland worsened, and anti-Semitism intensified. It was during this time that a campaign to oust Jews from the legal profession was mounted. The major professional unions of lawyers began to exclude Jews, and in 1938, a law enacted by the Sejm empowered the minister of justice to control the admittance of candidates to the profession, specifically to prevent Jewish entry. This law was coupled with a boycott of Jewish lawyers.\textsuperscript{38} The diminishing prospects of Jewish lawyers in Poland led to a sharp decline in the enrollment of Jewish students to law faculties. Whereas in 1933/4 Jews comprised 21\% of all law and political science students in Poland (3,305 out of 15,390 students), by 1938/9 they comprised only 4\% (525 out of 12,836 students).\textsuperscript{39}

Most of Polish Jewry, including the lawyers, died in the Holocaust. However, some of the lawyers who survived immigrated to Palestine, joining Polish-Jewish lawyers who immigrated to that country before World


\textsuperscript{36} Mahler, “Jews in Public Service,” 297–99, 303, 308.

\textsuperscript{37} Ibid., 304.

\textsuperscript{38} Ibid., 308–23.

War II. Not all immigrants continued to practice law, but some did.40 What role did these lawyers play in shaping Israel’s legal system? It seems that Polish-educated lawyers only played a minor role in the early Israeli legal system. Their role was limited because the legal system of Mandatory Palestine and later of the State of Israel was dominated by lawyers whose cultural allegiance was to English, and to a lesser extent, to German law.41 Polish law was inaccessible to non-Polish lawyers, and it was often deemed culturally inferior to the legal systems of Western Europe, and also tainted by the experience of Polish interwar anti-Semitism. Another factor contributing to the relatively marginal role of Polish lawyers in early Israeli law was that some of these lawyers (including those I discuss in this article) were affiliated with relatively marginal centrist or right-wing parties rather than with the Israeli Labor Party, which dominated Israeli politics before and after Israeli independence. Nevertheless, despite their marginality, there were some important Polish-trained Israeli lawyers. I will discuss four of these lawyers now.

1. Kister: Occasional Citations

Israeli case law contains very few explicit references to Polish law. Both Israeli law, generally, and Israeli case law are highly comparative, but the comparative references found in Israeli decisions mostly refer to Anglo-American law. References to continental sources are relatively rare (in any given year between 1948 and 2004, only 1–2% of the published cases of the Israeli Supreme Court mentioned continental legal sources).42 This was partly the result of the fact that, until 1980, Israeli judges were formally (although not practically) required by law to turn to English law in cases of lacunae in existing legislation.

A search of the leading Israeli legal database (Nevo), using multiple keyword searches related to Poland, yielded very few relevant results.43 The

40. The transition required the acquisition of new linguistic skills (in Hebrew, and also English, given the strong English influence on the law of mandatory Palestine and later of Israel). Lawyers trained abroad were also required to pass special bar examinations to practice law.

41. For discussions of Anglo-American-trained and German-trained Israeli lawyers, see the works by Lahav, Likhovski, Oz-Salzberger, and Sela-Sheffy mentioned in notes 7–9.


43. A search of an Israeli legal database (Nevo), conducted in early 2015, used the following Hebrew keywords: polin (Poland), polanyah (Poland), mishpat polani (Polish law), hok polani (Polish law), yurisprudencey polanit (Polish case-law), torat mishpat polanit (Polish jurisprudence), and psak din polani (Polish case). Some of the keywords (such as polin) yielded more than 500 results, but only a few of these turned out to be substantive.
majority of the cases were from the period between Israeli independence in 1948 and the mid-1970s (when the composition of the Supreme Court changed, and the first generation of Israeli justices, mostly foreign born, was replaced by Israeli-born judges). There were, of course, cases where the court was forced to turn to Polish law because of conflict of law rules. However, only the decisions of one Israeli judge contained a significant number of references to Polish law unrelated to conflict of law issues. The judge in question was Yitzhak Kister, an ultra-orthodox Jew born in 1905 in Galicia. Kister studied law in the 1920s at the University of Lviv. He practiced as a lawyer in Poland from 1925 to 1935, and thereafter immigrated to Palestine. He was appointed to the Tel Aviv Magistrates’ Court in 1945, to the Tel Aviv District Court in 1948, and to the Israeli Supreme Court in 1965, serving there for a decade until his retirement.

In some of Kister’s decisions, one can find references to facts related to Jewish life in Poland. For example, in a minority opinion he wrote in a case dealing with Israeli television broadcasts on Saturdays, the Jewish Sabbath, Kister referred to a 1919 law enacted by the Sejm in 1919 declaring Sunday a day of rest. This law, Kister said, was intended to force Jews to desecrate the Sabbath and work on Saturdays out of economic necessity. In another case, involving child custody, Kister was asked to recuse himself because he was an ultra-orthodox Jew (and therefore, so claimed one of the lawyers, biased against one of the parents who was non-orthodox). Kister, somewhat offended, wrote that “in western democracies,” it is often the case that judges have “strong religious beliefs,” and that this is not a reason for recusal. After mentioning English law in this matter, Kister added that even in the Second Polish Republic, before the triumph of anti-Semitism in the 1930s, there was no attempt to recuse Jewish judges because of their religious beliefs.

