

# The Image of European Union Law in Bilateral Relations

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## ABSTRACT

*The impact of foreign law on the development of national laws has been analyzed and vindicated in numerous studies in comparative legal literature. These studies typically focus on the two most prominent legal systems—common law (the Anglo-American system) and civil law (the Continental system). The historical reasons for this are clear, emanating from the fact that the world's legal systems are based on these legal regimes and are amended in the spirit of changes made to them. Over the years, however, with the many effects of legal and economic globalization, legal systems have become a diverse mosaic which has appropriated doctrines and interpretations on legal issues drawn from various other legal traditions.*

*One of the most prominent legal systems to emerge in recent years is that of the European Union (EU), currently the largest democratic bloc of countries in the world. Despite its relative novelty, EU law has great influence on the development of legal interpretation in many legal systems. This Study, which is laid out in two complementary Articles, is the first to empirically examine the influence that EU law had on the development of a non-EU country. These Articles take Israel as a case study on which normative conclusions can be drawn for other non-EU countries with whom the EU has established close bilateral legal, economic, cultural, and social relations. The importance and significance of comparative sources to the development of Israeli jurisprudence is expressed in local legislation and rulings.*

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*The first Article comprising this Study is this Article that explains the legal image of bilateral relations between the EU and third countries. The sequel Article is devoted to empirically translating this image into legal results. The boundaries of the Study are not confined to Israel but have a profound effect on the development of comparative research relating to EU law. The Study offers a novel method by which to measure the impact of EU law on third countries' legal systems. The Study is conducted against the backdrop of the growing debate surrounding the frailty of the EU in past decades, particularly in light of the voices among member states today calling for its dismantling. Despite this, as this Study proclaims, the impact of EU law on third-country legal systems must not be undermined.*

*This Study is new to local and international discourse, and is part of a broader research project examining the impact EU law has on the way other countries interpret their own laws. Previous scholarship has demonstrated that those prevailing in "leading legal systems" place interpretive dependence on the accepted legal doctrines in Israel. Ironically, these inquiries fail to consider the EU as an independent legal system, even though it attained this status shortly after the end of World War II. In contrast, this Study does not analyze the diffusion and impact of the respective national legal systems of the Union's member states on Israeli law, but rather limits the focus solely to supranational EU law. The Study points to the importance of EU law, weaknesses notwithstanding, as an influential element in Israeli case law. The Study contradicts the EU's expectations regarding its role in the international arena, and it further contradicts the growing global importance of EU law.*

*The findings of this Study strengthen the argument that, when engaging in comparative law, Israeli courts, similar to other non-EU countries, tend to limit themselves to specific legal systems. In doing so, they calcify interpretive approaches and close themselves off to additional sources that may contribute to the development of local law. In previous articles on the use of comparative law in Israel, EU law has not been empirically analyzed in its entirety, and it seems that the aforementioned tendency of the courts characterizes researchers in this field as well, leading to the perpetuation of the prevailing traditional approach to comparative law.*

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*“I always support the need to use European comparative law. I think it is an omission that there are only few jurists who are assisted by the developing legal system in the European [continent].”*<sup>1</sup>

## I. INTRODUCTION

One cannot deny that comparative law plays an important role in Israel. Empirical studies conducted over the past few decades, which examine the identity and origins of foreign-law sources referenced by Israel’s Supreme Court (ISC), found that judges routinely abandon or ignore the sources drawn from English law, preferring American-law sources instead. A number of factors can be attributed to this trend, which include, but are not limited to: the independent development of Israeli law since the establishment of the State, particularly following the severance of relations with the British legal system; changing perceptions regarding legal education; Israel’s constitutional revolution; and a perceptible shift towards principles rooted in civil law. In addition, global changes, such as the development of the

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1. Deputy President of the Supreme Court (Ret.), Conversation, *in* ELICHAH SHILO ET AL., *BENEATH THE CLOAK: OPEN CONVERSATIONS WITH SUPREME COURT JUDGES – CONVERSATIONS WITH SUPREME COURT JUSTICES* 70 (2017) (Isr.) (translated by the authors).

internet, easier access to legal materials, and the emergence of an international judicial dialogue affected the legal world in general and the perception of the judicial role in it in particular. Amongst all this, in Europe a new supranational political entity developed, which in its sixty-nine years of existence has evolved into a major actor affecting virtually all the areas of its citizens' lives—the European Union (EU).

The EU's influence on Israel is evident in numerous respects, and it appears that Israel regards itself as a key partner in many of the EU's programs and activities.<sup>2</sup> European influence is expressed in the daily lives of Israel's citizens and residents, in Israeli-EU relations, and in the bilateral relations between Israel and each one of the EU's member states. From the early days of its independence, the first immigrants to the Jewish state came, *inter alia*, from many European countries.<sup>3</sup> The large number of European Jewish immigrants, most of whom were Holocaust survivors, made themselves and their descendants into potential citizens of the EU, especially following the 2004 and 2007 enlargements of the EU. Today, in wake of the amendments introduced into the Spanish nationality law (2015; Law 12/2015) and the Portuguese "Law on Nationality" (2015), Jewish "laws of return," which offered citizenship to descendants of Sephardic Jews who were forced to flee the Inquisition five centuries ago, more than 50 percent of Israel's citizens<sup>4</sup> can be defined as "Rooted Cosmopolitans"—these are Israelis who hold or are entitled to citizenship in one of the EU's twenty-seven member states or in the United Kingdom (UK).<sup>5</sup>

Apart from the aspect of potential citizenship, which has come to dominate the public discourse in Israel, economics and culture play a part in Israel's perceived stake in the EU. The EU today is the largest trading partner of Israel. In addition to the strictly economic implications of trade, trading activities have legal and normative derivatives, including regulatory approval and/or mutual recognition

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2. An example of this is the COST (Cooperation in Science and Technology) Program aimed at encouraging European research and development and allowing science and innovative development. Israel participates as a "cooperating country." See *About COST*, EUROPEAN COOPERATION IN SCI. & TECH, <https://www.cost.eu/who-we-are/about-cost/> (last visited Dec. 8, 2020) [<https://perma.cc/D58R-C4SU>] (archived Dec. 8, 2020); *COST Members*, EUROPEAN COOPERATION IN SCI. & TECH, (last visited Dec. 8, 2020) [<https://perma.cc/ATA4-JYAP>] (archived Dec. 8, 2020).