More interesting are cases in which Kister relied on Polish law as part of a legal (rather than historical) argument. One such case involved a discussion of the unenforceability of a marriage promise, when both sides were married at the time to other persons. In this case, Kister turned to

44. See, for example, CA 105/47 Avraham Ya’akov Kornblit v. Ya’akov Freiermauer, 2 Piskey Din (hereafter PD) 184; CA 180/51 Arnold Goldkorn v. Silviyah Visotski, 8 PD 262; CA 100/57 Yezi Vandel Hirshberg v. Martyah Yakobsfeld-Yakroskah, 12 PD 1896; and IC (Haifa) 101/50 Be’Inyan ‘Izvon ha-Mano’ah Meir Grinberg, 4 Psakim Mekhiziyim (hereafter PM) 95.
46. HCJ 80/70 Yehudah Elitsur v. Rashut ha-Shidur, 24(2) PD 648, 668.
47. HR 600/63 Ha-To’ets ha-Mishpati v. Shmuel Reuven, 38 PM 411, 413.
post-World War II Polish socialist law to prove that such agreements were unenforceable in communist Poland as well, thus seeking to demonstrate that the illegality of such contracts was not grounded only in religious morality, but also in socialist ethics (espoused at the time by dominant parts of Israeli society). To prove his point, Kister relied on a 1959 commentary on Polish family law, which discusses a 1952 Polish Supreme Court case, the 1952 Polish Constitution, and the 1950 Polish Family Law Code. All these sources, argued Kister, proved that “socialist morality” also sought to safeguard marriage and prevent adultery.48 He also used this 1959 commentary in discussions about child adoption, presumptions of paternity, and liability for child support.49

Polish law certainly appeared in Kister’s decisions, one can conclude, but it seems to have played a very minor role in his decisions. Perhaps the reason is to be found in his specific identity. Kister was an ultra-orthodox Jew whose notion of identity was closely tied to his religious beliefs. He did not view himself as Polish, and his ties to Polish law were accordingly quite tenuous.50 Such an attitude was very different from that expressed by another Polish-Jewish Israeli lawyer—Maximilian Apolinary Hartglas—whose Polish identity was stronger than that of Kister.51


50. See, for example, CA 1976/57 Irenah Grodzinskah v. Yee Grodzinski, 16 PM 162, 169–70 (in which Kister states that both Polish law and Jewish law would not regard a Jew as a Pole); HCJ 80/70 Yehudah Elitsur v. Rashut ha-Shidur, 24(2) PD 648, 668 (Kister criticizing “assimilated Jews,” whose representatives in the Sejm voted, together with the Socialist Party, in favor of the 1919 law declaring Sunday a day of rest, so as to force Jews to work on Saturdays and thus “become Poles”).

51. For a discussion of the identity options available for Polish Jews at the time see, for example, Awakening Lives: Autobiographies of Jewish Youth in Poland before the
2. Hartglas: Continental Critique of the Israeli Legal System

Maximilian (Meir) Apolinary Hartglas was born in 1883 to an assimilated Jewish family in Biała Podlaska in the Russian part of Poland. Like his father, Hartglas became a lawyer. He studied law at the University of Warsaw and practiced in Warsaw and Siedlce. He served as a member of the Sejm between 1919 and 1930, and was later a member of the Bar Council in Warsaw. He left Poland for Palestine in 1939, where he worked for the Jewish Agency, the body representing the Zionist movement in Palestine and serving, in many senses, as the government of the Jewish community there. When the State of Israel was created in 1948, Hartglas became the director general, and later the legal adviser, of the Israeli Ministry of Interior.\(^52\)

In his autobiography, written in Polish in 1950, Hartglas noted that his identity was split throughout his life between his attachment to Polish culture and his identification with the “suffering of the Jewish nation.”\(^53\) However, it seems that the Polish facet of his identity was the dominant one, certainly in legal matters. In his autobiography, Hartglas relied on his experience as a Polish lawyer to critique Israeli society, politics, and law. A special ire (which echoed orientalist notions common in the first part of the twentieth century) was reserved for the Anglicized nature of Israeli law. “My proper profession,” he wrote, “is law, but I am raised on French law [which heavily influenced Polish law] tinged with Russian and Polish legislation. Here [in Israel] though, the English approach is considered omnipotent, but not even the original approach, but a remake for colored [people]. It is something so inconsistent, so narrow and ridiculous, so obsolescent, that it makes the European lawyer’s hair stand on end.”\(^54\) Hartglas called local lawyers “caricatures of their English peers who believe that one should blindly follow everything English.”\(^55\) He described local legislative acts as a “reproduction of

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54. Ibid., 340.

55. Ibid., 421.

English acts deformed by the local partisanship, colonial-levantine negrotization (lewantyńsko-kolonialne zmurzynienie) and half-intelligence.\textsuperscript{56}

The Israeli attachment to English law was, according to Hartglas, part of a wider phenomenon:

\ldots assimilation with the English—the Negro assimilation (murzyńska asymilacja) that is not [an absorption of] the essence of what we are identifying with, but [an incorporation of] its ugly side, of what is superficial—\textemdash is rooted here [in Israel] to the extent that we can’t even imagine in Poland. The biggest ambition of people here is to come into contact with an Englishman, even an English policeman, an English usher. To have an Englishman at a party and to ape the behavior at English parties, with everybody standing with his own cup of tea and a biscuit, where people don’t know each other and are bored to death, is an ambition of every housewife… Now [after Israeli independence in 1948], when there are no more English here, not much has changed… One still dreams of degrees from English universities, even though the owners of these degrees usually possess little knowledge and even less intelligence. People still organize boring English parties, and cry silently that the English are not here anymore. Anything that is English is still magnificent, even if the world already rejected it 300 years ago as obsolete.\textsuperscript{57}

Such mimicry of English ways, he concluded, was prevalent everywhere in Israel: “The [Israeli] parliament, political regime, courts, legislation, army training and post office—everything here is designed not in its own form based on general European tradition, but is a copy of the way they do it in England.”\textsuperscript{58}

Hartglas’s Polish past was also reflected in his discussion of the major draft of Israel’s constitution. The 1947 United Nations resolution for the partition of Palestine between a Jewish and an Arab state demanded that the two states to be established in Palestine should promulgate democratic constitutions.\textsuperscript{59} However, such a constitution was never enacted. In June

\textsuperscript{56} Ibid., 422.
\textsuperscript{57} Ibid. 340
\textsuperscript{58} Ibid., 370. Hartglas’s disdainful attitude toward Israeli lawyers was shared by some of his Polish-Israeli compatriots. Zorach Warhaftig, the Polish-Israeli member of Parliament (who will be discussed later in this article), sarcastically described an international lawyers’ conference held in Israel in 1958, saying that “the Israeli lawyers wildly danced around the distinguished guests, the English lawyers, and told them that we [Israelis] were good students of their decisions, and even advised them to learn Hebrew so that they could see for themselves how well we [Israelis] interpret their decisions.” See Warhaftig, Divrey ha-Knesset, Nov. 11, 1958, 231, 232, quoted in Menachem Mautner, Mishpat ve-Tarbut be-Yisrael be-Fetah ha-Me’ah ha-’Exrim ve-Ahat (Tel Aviv: ‘Am ‘Oved, 2008), 90.
1950, the Israeli Parliament (Knesset) adopted a suggestion made by one of its members, M.K. Yizhar Harari, that the Israeli constitution would not be adopted wholesale but as a series of basic laws.60 A major factor in this decision, known as the “Harari compromise,” was the inability of the secular and religious parties to agree on the proper relationship between state and religion in Israel. The way chosen to prevent a constitutional crisis was to postpone the decision.61

Between 1948 and the summer of 1950, however, many Israeli lawyers and politicians were busy creating draft constitutions.62 The most important of these drafts was created by Leo Kohn, a German-Jewish lawyer working for the Jewish Agency. In 1932, Kohn published the leading commentary on the Irish Constitution of 1922. His proposed Israeli constitution, which was partly inspired by the Irish experience, was adopted by the Constitution Committee of the Israeli Parliament as the main draft discussed before Israeli constitution-making efforts were stalled in the summer of 1950.63

In 1948, Hartglas published an article on Kohn’s draft constitution. In this article, Hartglas noted that his comments were based on his experience as a member of the Polish Sejm as well as on his “experience as a lawyer who argued, before the higher courts in Poland, matters involving the


62. A number of these draft constitutions can be found online at: http://main.knesset.gov.il/Activity-Constitution/Pages/ConstProposals.aspx (accessed December 24, 2017). See also RZA, PA 16, file 95; Aviram Shahal, “Ha-Hukah she-Nishkekhah: Hatsa’at ha-Hukah shel Leo Kohn veha-Bet ha-Aviv,” (LLM thesis, Tel Aviv University, 2014).

interpretation and implementation of the [Polish] constitution.”

64 His comments on Kohn’s draft reflected this Polish background. For example, Hartglas argued, based apparently on the Polish precedent, that the constitution should not include a detailed description of the structure of the court system, an issue that, he said, should be left to special legislation. Hartglas also suggested, again apparently based on the Polish experience, that the constitution include provisions dealing with the rights of workers, just like the “most modern constitutions of Europe.”

Hartglas, one can conclude, mostly used his Polish legal background as a basis for criticizing Israeli law (and, more broadly, Israeli society), which he saw as aping obsolete English legal traditions. His “Polishness,” however, was less specifically Polish and more continental in its nature. As a lawyer trained in a legal system based on continental notions, he had difficulty adjusting to the Israeli legal system, which was heavily influenced by English law.

Hartglas’s critique, however, had little impact on Israeli law or Israeli lawyers. His autobiography was written in Polish, and was only published posthumously in 1996. One can speculate that, even had this autobiography appeared during his lifetime (he died in 1953), it would have gone unnoticed, given that Hartglas was a relatively marginal figure in Israel’s emerging legal community. Although he was an important Jewish politician in interwar Poland, he arrived in mandatory Palestine a broken man, and was able to obtain a position in the Israeli government mainly because of the efforts of his political patron, Yitzhak Gruenbaum, an important, albeit not a leading, Israeli politician.

64. Apolinary Hartglas, “Hukah le-Yisrael,” Ha-Praklit 5 (1948): 163. There was no judicial review in the American sense of the term in interwar Poland. Indeed, article 81 of the March 1921 Constitution explicitly stated that “the courts have not the right to inquire into the validity of duly promulgated statutes.” Nor was a constitutional court of the type created in interwar Austria or Czechoslovakia established in Poland. See Bogumił Szmulik and Marek Żmigrodzki, “Kwestia kontroli konstytucyjności prawa w Polsce w latach 1918-1982,” Annales Universitatis Mariae Curie-Skłodowska. Sectio K, Politologia 5 (1998): 151, 153. However, the March Constitution did create a “Court of State” (Trybunał Stanu) which could impeach the president and government ministers (articles 51, 59, and 64), and, in addition, article 73 established a system of administrative courts culminating with a Supreme Administrative Court, which could review administrative acts. See Ludwik Kos-Rabcwicz-Zubkowski, “Polish Constitutional Law,” in Polish Law Throughout the Ages, ed. Wagner 215, 256.