3. See, e.g., Yoav Gelber, *The Historical Role of the Central European Immigration to Israel*, 38 LEO BAECK INST. Y.B. 323 (1993). This immigration to Israel is considered one of the main indicators of the success of the Zionist movement in establishing a home for the Jewish people after the Holocaust, particularly in light of original plans by the Allied authorities to repatriate displaced persons to their countries of origin.

4. Author's estimation based on SHARON PARDO, *NORMATIVE POWER EUROPE MEETS ISRAEL: PERCEPTIONS AND REALTIES 1–2* (2015).

5. Yossi Harpaz, *Rooted Cosmopolitans: Israelis with a European Passport – History, Property, Identity*, 47 INT'L MIGRATION REV. 166 (2013); see also JAMES LOEFFLER, *ROOTED COSMOPOLITANS: JEWS AND HUMAN RIGHTS IN THE TWENTIETH CENTURY* (2018).

(e.g., Agreements on Conformity Assessment and Acceptance),<sup>6</sup> harmonization of rules and best practices, and compliance with norms and principles undertaken within the framework of European and international covenants and organizations, such as General Agreements on Trade and Services (GATs) and the Organization for Economic Co-Operation and Development (OECD). Israel is a member of various European programs, institutions, and organizations and maintains special status in the EU's research and development programs. Given the EU's vast network of formal and informal relations, Israel is engaged with the EU in joint and reciprocal activity, ranging from the promotion of shared democratic values<sup>7</sup> to participation in shared professional sports leagues and the Eurovision song contest.

Israel's legal and legislative environment has traditionally relied heavily on the laws of European countries, whether directly or indirectly, in light of the fact that, during the founding years of the country, many Israeli judges and legal scholars were born in European countries and some were educated in Europe.<sup>8</sup> Despite intermittent disputes, over the years Israel and the EU have developed a deep and a comprehensive relationship. Against the backdrop of studies that have examined both the ISC's predisposition to refer to foreign law in its rulings and the enhancement of Israel-EU economic and cultural ties, this Study seeks to examine the convergence between Israeli and EU jurisprudence.

The Study's review of the rulings of Israel's Supreme Court justices, which will be analyzed and discussed in the sequel Article, attests to the normative importance the Israeli Court bestows on the sources of EU law. One prominent example is found in the *Noach* case,<sup>9</sup> which discusses the legality of force-feeding geese. In his comprehensive opinion, Judge Grunis dedicates, for the first time in ISC history, an entire chapter in the ruling entitled "The Legal

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6. The European Union and Israel signed the ACAA Agreement (Agreements on Conformity Assessment and Acceptance) on May 6, 2010 that was ratified on January 19, 2013. This agreement includes an annex regarding Good Manufacturing Practice (GMP) on products in the pharmaceutical industry allowing medicine approved by the European Medicines Agency to be distributed in Israel, and *vice versa*, without needed additional approvals. See *Agreement Between Israel and the EU on Conformity Assessment and Acceptance of Industrial Products: Questions and Answers*, EUROPEAN UNION, [https://ec.europa.eu/health/sites/health/files/files/international/2013\\_qa\\_israel-eu.pdf](https://ec.europa.eu/health/sites/health/files/files/international/2013_qa_israel-eu.pdf) (last visited Dec. 8, 2020) [<https://perma.cc/V7RN-GTG8>] (archived Dec. 8, 2020).

7. Sharon Pardo, *Israel and the European Union*, in *THE OXFORD ENCYCLOPEDIA OF EUROPEAN UNION POLITICS* (Finn Laursen ed., 1st ed. 2019).

8. See discussion *infra* Part II.A.

9. HCJ 9232/01 "Noach" Israeli Ass'n of the Orgs. for the Prot. of Animals v. Att'y Gen. 57(6) PD 212, 212 (2003) (Isr.).

Situation in Europe.”<sup>10</sup> Another example, which is found in one of the most important constitutional rulings of the past years, known as the *Privatization of Prisons* case,<sup>11</sup> also testifies to the importance of European law. In this case, the Court President Justice Beinisch noted that there was no discussion in either EU courts or the European Court of Human Rights (ECHR) on the issue of the constitutionality of prison privatization.<sup>12</sup> This reference to the absence of such discussion in EU law shows that, on topical and innovative issues, the Supreme Court justices refer to the experience of other legal systems, including that of the EU. The president also notes that, in certain cases, even the Union’s legal system failed to cope with similar challenges to those facing the Israeli Court. The Supreme Court justices often make passing references to the sources of EU law as a “window into what occurs in [legal] systems abroad.” However, a careful reading of these references indicates that sometimes, even though the reference appears incidental, it is used in a discreet way to strengthen domestic law. In addition, as will be illuminated in the sequel Article, precisely because of the development of EU legislation and case law, Israeli Supreme Court justices devote entire chapters in their rulings to a comparative review of European law and Israeli law.<sup>13</sup>