3. Bader: Constitutional Copying

Yochanan Bader, born in 1901, was, like Hartglas, an assimilated Jew. Bader was the son of a wealthy Jewish lawyer in Kraków. His father was a friend of a number of distinguished Polish figures including the major Polish statesman of the interwar period, Józef Piłsudski, and the Polish nationalist author Jerzy Żuławski.67 In Bader’s autobiography, he noted that as a child he regarded himself as “a little Pole.”68 In his youth, Bader was a communist, only later espousing Zionism.69 He studied law at the Jagiellonian University in Kraków in the early 1920s, and later worked as a prominent trial lawyer in Poland in the 1920s and 1930s, acting as a defense attorney in a series of political trials, many of them of communist defendants. In 1939, Bader fled eastward to the Soviet Union, whence he moved to Palestine in 1943, working there as a journalist. After Israeli independence, Bader became a leading Israeli parliamentarian, serving in the Israeli Parliament as a member of the right-wing Herut Party (a forerunner of the Likud Party) for almost 30 years, between 1948 and 1977.70

Bader was an eloquent and polyglot parliamentarian conversant in Polish, Greek, Latin, Russian, English, and French.71 Until his death in 1994, however, Bader spoke Hebrew with a heavy Polish accent, and although he was one of the most prominent members of the Israeli Parliament, he never learned to write properly in Hebrew. An interview in an Israeli magazine published when he was 81 years old and entitled “The Last Pole” mentioned Bader’s “Polish charm and style.” It also noted how he enjoyed “arguing and cursing in Polish,” with one of his friends and rivals in the Israeli Parliament, Moshe Sneh, the head of the Israeli Communist Party (who was both a medical doctor trained at the University of Warsaw and an officer in the Polish army), as well as with the head of his own party, Menachem Begin (who, like Bader, also studied law in interwar Poland).72


68. Ibid., 49. This may have been a reference to Władysław Bełza’s patriotic children’s poem which begins “Who are you? A little Pole.”

69. The first volume of Bader’s two volume autobiography (Darki le-Tsiyon) contains a detailed discussion of the transformation of Bader’s identity from that of an assimilated Polish Jew as a young person, to that of a communist, and later a Zionist.

70. Bader also practiced law for a brief period in the 1960s. See Bader, Ha-Knesset, 15. 71. Ibid., 166.

There are many specific examples of the influence of Polish law on Bader’s legal thought.73 Such influence was most evident in the constitutional realm. Specifically, it can be found in Bader’s proposed draft of Israel’s constitution.74 Bader began working on his draft when he was still incarcerated in a British prison, immediately before Israeli independence.75 Parts of the draft were read in the first conference of the Herut Party in June 1949, and were later debated by the council of the party.76 Bader may have been influenced by a number of constitutions in preparing his draft constitution. In one comment he wrote during this period he mentioned several constitutional texts such as the American constitution, and the French Declaration of the Rights of Man and of the Citizen of 1789. He may have also been inspired by more modern sources such as the Italian Constitution of 1947.77 However, one of the major sources of Bader’s forty page draft constitution seems to have been the March 1921 Constitution of Poland.

Poland had a constitutional tradition dating back to one of the first modern constitutions, the 1791 Constitution. However, neither this document, nor the Napoleonic Constitution of 1807 or the Alexandrine Constitution of 1815 could be adapted to the conditions of interwar Poland. In March 1921, the new Polish Republic promulgated a constitution modeled primarily on the constitution of the French Third Republic, but also influenced by American and German models. The constitution envisioned the creation of a liberal parliamentary democracy. It guaranteed equality of all citizens, freedom of expression, and legal protection by the state of all citizens. It

73. For example, his unsuccessful calls for the Israeli legal system to adopt the use of juries, calls based on his experience as a trial lawyer in Galicia, where juries were used in criminal trials during the Austrian period and (to a lesser extent) also during the interwar period. See Bader, Darki, 37, 123–24, 205; Yochanan Bader, “Shilton ‘al yedey ha-‘Am: Keytsad le-Hasigo,” Herut, January 7, 1949; Divrey ha-Knesset, February 2, 1955, 720; Divrey ha-Knesset, November 15, 1955, 321–22; and Divrey ha-Knesset, November 22, 1955, at 358–59. On the use of juries in interwar Poland, see also Stanislaw Pomorski, “Lay Judges in the Polish Criminal Courts: A Legal and Empirical Description,” Case Western Reserve Journal of International Law 7 (1975): 198–209.

74. The text of Bader’s draft constitution can be found in Bader’s personal archive at the Jabotinsky Institute in Tel Aviv. See Jabotinsky Institute, file P 21 5/1.

75. Bader, who was linked to Begin’s paramilitary group, the Irgun, was freed only on May 6, 1948, 5 days before the establishment of the state of Israel. See Bader, Darki, 427, 440.


77. See Yochanan Bader, “Shirit ve-Rodanut be-Masveh shel ‘Zkhuyot Yesod’,” Herut, December 31, 1948. I am indebted to Aviram Shahal for the point about the Italian constitution.
also mentioned some social rights, such as unemployment and sickness benefits, or the right to education. However, the constitutional regime created by this constitution was unstable. The proportional nature of the Polish election system led to the formation of many political parties, none of which was able to capture an absolute majority in the Sejm. As a result, during the first part of the 1920s, many Polish governments rapidly rose and fell, ultimately leading to a constitutional crisis and a coup d’état in May 1926, followed by an amendment that gave the Polish president the right to dissolve the Sejm when it was deadlocked. In 1935, the March 1921 Constitution was replaced by a new, authoritarian, constitution. This new constitution gave the president of Poland additional powers at the expense of the Sejm, mirroring a more general crisis of liberal democracies, which characterized European politics in the 1930s.78

The similarity between the 1921 Polish Constitution and Bader’s draft constitution is evident in the details of Bader’s document; for example, in the provisions dealing with the office of president or with the convocation of Parliament. Thus, the Polish Constitution stated that “the President of the [Polish] Republic may not hold any other office or be a member of the Sejm or the Senate,” whereas Bader’s draft declared that “the President [of Israel] may not be a member of the Parliament, and may not serve in any other capacity or profession from the moment of election.”79 The Polish Constitution stated that “the President of the [Polish] Republic may, at his own discretion, convocate the Sejm to an extraordinary session at any time and is bound to do this within two weeks upon request of one-third of the total number of deputies,” and Bader’s draft declared that “the President of the State [of Israel], the presidium of the Parliament or a third


of the members, can convoke an extraordinary session of the Parliament.\footnote{PC, art. 25; BD, art. 73.4.}

Both the Polish Constitution and Bader’s draft contained a bill of rights. However, unlike older constitutional texts, such as the American Constitution, which only listed constitutional rights, many European constitutions also contained a list of duties.\footnote{See, for example, The Constitution of the German Federation of August 11, 1919, articles 132, 133 (an English translation is available in Heinrich Oppenheimer, \textit{The Constitution of the German Republic} [London: Stevens and Sons, 1923], 248).} This was also true of the Polish Constitution, and of Bader’s draft. Both documents contained sections dealing with civil duties. In both texts, similar rights and duties were enumerated. Thus, both mentioned the right to labor (also mentioned, as we saw, by Hartglas) and the right to scientific research and publication. The Polish Constitution stated that “labor is the main basis of the wealth of the [Polish] Republic, and should remain under the special protection of the state,” and Bader’s draft asserted that “labor is the basis of society, and enjoys the special protection of the state [of Israel].”\footnote{PC, art. 102; BD, art. 47.1.}

The Polish Constitution stated that “learned investigations and the publication of their results are free,” and Bader’s draft declared that “there will be no limitation of scientific research or the publication of its results.”\footnote{PC, art. 117; BD, art. 28.}

The sections dealing with duties also contained similar provisions, both beginning with a general declaration about the duty to obey the constitution and the laws of the state. The Polish Constitution stated that “every [Polish] citizen has the duty of respecting and obeying the constitution of the state and of the valid laws and ordinances of the state and self-government authorities,” and Bader’s draft declared that “every person in the State of Israel has a duty to obey and respect its constitution and laws.”\footnote{PC, art. 90; BD, art. 56.1.}

Some of the provisions just mentioned dealt with universal topics relevant to every state and society, and Bader may have copied them from the March 1921 Constitution, or he may have taken them from other constitutional texts. The most interesting provisions in Bader’s draft were those that seem to have reflected the influence of the Polish context on his constitutional thought. Both in Poland and in Israel, nationalism is linked to religion. It is not surprising, therefore, that the Polish Constitution and Bader’s draft both contained provisions recognizing the dominant role of the religion associated with the nation. Thus, the Polish Constitution stated that “the Roman Catholic religion, being the religion of the preponderant majority of the nation, occupies in the state the chief position among
enfranchised religions.” Similarly, Bader’s draft, in the section dealing with religion and freedom of conscience, contained a clause declaring that that “[the Jewish religion, which is] the moral and historical basis of the State of Israel and is the belief of the preponderant majority (rov rubam) of its citizens occupies in the state a special place amongst religious beliefs enjoying equal rights.” The unique role of religion in Poland, Israel, and other new nation-states (such as Ireland) created out of the older multiethnic and multiconfessional empires in the first part of the twentieth century has elicited some scholarly attention. In the Polish case, as well as in Bader’s draft, this role found its expression in a specific attempt to embed the dominance of the religion of the majority in a specific constitutional provision, but to do so in a way that would also recognize other religions.

Bader did not simply copy the 1921 Polish Constitution. For example, the way in which the two major parts of the constitutions were ordered was different in both texts. Whereas the 1921 Polish Constitution began with sections dealing with the powers of the legislative and executive branches of government (art. 3–73), only later moving to the duties and rights of citizens (art. 87–124), Bader’s draft began with a “bill of rights of the Jewish people” (art. 1–55), moving to duties (art. 56–57), and only then discussing the powers of the three branches of government (art. 64–121). Bader’s draft also included institutions and procedures that

85. PC, art. 114. Article 114 was the result of a compromise between the left-wing parties in the Sejm (who wanted to separate church and state), and right-wing parties (who wanted to give a predominant role to Catholicism in the new Polish state); see Marcin Łysko, “Przepisy wyznaniowe w konstytucji marcowej,” in Konstytucja—ustrój polityczny—system organów państwowych: prace ofiarowane profesorowi Marianowi Grzybowskiemu, ed. Stanisław Bożyk, and Adam Jamróz (Białystok: Temida 2, 2010), 313–30. See also Brian Porter-Szücs, Faith and Fatherland: Catholicism, Modernity, and Poland (New York: Oxford University Press 2011), 172–3.

86. BD, art. 18.5. Similarity also extended to the specific details of the provisions dealing with religion in both texts. The Polish Constitution stated that “every religious community recognized by the [Polish] state...may possess and acquire movable and immovable property, administer and dispose of it,” whereas Bader’s draft declared that “every religious community will have the right, within the general framework of law...to purchase and possess immovable and movable property and organize it as it deems fit.” PC, art. 113; BD, art. 21.1.


88. A similar provision was also found in article 44 of the 1937 Constitution of Ireland, which stated that “the State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.”
did not appear in the 1921 Polish Constitution, such as referenda (art. 91–93), an idea that he may have taken from another Polish interwar constitutional text, the April 1935 Polish Constitution. Bader’s draft constitution also rejected the use bicameralism, which was used in Poland. Another difference is found in the fact that the 1921 Polish Constitution did not recognize judicial review of legislation, whereas Bader’s draft did (art. 113.3).

Bader did not explicitly discuss the sources of influence on his draft. However, it seems reasonable to assume that these were found in his specific educational experience as a law student in interwar Poland. Until 1918, the teaching of constitutional law was restricted in the parts of Poland that were under Russian rule, but was more developed in the Austrian part. Following the war, the Austrian model of legal education was adopted in other parts of Poland. Specifically, courses on “political law,” and on “modern constitutions” were taught both at the Jagiellonian University in Kraków and at the University of Warsaw. Bader himself took two constitutional law courses as a student at the Jagiellonian University, a constitutional history course on the May 1791 Polish constitution, taught by Professor Stanisław Kutrzeba, and a course on “the development of modern constitutions,” taught by Professor Stanisław Estreicher.