The Study examines, for the first time, through integrated empirical-descriptive research, the status of EU law in ISC rulings. Unlike previous studies on the effects of foreign law that focus on the “leading” legal systems—Anglo-American common law and continental civil law—this Article offers a new perspective on how a supranational legal system serves as a source of reference for the interpretation and criticism of Israeli law in myriad areas. Through a specifically constructed database, the Study, as laid out in the two Articles, covers all rulings and decisions made during the period of time between 1980—the first time the ISC referred to any normative source of EU law—and 2016. This database, which will be described in detail in the sequel Article, includes all ISC references to the normative sources of EU law, including treaties, regulations, directives, and the rulings of the Court of Justice of the European Union (CJEU). The Study uses the methodology known in academic literature as Citation Analysis to examine each reference. The Study focuses solely on supranational EU law rather than the diffusion of norms drawn from the national laws of individual EU member states. It demonstrates that the status of EU law has risen in ISC deliberations. In its current rulings, some of which have far-reaching implications, the ISC refers to various sources of EU

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10. *Id.* at 226–29.

11. HCJ 2605/05 Acad. Ctr. of L. and Bus., Hum. Rts. Div. v. Minister of Fin., 63(2) PD 545 (2009) (Isr.).

12. *Id.* (Beinisch, J. ¶ 60).

13. See discussion accompanying *supra* note 9; see also HCJ 8425/13 Eitan Israeli Immigration Policy v. Gov’t of Israel (Isr.) (Sep. 22, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

law, while drawing interpretive and conceptual inspiration from the EU's legal system.

In the field of public law, constitutional law cases are found to be the most frequently referenced. In the field of private law, the Article finds that EU law is referenced most frequently in intellectual property cases. The overall trend indicates that, while the increase in the number of rulings referencing sources of EU law is positive and relatively stable over time, the positive qualitative increase in the scope of the references in each period examined is more pronounced—positive with a higher trajectory of growth. The compilation of data presented in the Study indicates that interpretive and conceptual approaches reflected in Israeli jurisprudence are edging toward ideas rooted in the European legal system.

Part II of this Article begins with a brief presentation of the historical and theoretical development of comparative legal research. It outlines the ideas underlying this discipline and traces the rise of its prestige in recent decades in light of growing global judicial discourse. The Part then describes how the judicial culture has developed in Israel. The Part discusses the judicial culture's impact on Israeli legislation, as well as the impact of the justices' origins on their rulings, as articulated in the local research literature. Finally, Part II introduces the empirical evidence collected from existing literature on the use of comparative law by Israeli justices, pointing out the main trends identified in these studies and their differences from this Study. Next, Part III chronicles Israeli-EU relations from their inception until today. It points out the centrality of what has unfolded as an uneasy relationship in many respects, and it identifies the major trends and changes that have taken place in recent years. Part IV presents some preliminary findings of the Study. The brief overview discusses several aspects of the impact of EU law on the various branches of public law and private law in Israel. Part IV also outlines additional trends affecting the status of EU law as a foreign law of reference in Israel. These preliminary findings, together with other key results, will be presented and analyzed in the sequel Article, which is built on and supported by the theoretical and historical infrastructure, laid out below in Parts II and III of the current Article.

## II. KEY CHARACTERISTICS OF COMPARATIVE LAW IN ISRAEL

### A. *The Historical and Theoretical Development of Comparative Law*

Comparative law is a method used to examine a legal problem through the analysis of different legal systems. Its objective is to glean

insights from sources outside a local legal system. Legal scholars—lawyers, judges, academics—are using comparative law to better understand various existing legal models in order to select the most fitting or appropriate model for the specific problem or legal system. In his article, Ron Harris provides three traditional explanations regarding the rationale behind the study of comparative law in law schools.<sup>14</sup> First, comparing legal systems expands one's horizons and offers additional solutions to specific legal problems of which lawyers may have previously been unaware. Exposure to these solutions allows one to analyze their relative advantages and disadvantages and can contribute to improvements in existing law. Second, the comparison process itself facilitates a more analytical and objective observation of the local legal system in which one operates. Limiting theoretical analysis to just one legal system blurs important distinctions between basic legal building blocks, while a journey through additional legal systems allows identification of the universal building blocks serving as the foundation of every legal system. This process assists lawyers in identifying their legal systems' own building blocks, and it enhances the lawyers' capabilities to analyze the interrelationship between these fundamental legal components. Third, comparative analysis contains a practical dimension as well. The current age of globalization has increased the incidence of cross-border disputes, requiring representation of local clients abroad and foreign clients locally. Additionally, familiarity with different legal systems improves the discourse between legal professionals from various countries, promoting closer bonds between legal systems and harmonization, which eventually may lead to a more unified global legal system.<sup>15</sup> The academic debate surrounding the status of comparative law in Israel's legal systems has clearly left the hallowed halls of law schools and spilled into both Israel's courtrooms and its case law.

That said, for example, ISC President Justice Barak explained:

The strength [of comparative law] lies in its ability to broaden horizons and interpretive outlook. Its strength is in informing the interpreter as to the normative potential inherent in the legal system. Its limitations are rooted in the uniqueness of each individual legal system, its institutions, ideologies and the way it treats individuals and society. Indeed, comparative law is like an

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14. See Ron Harris, *Why and How Comparative Law Should be Taught in Israel?*, 25 IYUNEI MISHPAT 443, 443–44 (2001) (Isr.).

15. Both the unity and uniqueness of various legal systems have their advantages and disadvantages. See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 2 (1991); Pablo Lerner, *Comparative Law in the Harmonious Age*, in URI KITAI BOOK – COLLECTION OF LEGAL ESSAYS IN HIS HONOR 131 (Boaz Sangero ed., 2007) (Isr.); Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 390 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019); Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 2d ed., *supra* note 15, at 345.

experienced friend, whose advice should be heard, but should not replace independent decision-making.<sup>16</sup>

In a different instance, Justice Cheshin warned:

We are burdened to take care not be carried away with foreign legal systems, specifically—to know how to differentiate and sort principles and doctrines, ways of thought and techniques for new solutions—from which we find inspiration and wisdom—and between those details and specific solutions which we have no oversight. Indeed, comparative law broadens our horizons, enriches us with knowledge and wisdom, and delivers us from provincialism, but, at the same time, lest we forget, we are acting on behalf of ourselves and our jurisdiction and we should be wary of imitative assimilation and self-deprecation.<sup>17</sup>

Many view comparative law as a discipline of legal science. Others maintain that comparative law is not a separate legal discipline, but rather a tool used to get “closer” to other legal systems.<sup>18</sup> The use of comparative law is diverse, ranging from drafting legislation to adjudicating court rulings.<sup>19</sup> In this respect, comparative law professes to recreate a comprehensive legal science embracing the entire world

16. See HCJ 4128/02 Israel Union for Env'tl. Def. v. Prime Minister of Israel 58(3) PD 503, 516 (2004) (Isr.) (translated by the authors).

17. See HCJ 8472/01 Maharsak v. State of Israel 59(1) PD 442, 474 (2004) (Isr.) (translated by the authors); see also HCJ 8425/13 Israeli Immigr. Pol'y Cntr v. Prime Minister of Israel (Sept. 22, 2014) (Vogelman, J. ¶ 70) (Isr.) (translated by the authors) (“Comparative analysis has its limitations. It needs to be executed carefully, considering the specific context and the normative, cultural and social limitations that may impinge on the quality of the comparison. A provision of law should not be isolated, nor should its substance be measured separately from its provisional framework; indeed ‘comparative law is not solely a comparison of legal provisions alone.’”).

18. See Esin Örüçü, *Methodological Aspects of Comparative Law*, 8 EUR. J.L. REFORM 29, 29–30 (2006); Esin Örüçü, *Methodology of Comparative Law*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 560, 560 (Jan M. Smits ed., 2d ed. 2012); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1179 (2011) (“[M]embership in the ‘world society’ of nation-states requires compliance with the norms and standards of ‘world culture,’ and countries seek to demonstrate their compliance by incorporating these norms into their constitutions.”); *infra* note 60 and accompanying text. This type of international influence between legal systems is referred to in academic literature as “mimicry.” See Beth A. Simmons & Zachary Elkins, *The Globalization of Liberalization: Policy Diffusion in the International Political Economy*, 98 AM. POL. SCI. REV. 171, 185–87 (2004).

19. See Jan M. Smits, *Comparative Law and its Influence on National Legal Systems*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 512, 514 (Mathias Reimann & Reinhard Zimmermann eds., 2006). For a discussion of the more extensive use of comparative law, particularly in “mixed” legal systems, see THE OXFORD HANDBOOK OF COMPARATIVE LAW 1st ed., *supra* note 19, at 477–512; Vernon Valentine Palmer, *Mixed Jurisdictions*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 590 (Jan M. Smits ed., 2d ed. 2012); Luis Muñoz Argüelles, *Mixed Jurisdictions: The Roads Ahead*, in MIXED LEGAL SYSTEMS, EAST AND WEST 33 (Vernon Valentine Palmer, Mohamed Y. Mattar & Anna Koppel eds., 2015); Nir Kedar, *A Scholar, Teacher, Judge, and Jurist in a Mixed Jurisdiction: The Case of Aharon Barak*, 62 LOY. L. REV. 659, 662–63 (2016).

that can assist the legal community. Indeed, every legal rule, whether engraved in stone or the product of legal rulings, constitutes a solution to a social problem. Comparative law researchers compare current accessible legal systems to uncover the best solution for their respective legal systems.<sup>20</sup> Indeed, to a certain extent, the task of every legal scholar is to compare facts to case law, case law to the text of the law, old law to new law, and various interpretations of a specific text.<sup>21</sup> Theoretical and practical difficulties usually arise when the comparison involves different legal systems.<sup>22</sup> Various scholars see the main role of comparative law as a practical one—a way to encourage judges to familiarize themselves with solutions to various problems from different jurisdictions.

A cursory overview of the development of comparative law reveals that its roots are planted in ancient Greece, passing through the Age of Enlightenment to the Modern Era of the last few centuries.<sup>23</sup> By the end of the nineteenth century, with the creation of national codes, all legal systems became accessible and expressed in writing. Researchers have concluded that comparative law is not just important or necessary, but indispensable for legal systems. The First International Congress of Comparative Law was convened in Paris in 1900 and is seen as a breakthrough regarding the use of comparative law at that time.<sup>24</sup> Experts from all over Europe discussed the nature, goals, and other aspects of comparative law, placing a special emphasis on the role of comparative law to create a “common law for the civilized

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20. See Konrad Zweigert, *Comparative Law and Promoting the Law*, 2 IYUNEI MISHPAT 607, 608 (1972) (Isr.); Daphne Barak-Erez, *Comparative Law in Practice: Institutional, Cultural and Practical Aspects*, 4 DIN U'DVARIM 81 (2008) (Isr.) [hereinafter Barak-Erez, *Comparative Law in Practice*] (translated by the authors).

21. Mordechai A. Rabello & Pablo Lerner, *On the Place of Comparative Law in Israel*, 21 MECHKARI MISHPAT 89, 91 (2004) (Isr.).