90. Compare the 1921 Constitution, art. 2, 25, 26, 35, 36 and BD, art. 64.
91. Brzezinski, The Struggle, 50. Given the problematic political history of the 1921 Constitution, amended in 1926 and replaced in April 1935 by an authoritarian constitution, the fact that Bader did not fully copy it is not entirely surprising. See generally Brzezinski, The Struggle, 51–54.
95. Jagiellonian University Archive, Kraków, Katalog główny studentów UJ za rok szkolny 1919/20, prawo II, Sgnatura S II 291a (Jan Bader’s personal file).
4. Warhaftig: Constitutional Precedents

Another important Polish-Jewish lawyer and parliamentarian was Zorach Warhaftig. Born in 1906, Warhaftig was educated at the University of Warsaw. Following graduation, he practiced as a lawyer in Warsaw, before fleeing Poland during World War II to Lithuania, and then through Russia and Japan to the United States. In the United States, Warhaftig served as the deputy director of the Institute of Jewish Affairs of the American Jewish Congress and the World Jewish Congress. This research institute, based in New York, documented the extermination of European Jewry, and later assisted in the resettlement of Jewish survivors after the Holocaust. In the summer of 1947, Warhaftig immigrated to Palestine, and there he became a leader of the religious Zionist Mizrahi movement, which later became the National Religious Party. He served in the Israeli Parliament between 1948 and 1981.

Warhaftig was exposed to many legal influences in his lifetime. He was an orthodox Jew knowledgeable in Jewish law (which he later taught at the Hebrew University). As a law student in Poland, he became familiar with modern Polish law, which, as has been discussed, was influenced by French, Austrian, German, Russian, and other legal systems. In the United States he was exposed to common-law ideas. As a member of the Institute of Jewish Affairs, he was also involved in projects dealing with international law, and wrote two books on international organizations involved in assisting Jewish refugees in Europe.

In the period immediately preceding the birth of the State of Israel, Warhaftig was instrumental in establishing the legal department of one of the two major political bodies of the Zionist community in Mandatory

96. Unlike Hartglas and Bader, Warhaftig’s autobiographical writings focus exclusively on the period of the Holocaust (see Zorach Warhaftig, Palit ve-Sarid bi-Yeme ha-Sho’ah (Jerusalem: Yad va-Shem, 1983/4)) and the period after his immigration to Mandatory Palestine in 1947 (see Zorach Warhaftig, Hamishim Shanah ve-Shanah: Pirkey Zikronot (Jerusalem: Yad Shapira, 1998)). This, in itself, can serve as an indication of the weaker affinity to Polish culture that he had, and on the spectrum between Jewish and Polish identity, he was, as an orthodox Jew, closer to the Jewish end, like Kister, rather than the assimilationist one like the secular Hartglas and Bader. However, Warhaftig did briefly mention his education at the University of Warsaw in his autobiographical writing. See Warhaftig, Hamishim, 88.

97. See, for example, Report of the Institute of Jewish Affairs for the Period February 1, 1941 –April 30, 1947 (New York: Institute for Jewish Affairs, 1947) (a copy of the report can be found in the YIVO Library at the Center for Jewish History, New York).

98. See Warhaftig, Hamishim, 10–11; Warhaftig, Palit; and Zorach Warhaftig, Hukah le-Yisrael: Dat u-Medina (Jerusalem: Mesilot, 1988), 22.

Palestine, the National Council (ha-va’ad ha-leumi). In September 1947, as part of his duties as the head of that legal department, he began drafting a constitution for the future State of Israel. Later, in December 1947, he was asked by Golda Meir, then director of the political department of the Jewish Agency, to stop his work on the constitution, and the task of constitutional drafting was assigned to Leo Kohn, who was a Jewish Agency official. However, Warhaftig continued to work informally on the topic. He later became the chair of the Constitution Committee of the Provisional State Council (April 1948–February 1949), and then a member of the Constitution, Law and Justice Committee of the Israeli Parliament. Warhaftig was assisted in his work by a number of lawyers and also by an international network of correspondents who provided him with comparative materials on constitutions around the world.

The interwar Polish constitutions of 1921 and 1935 were but one source of inspiration for Warhaftig’s constitutional endeavors immediately before and after Israel’s independence, among the many constitutional documents he used. These ranged from more well-known constitutions of countries such as the United States, France, Italy, the Soviet Union, or Brazil, to the new Indian Constitution, the constitutions of the German Länder post-1945, and the constitutions of countries such as Haiti, Honduras, Peru, and even Transjordan (which seems to have especially interested Warhaftig). In this sense, he was no different from many of the other

100. Warhaftig, Hamishim, 14–22.
102. For a list of people with whom Warhaftig was in touch, see, for example, RZA, PA 16, file 95 (vol. 3) (the list includes legal scholars, politicians, and rabbis in the United States, the United Kingdom, Sweden, France, Switzerland, Italy, and Argentina).
103. The foreign constitutions can be found in RZA, PA 16, files 98, 99. See also Warhaftig, Hukah, 41, 79, 445, 447, 452 (references to other constitutions). In one of the parliamentary debates, Warhaftig mentioned a number of South American constitutions and the similarity between them, and said that mechanically copying constitutional provisions from other countries was not something that should be done by Israelis. See Ha-Knesset ha-Rishonah, Hukat ha-Medinah: Ha-Din ve-Heshbon shel Va’adat Hukah Hok u-Mishpat bi-Dvar Hukat ha-Medinah veha-Diyunim be-Meliʿat ha-Knesset ha-Rishonah (Jerusalem: Ha-Madpis ha-Memshalti, 1951/2), 18. Warhaftig did mention some examples taken from the Polish Constitution of 1921, but these were accompanied by references to other constitutions. See RZA, PA 16, File 292 (vol. 2), Va’adat ha-Hukah: Yeshivah Shmunit, October 6, 1948, 2 (discussing a provision dealing with closed-door sessions of the Parliament and referring to the Polish, United States, and Swiss constitutions); Ha-Knesset ha-Rishonah, Hukat ha-Medinah: Ha-Din ve-Heshbon
participants in the Israeli constitutional drafting process. Constitutional provisions are usually more easily transferable than other types of legal norms, because they deal with a limited number of issues and are usually available in translation. They can, therefore, serve as a source of inspiration even when the people using them are not well versed in the legal system from which they were taken.¹⁰⁴