22. *Id.*

23. For a broader historical overview, see KONRAD ZWEIFERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 49–61 (Tony Weir trans., 3rd ed. 1998). Plato was the first to compare between existent law between city-states in Greece in his work *The Laws*. Aristotle's *Politics* also studied the laws of some 153 city-states. In contrast, the system employed in the Roman Empire did not reveal evidence of the use of comparative law, and Roman judges at the time, much like English judges later, were so convinced of the supremacy of the local legal system and politics, that they did not devote attention to foreign law. During the Age of Enlightenment, there were relatively more developed attempts at comparative analysis between certain legal systems. Scholars such as Grotius, Poppendorf and Montesquieu turned to comparative law to support their approach to studying natural law. The greatest contribution made by Humanist philosophers was their recognition of the ethical value, as opposed to the practical value, of comparative law. For more, see *id.*

24. H.C. GUTTERIDGE, *COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH* 18 (1946) (“ . . . the First Congress of Comparative Law held in Paris in 1900, which is regarded by many as the occasion on which modern comparative law first came into being.”).

world.”<sup>25</sup> Another important phase in the development of comparative law was launched after World War I. In large part resulting from the outcome of the war, European countries faced a single option—to breach the borders of accepted European legal tradition and seek solutions to problems plaguing current legal systems from outside sources. Interwar Germany, which under the Versailles Treaty was compelled to adopt external legal principles and was forced to employ comparative law to interpret these principles, is a prominent example of this.<sup>26</sup>

If the primary objective of the 1900 Paris Congress of Comparative Law was to compare different texts and codes, the use of comparative law during the second half of the twentieth century focused on the comparison of various solutions from different legal systems to address identical legal problems. This outlook on and implementation of comparative law is still with us today.

With the acceptance of comparative law as an analytical tool, usage became more frequent in many cases. Comparative law was initially applied primarily in civil law systems. Gradually, academics and lawyers began to employ comparative law in common law systems as well. Referral to other legal systems served as a basis for jurisprudential development, primarily in times of great economic or political upheaval.<sup>27</sup> This receptiveness to the use of comparative law stems from the common-sense logic of learning from experience rather than having to “reinvent the wheel.” Therefore, during Medieval times, for example, Roman law spread throughout continental Europe, primarily because competing legal systems at the time were incapable

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25. René David, *Comparative Law*, in *ENCYCLOPEDIA BRITANNICA* (1999), <https://www.britannica.com/science/comparative-law#ref423595> (last visited Sept. 26, 2020) [<https://perma.cc/5257-7R37>] (archived Sept. 26, 2020).

26. See ZWEIGERT & KÖTZ, *supra* note 23, at 60–61. After the war, additional academic institutions were built in Germany and France dedicated to study the of comparative law. The questions that occupied comparative law scholars shifted throughout the years from issues regarding the place and role of comparative law to practical issues regarding the necessity of using comparative law. The reason for this can be found in the understanding that the legal material available at the time was so extensive and comprehensive that solely discussing the role of comparative law would not do it justice. For more, see *id.*

27. For a further research on the term “legal transplants,” see Pierre Legrand, *What “Legal Transplants”?*, in *ADAPTING LEGAL CULTURES* 55 (David Nelken & Johannes Feest eds., 2001); William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 *AM. J. COMP. L.* 489 (1995); ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993); Toby S. Goldbach, *Why Legal Transplants?*, 15 *ANN. REV. L. & SOC. SCI.* 583 (2019); Valerie P. Hans, *Trial by Jury: Story of a Legal Transplant*, 51 *LAW & SOC’Y REV.* 471 (2017); George Rodrigo Bandeira Galindo, *Legal Transplants Between Time and Space*, in *ENTANGLEMENTS IN LEGAL HISTORY: CONCEPTUAL APPROACHES* 129 (Thomas Duve ed., 2014); John W. Cairns, *Watson, Walton, and the History of Legal Transplants*, 41 *GA. J. INT’L & COMPAR. L.* 637 (2013).

of addressing legal issues. Jurists turned to Roman rather than local law, not for the purpose of comparison, but rather, in most cases, because the Roman set of rules was the only ones they knew. Similarly, the French Code spread throughout Europe due to the expansion of liberal ideals, not as a result of comparative research.<sup>28</sup> Toward the end of the twentieth century, the increasing interest in the laws governing different countries was because of two key simultaneous processes occurring within and outside the legal realm: globalization (the flow of information, goods, and people worldwide) and the rise of international law.<sup>29</sup>

Another issue that arises in reference to the conduct of comparative law is the generalization or omission of anthropologic characteristics in the comparison between legal systems.<sup>30</sup> However, one must remember that those engaged with comparative law do not need to be sociologists or political scientists; rather they need to provide a wide perspective of legal understanding, broadening the scholar's horizons. Nonetheless, as certain legal phenomena are inherently related to specific socioeconomic realities, when performing comparative research, one must remember that a legal solution appropriate for one reality does not necessarily fit a different reality.<sup>31</sup> At this juncture, it is important to mention another rationale for comparative law—cultural proximity. For example, the Australian and New Zealand legal systems draw comparisons from Britain, while the Canadian legal system favors comparative law from the American system.<sup>32</sup> Following the changes that took place in recent years within

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28. Sacco, *supra* note 15, at 2.

29. See, e.g., Barak-Erez, *Comparative Law in Practice*, *supra* note 20, at 84; Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 222–23 (1999); David J. Gerber, *Globalization and Legal Knowledge: Implications for Comparative Law*, 75 TUL. L. REV. 949 (2001); Pablo Lerner, *המשפט המשווה בעידן של הרמוניזציה* [*Comparative Law in the Era of Harmonization*], in URI KITAI BOOK 131, 132–35 (2007) (Isr.) [hereinafter Lerner, *Comparative Law in the Era of Harmonization*]; Mary Ann Glendon, *Comparative Law in the Age of Globalization*, 52 DUQ. L. REV. 1 (2014); Horatia Muir Watt, *Globalization and Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 2d ed., *supra* note 15, at 599; Ralf Michaels, *Transnationalizing Comparative Law*, 23 MAASTRICHT J. EUR. & COMP. L. 352 (2016).