However, although the Polish influence was not a dominant one in Warhaftig’s drafting efforts, one can still find Polish traces in Warhaftig’s constitutional thought at critical junctures of Israel’s early constitutional history. This influence was not found in the specific content of constitutional drafts. Instead, Warhaftig turned to Polish constitutional history as a source for precedents, which he used to justify his political positions.

At the beginning of 1948, Warhaftig prepared two texts dealing with constitutional issues that were expected to arise as a result of Israeli independence (drafts C and D). Draft C dealt with the topic of elections. Draft D dealt with the regulation of legal matters in the transition period following the establishment of the state. Warhaftig called draft D “the small constitution” (ha-hukah ha-ktanah), a term, he said, that he had borrowed from the Polish transitional constitution of 1919.¹⁰⁵ This draft was later an

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¹⁰⁴. See, generally, Perju, “Constitutional Transplants,” 1320. An interesting example of this phenomenon can be found in the work of a committee created by the dominant political party in Israel at the time, the Israeli Labor Party (MAPAI), which prepared a draft constitution between December 1947 and April 1948. See Milfeget Po’alei Eretz Yisrael: Ha-Merkaz, Li-Ve’ayot ha-T’hukah shel Ha-Medinah veha-Shilton ha-Mekomi (Tel Aviv: n.p., August 1948) (a copy can be found in RZA, PA 16, file 95, vol. 2). The chapter dealing with civil rights in this draft was written by Yitzhak Coren, a Romanian lawyer. In his explanatory notes, Coren mentioned the Romanian example but also the Polish 1921 Constitution and the Czech one. Milfeget Po’alei Eretz Yisrael: Ha-Merkaz, Li-Ve’ayot, 87, 90–91.

important source for the first Israeli legislative act, the Law and Administration Ordinance, 5708–1948, promulgated on May 19, 1948.106

Another example of the use of Polish constitutional precedents by Warhaftig is found in a July 1948 memorandum that he wrote to the Israeli Minister of Justice, Pinchas Rosen. This memorandum discussed the transitional nature of the Provisional State Council and State Administration, the two bodies that served as Israel’s temporary parliament and government in the period immediately after the country’s declaration of independence. Warhaftig argued that because, in these two bodies, the various Jewish political parties were represented based on elections held in 1944 and 1946, respectively (to the Jewish Assembly of Representatives in Palestine and to the Zionist Congress), they could be turned into a permanent parliament and government without the need for new elections. In support of his position, Warhaftig referred to a Polish post-World War II precedent: in 1944, the Moscow-backed Polish Committee of National Liberation (PKWN) declared itself the government of Poland without elections, and later, in 1945, turned itself into a government of national unity, the first elections being held only in 1947.107

Perhaps the most interesting use of Polish constitutional precedents by Warhaftig relates to the decision to postpone the creation of an Israeli constitution. As noted earlier, in June 1950, the Israeli Parliament decided not create a single constitutional document, but instead to enact the constitution piecemeal in a series of basic laws (the aforementioned Harari

106. On the relationship between Warhaftig’s draft D and the Law and Administration Ordinance, see Amihai Radzyner, “Yesodot veha-Nishkahim shel Pkudat Sidrey Shilton u-Mishpat veha-Ma’avak ha-Samuy ‘al Hesdery Dat u-Medinah,” Katedra 136 (2010): 121–50. On Israel’s early constitutional history, see, generally, Eliahu S. Likhovski, Israel’s Parliament: The Law of the Knesset (Oxford: Clarendon Press, 1971), 14–15. The term “small constitution” was used not only by Warhaftig, but also by a number of other legal commentators; for example, by Israeli Supreme Court Justice Moshe Landau. See Moshe Landau, “Dvarim le-Zekher Uri Yadin Z’L,” in Sefer Uri Yadin: Ha-Ish u-Fo’olo, vol. 1, ed. Aharon Barak and Tana Shpanitz (Tel Aviv: Bursi, 1990), 11, 12. One should note that other texts were also sometimes called “the small constitution;” for example, the Israeli Transition Act, 1949, passed on February 16, 1949. See, for example, Menachem Begin, “Gilguley Hukim,” Herut, June 15, 1962, 2. Sometimes the Law and Administration Ordinance together with the Transition Act were called the “small constitution.” See “Hukat ha-Ma’avar shel ha-Medinah: ‘Ha-Hukah ha-Ktanah,’” Ha-Tsofeh, Feb. 9, 1949, at 4. A synonymous (Aramaic) term—Hukah Zuta—was used to refer to a 1950 Ministry of Justice proposal. See “Ha-Memshalah Mekhinah Hukah Zuta,” Ma’ariv, May 7, 1950, at 3. See also Divrey ha-Knesset, July 30, 1975, at 4002 (Minister of Justice Haim Zadok referring to the Law and Administration Ordinance as a Hukah Zuta).

Such an approach had already been suggested by Warhaftig in December 1948, when he referred to the English tradition of regulating constitutional matters by ordinary law rather than by a written, formal constitution.