30. Some scholars disagree with the inclusion of legal anthropology in the comparative study between systems. The disagreement originally derives from the positivist perception of the law. There are researchers that believe there is no reason to refuse the comparison between rules associated with two different categories, because the goal of comparative law is not only to improve local law but also to learn basic truths including perceptions, differences, and similarities between different legal systems. See Sacco, *supra* note 15, at 8–9. For an interdisciplinary discussion on the role of anthropology in the study of comparative law, see, for example, *COMPARATIVE LAW AND ANTHROPOLOGY* (James A.R. Nafziger ed., 2017).

31. Rabello & Lerner, *supra* note 21.

32. See THE INTERNATIONALISATION OF LEGAL EDUCATION: THE FUTURE PRACTICE OF LAW 49 (William van Caenegem & Mary Hiscock eds., 2016); Simon Chesterman, *The Evolution of Legal Education: Internationalization, Transnationalization, Globalization*, 10 GERMAN L.J. 877 (2009). For a more current

law schools around the world, compulsory comparative-law classes resemble an endangered species. An exception to this can be found at the National University of Singapore (NUS), which includes in its curriculum a mandatory class dedicated entirely to comparative law and various legal systems.<sup>33</sup>

The use of comparative law is not uniform in all countries or between different legal systems. There appears to be a distinction between Europe and the United States, specifically regarding their respective positions on how and when the court should discuss foreign law in domestic conflicts. While European countries tend to be relatively enthusiastic about the use of comparative law, the United States avidly debates whether “comparative thinking” should be “allowed” at all,<sup>34</sup> specifically regarding constitutional issues. Many claim that the uniqueness of the American legal system supports jurisprudential isolation. In contrast, many argue that because the United States has shaped the design of several legal systems around the world, it has the right to incorporate comparative law into at least some of the systems it has helped create.<sup>35</sup> In recent decades, US-based studies suggest that federal courts and the U.S. Supreme Court increasingly refer to foreign law in their rulings relative to sixty years ago.

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analysis on the risks in global legal education in Britain following “Brexit,” see Jessica Guth & Tamara Herve, *Threats to Internationalised Legal Education in the Twenty-First Century UK*, 52 LAW TCHR. 350 (2018).

33. See THE INTERNATIONALISATION OF LEGAL EDUCATION: THE FUTURE PRACTICE OF LAW, *supra* note 32, at 28–29, 54. As part of this global trend, the curriculum at the Harry Radzyner Law School at the Interdisciplinary Center Herzliya, Israel, for example, includes a compulsory course for all students entitled “Legal Systems.” *See id.*

34. For further inquiry on this debate, see generally Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 138–39 (2006) (“The controversy has clearly become both partisan and ideological; Supreme Court Justices who support the practice have even received death threats.”). For critique, see generally Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to The Law of Other States*, 59 STAN. L. REV. 1281 (2007). For a response to this criticism, see Eric A. Posner & Cass R. Sunstein, *Response: On Learning from Others*, 59 STAN. L. REV. 1309 (2007); see also Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57 (2004); Kenneth Anderson, *Foreign Law and the U.S. Constitution*, AM. J. INT’L L. 57 (2004). For a more recent response to this criticism, see generally David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927 (2015).

35. See Mark Tushnet, *Comparative Constitutional Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 2d ed., *supra* note 15, at 1225, 1255.

The growing controversy regarding the use of comparative law in US federal case law led David Zaring to study the trend empirically.<sup>36</sup> Zaring analyzed how many US federal court rulings over the past sixty years in all legal fields (not just constitutional law cases) referred to foreign law. His research showed that, despite speculation to the contrary, the empirical evidence does not support this observation.<sup>37</sup> An interesting finding in Zaring's research is that the ISC is among a small group comprising the ECHR, the High Court of Australia, the Italian Corte di Cassazione, and the Supreme Court of India, to which the US federal courts referred twenty-five to thirty-two times during the research period.<sup>38</sup>

The United States notwithstanding, the use of comparative law is more prominent in common law legal systems. One of the reasons that comparative law is used in Europe more often than in the United States is the higher portion of lawyers with foreign education.<sup>39</sup> Under European student mobility programs, students can study throughout the entire continent (as well as outside Europe) and often cross borders between common law and civil law legal systems, rendering the embrace of comparative law more acceptable throughout the European continent.<sup>40</sup> At the same time, however, methodological opposition is voiced regarding the referral to foreign law over the necessity of "cherry picking." Since courts cannot take every piece of foreign case law into consideration, judges do not have a clear set of rules as to which foreign jurisdictions should be referenced; this causes them to "cherry pick" those foreign laws that support their predisposed opinion and without a clear policy or rationale on which to base this selection. This methodological critique is popular in the United States, as it supports the argument that the use of comparative law is convenient for decision makers who choose the jurisdictions to suit their opinions. For instance, when a court is looking to rule in favor of human rights, it will not refer to a constitution of an Asian country.<sup>41</sup> In US case law, judges may refer to foreign law regarding questions of capital punishment, but refrain from doing so on questions of abortion rights. Antonin Scalia, a former Justice of the U.S. Supreme Court, stated that constitutional issues must be interpreted solely on the basis of local sources.<sup>42</sup> The use of comparative constitutional law is based on the premise that the constitutional arrangements in the jurisdictions being

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36. See David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297 (2006).

37. *Id.* at 314.

38. *Id.* at 324–25.

39. See THE INTERNATIONALISATION OF LEGAL EDUCATION: THE FUTURE PRACTICE OF LAW, *supra* note 32, at 7.

40. *Id.* at 14.

41. See Tushnet, *supra* note 35, at 1255.

42. See *Stanford v. Kentucky*, 492 U.S. 361, 379–80 (1989).

compared are identical, although this is not necessarily the case.<sup>43</sup> As a matter of course, judges do not normally analyze the history or circumstances surrounding foreign law. In light of these issues, the impact of foreign law on legal systems has recently become one of the most researched fields.

In the age of globalization, in which legal materials are easily accessible, comparative law references are not limited solely to normative or inspirational insights gleaned from foreign legal systems. Referencing foreign normative material today has become an expression of the international judicial dialogue between legal systems and various jurisdictions. Technological improvements have transformed the way the global legal community operates beyond recognition. As Claire L'Heureux-Dube observes:

This development is a tremendous change from the way judicial influence between jurisdictions occurred in the past, when colonial powers such as Britain and France were the most influential, and to many, the only acceptable sources of foreign authority on the most matters. In the fields of human rights and constitutional principles, the United States often had a similar influence. However, as courts look all over the world for sources of authority, the process of international influence has changed from reception to dialogue.<sup>44</sup>

In recent years, the perception of dialogue between courts of law in the international arena has shifted from a concept of “reception,” where one of the countries exclusively “receives” or “absorbs” the foreign law of the other countries, to a concept of “dialogue,” in which both countries mutually consider the foreign law of the countries involved in the dialogue.<sup>45</sup>

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43. See Tushnet, *supra* note 35, at 1253.

44. Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 16–17 (1998) (emphasis omitted); see also Jay Lawrence Westbrook, *International Judicial Negotiation*, 38 TEX. INT'L L.J. 567, 567–68 (2003) (discussing the increasing frequency of negotiations between courts in different nations).

45. See Michael Freitas Mohallem, *Horizontal Judicial Dialogue on Human Rights: The Practice of Constitutional Courts in South America*, in JUDICIAL DIALOGUE AND HUMAN RIGHTS 67, 68 (Amrei Müller ed., 2017). These considerations, however, are not always mutual or voluntary. Often, countries are coerced into adopting certain foreign law due to financial or military pressure placed on it by a foreign country. Additional diffusion systems include competition, learning and acculturation. For an empirical discussion on the diffusion of constitutional rights throughout the world, see Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT'L REV. L. & ECON. 1 (2014). Goderis and Versteeg demonstrate that when countries choose to adopt rights in their constitutions, they are shaped through various diffusion systems such as dependence on the country's history, its colonial past, the legal sources relevant to the legal system under examination, its religious background and the foreign aid it receives. For a discussion regarding the creation of legal “implants” within the legal systems of developing countries designed to protect intellectual property through various diffusion systems, see Jean-Frédéric Morin & Edward Richard Gold, *An Integrated*

The community of local and international courts and tribunals cooperate from time-to-time through considering, quoting, relying, adopting, accepting, analyzing, and rejecting judgements from various legal fields, such as constitutional law.<sup>46</sup> The concept of “judicial dialogue” has been intimately related to the incursion of globalization over the past few decades and its growing centrality in all areas of life. As discussed above, in the past, comparative law was an integral part of academic inquiry but did not play a particularly important role in the day-to-day life of the legal community. This situation has apparently changed over the past twenty years. The impact of the European integration process, as an expression of international processes in various legal fields, is one of the manifestations of a growing judicial dialogue. This dialogue is being conducted not only as a theoretical concept, but also as a practical presumption used by attorneys and judges seeking original and creative solutions, especially when confronted with legal issues that had not previously been discussed.<sup>47</sup> Comparative law aids in the establishment of a new legal system that is simultaneously local and global.<sup>48</sup>

In recent years, one of the objectives of comparative law has been to establish a unified legal language on certain issues.<sup>49</sup> The employment of comparative tools is greatly developed in the private legal sector since, in a global age, products created in one legal system can be litigated in a different legal system, creating the necessity to use comparative law to examine an issue through the lens of another legal system.<sup>50</sup> The globalization process creates a situation necessitating harmony between national and international law,

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*Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries*, 58 INT'L STUD. Q. 781 (2014).

46. Iris Canor, *המשפט הישראלי בצל הגלובליזציה* [The Israeli Legal System in the Shadow of Globalisation], 23 MECHKARI MISPHAT 224 (2006) (Isr.) (translated by the authors). For seminal articles and comprehensive reviews that discuss the various aspects of judicial dialogue, including the relationship between the CJEU and the supreme courts of European member states, see Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICHMOND L. REV. 99 (1994); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003) [hereinafter Slaughter, *A Global Community of Courts*]. Regarding the advantages and disadvantages of using comparative law in constitutional matters, see generally Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind”: *The Value of a Comparative Perspective in Constitutional Adjudication*, 1 FIU L. REV. 27 (2006); Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499 (2000); VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010).

47. See Harris, *supra* note 14, at 444.

48. See Canor, *supra* note 46, at 227.

49. See generally Arie Reich, *Globalization and Law: The Influence of International Law on Commercial Law in Israel in the Next Age*, 17 MECHKARI MISPHAT 17 (2002) (Isr.).