However, the English tradition was not the only one that Warhaftig used. In an article published in 1949, he discussed the relative merits of written and unwritten constitutions, arguing that Israel should not hastily adopt a written constitution. In support of this position, Warhaftig referred to a 1947 article by Mieczysław Szerer, a judge of the Supreme Court of Poland, entitled “On the Vocation of Our Time for Constitution-Making.” Szerer’s article consciously echoed arguments made by the influential German legal scholar, Friedrich Carl von Savigny, in his well-known 1814 pamphlet, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft (On the Vocation of our Time for Codification and for Legal Scholarship). In this pamphlet, Savigny argued against haste in creating a civil code for German states after the Napoleonic Wars. Szerer, in his 1947 article, put forth similar arguments against haste in constitution making. In 1949, Warhaftig repeated Szerer’s arguments and also made use of recent Polish constitutional history by mentioning the fact that, following World War II, not all the countries of Eastern Europe had adopted new constitutions. He noted:

the Polish situation is typical. There, there is a tendency not to hasten and adopt a new constitution. [The Poles] believe that the time has not arrived


112. After the liberation of Poland in 1944, the March 1921 Constitution was restored. Following the first elections in 1947, the new Parliament enacted (on February 19, 1947) a “Constitutional Law,” defining the powers of the different branches of government, and augmented this law (on February 22, 1947) with a declaration on the “Rights and Freedoms of Citizens.” These two laws together were called “the small constitution.” The 1921 Constitution was only replaced by a new, communist, constitution in July 1952. See Mirkine-Guetzévitch, Les constitutions européennes, 606 n. 2; Michal Plachta, “The Formation of the Polish Legal System during the Changes in the Structure of Government: 1944–1949 (with a Special Emphasis on the Criminal Justice System),” Review of Socialist Law 16 (1990): 57, 64–67.
yet...the Polish Parliament (Sejm) has enacted a ‘small constitution’ on Feb. 19, 1947 and a number of constitutional laws...The small constitution enacted by the Polish Parliament is based on the principles of the Polish constitution of 17.3.1921...One of the most important experts on law of the current Polish regime, the Supreme Court Justice M[ieczysław] Szerer published an article in which he argues that the current generation is not worthy of a new constitution and that an evolutionary development of customs and constitutional law, based on the example of the development of the English constitution, is the preferable way for Poland today.113

Thus, a German scholar’s (Savigny) 1814 arguments against haste in creating civil code were transferred into the constitutional field in a 1947 article by a Polish judge (Szerer) arguing against haste in constitution making in the context of post-World War II Poland, and then applied to post-independence Israel by an Israeli lawmaker (Warhaftig). The latter used Savigny’s and Szerer’s ideas to argue against rushing into constitution making in the Israeli context.114 In the Polish case, a (communist) constitution was finally enacted a few years later, in 1952. In the Israeli case, the resulting delay has led to the fact that, to this day, Israel has no single-document constitution.

Conclusion

The English historian Hugh Trevor-Roper described 1950s Israel as “an East-European social-democracy planted incongruously in the valleys of Philistia and the hills of Judaea.”115 It is not surprising that it was so, given the background of many of its founding fathers. As this article showed, one can find some East-European echoes in the legal sphere. Specifically, I discussed here traces of Polish law in texts produced by Polish-Jewish lawyers who were important, albeit not major figures in the early history of Israeli law. The legacy of Polish law in Israel was mostly evident in constitutional law.116 The Polish 1921 constitution was used by Yochanan Bader as one of the sources of his draft of the Israeli Constitution (and by Apolinary Hartglas as a template to critique the main draft of that constitution, prepared by Leo Kohn). Polish

114. For a general discussion of the argument against legislative haste in the period immediately after Israeli independence, see Likhovski, “‘The Time Has Not Yet Come.’”
116. Another, more difficult to trace, influence may have occurred when Israeli legal drafters in the 1950s adopted a piecemeal legislation method for the replacement of the Ottoman-British legacy that the Israeli legal system had inherited, a method similar to the one used by the Codification Commission of Interwar Poland.
constitutional precedents, especially the idea of a temporary, intermediate “small constitution,” were used by Zorach Warhaftig to justify the decision not to create a single-document written constitution: the most important decision in Israel’s constitutional history.

The traces of Polish influence found in the constitutional realm could simply be attributed to the fact that Polish constitutional law was familiar to the lawyers that I have discussed in this article, and, therefore, it played a part in the bricolage process that is often the hallmark of constitutional drafting. However, there were, perhaps, additional reasons for the existence of these traces. First, traces of Polish influence on early Israeli constitutional thought were a result of the fact that in this realm, the most important source of the Israeli law—English law—had little to contribute. Israeli lawyers therefore turned to other places: to Ireland in the case of Leo Kohn, the official drafter of the (failed) Israeli constitution, and to Poland in the case of Hartglas, Bader, and Warhaftig.

A second reason was the modernity of the Polish constitutional texts (evident in the notion of a right to labor, or the use of referendums). As Leo Kohn noted in the introduction to one of his constitutional drafts, “the interwar period was full of experiments and proposals. The disintegration of the German, Austrian and Russian empires and the renewal as sovereign units of several oppressed nations such as the Poles, Czechs, Slovaks and the Baltic people gave birth to numerous constitutions. These mainly followed West-European constitutions but they also tried to implement fundamental novelties.”

Finally, another factor leading to Polish influence was the problem that both Poles and Zionists faced in creating new states whose identity was closely linked with the religion of the dominant majority. The attempt to deal with this problem in a way that would constitutionally recognize the religion of the majority while also acknowledging other religions is evident in both the 1921 Polish Constitution and in Bader’s draft.

The history of interwar constitutional innovation in the Europe periphery, and its subsequent impact on the new countries that emerged after 1945 in the non-European world, has not been properly explored yet. More scholarly attention might allow for a deeper understanding of the way in which constitutional (and, more generally, legal) innovation emerges, and then travels around the world, providing a more accurate model of legal transplantation than the conventional core/periphery model that is still dominant today.