50. Canor, *supra* note 46, at 228.

imbuing comparative law with greater legitimacy<sup>51</sup> and making it part-and-parcel of a growing judicial dialogue. Iris Canor argues:

As long as [the judicial dialogue] is designed to create a world order, which protects local autonomy, democratic decision-making and the rule of law, it should not be viewed as a compromise that is trying to establish the hierarchy of the courts, but rather as a base for creating a horizontal and an equitable judicial system. The dialectic between national courts is the most fitting method for creating judicial conversation, as it is based on persuasion and explanation – tools employed by judges on a daily basis.<sup>52</sup>

The judicial dialogue between judges around the world takes place in numerous channels, some overt and some hidden from plain sight. Dialogue can take place through the mutual referencing of foreign judgements, informal interaction, professional conferences, and more. In the digital age, the junctions in which judges meet one another and opportunities for cross germination have grown. Indeed, “these interactions both contribute to a nascent global jurisprudence on particular issues and improve the quality of particular national decisions, sometimes by importing ideas and sometimes by insisting on an idiosyncratic national approach for specific cultural, historical, or political reasons.”<sup>53</sup>

As previously mentioned, this Article demonstrates the way in which the ISC makes references to normative sources of EU law. However, when analyzing EU jurisprudence in the context of the Israeli-EU dialogue, this Article found that the CJEU mentioned the ISC only once, when referring to a quote in Justice Barak’s opinion in the *Targeted Assassinations*<sup>54</sup> case:

In the words of Aharon Barak, the former President o[f] the Supreme Court of Israel: “It is when the cannons roar that we especially need the laws . . . Every struggle of the state – against terrorism or any other enemy – is conducted according to rules and law. There is always law which the state must comply with. There are no ‘black holes.’ . . . The reason at the foundation of this approach is not only the pragmatic consequence of the political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law’s war against those who rise up against it.”<sup>55</sup>

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51. See Reich, *supra* note 49, at 24.

52. See Canor, *supra* note 46, at 236.

53. See Slaughter, *A Global Community of Courts*, *supra* note 46, at 195.

54. See HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel 62(1) PD 507 (2006) (Isr.).

55. See Joined Cases C-402/05 P & C-415/05 P, *Al Barakaat Int’l Found. v. Council & Comm’n*, 2008 E.C.R. ¶ 45.

Despite the CJEU's seeming "detachment" from Israeli jurisprudence, empirical studies conducted by Barak-Erez show that Justice Barak's written judicial opinions, as well as his academic writings, have not evaded the attention of the national courts in EU member states.<sup>56</sup> One can attribute the relative EU "detachment" from Israeli jurisprudence to the lack of accessible legal documents in English. The fact that the CJEU chose to reference the *Targeted Assassinations* case is that, not coincidentally, the ISC, in cooperation with Israel Ministry of Foreign Affairs, published three volumes of major ISC rulings in the field of homeland security, under the title "Judgements of the Israel Supreme Court, Fighting Terrorism Within the Law." This title included, *inter alia*, the English version of the *Targeted Assassinations* case.<sup>57</sup> One can assume that Israeli legal doctrines can be properly used by foreign courts if key, prominent, and principled court decisions were to be translated into English. In doing so, the judicial dialogue between both legal systems, as well as mutual referencing in all fields of law, would be enhanced.<sup>58</sup>

### B. Israel's Judicial Culture

Although the Israeli legal system is based in large part on the adoption of foreign law, surprisingly, comparative law, as an

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56. For example, until 2011, British courts referenced five of Justice Barak's judicial opinions and three of his academic books. Similarly, in Poland and Ireland Justice Barak's judicial opinions were mentioned once in each; in the Czech Republic, his academic writings were also mentioned once. This, interestingly, is while Justice Barak's opinions resonated much more within the North American court systems relative to Europe. In Canada, for example, Justice Barak's opinions and academic writings were each referenced six times. In the United States, Justice Barak's opinions were mentioned four times and his academic writings fourteen times. For further discussion, see generally Daphne Barak-Erez, *Judicial Conversations and Comparative Law: The Case of Non-Hegemonic Countries*, 47 TULSA L. REV. 405 (2011).

57. The three volumes are available online. See THE SUPREME COURT OF ISRAEL & THE MINISTRY OF FOREIGN AFFAIRS, JUDGMENTS OF THE ISRAEL SUPREME COURT: FIGHTING TERRORISM WITHIN THE LAW (2005), <http://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Fighting%20Terrorism%20within%20the%20Law%20-Jan-2005.aspx> (last visited Sept. 28, 2020) [<https://perma.cc/G9C9-8U9W>] (archived Sept. 28, 2020); THE SUPREME COURT OF ISRAEL & THE MINISTRY OF FOREIGN AFFAIRS, JUDGMENTS OF THE ISRAEL SUPREME COURT: FIGHTING TERRORISM WITHIN THE LAW VOL. 2 (2006), [http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Judgments\\_Israel\\_Supreme\\_Court-Fighting\\_Terrorism\\_within\\_Law-Vol\\_2.aspx](http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Judgments_Israel_Supreme_Court-Fighting_Terrorism_within_Law-Vol_2.aspx) (last visited Sept. 28, 2020) [<https://perma.cc/4UD5-AA94>] (archived Sept. 28, 2020); THE SUPREME COURT OF ISRAEL & THE MINISTRY OF FOREIGN AFFAIRS, JUDGMENTS OF THE ISRAEL SUPREME COURT: FIGHTING TERRORISM WITHIN THE LAW VOL. 3, (2009), [http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Judgments\\_Israel\\_Supreme\\_Court-Fighting\\_Terrorism\\_within\\_Law-Vol\\_3.aspx](http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Judgments_Israel_Supreme_Court-Fighting_Terrorism_within_Law-Vol_3.aspx) (last visited Sept. 28, 2020) [<https://perma.cc/2B55-MPGK>] (archived Sept. 28, 2020).

58. See Barak-Erez, *supra* note 56, at 434, 436 (stating that citing foreign law systems and the use of comparative law inevitably favor "hegemonic" legal systems and available sources in international languages, such as English).

independent field of study, has not received much attention in Israeli academic research.<sup>59</sup> Historically, one can argue that numerous factors have affected the tendency of the Israeli legal system to attribute great significance to comparative law—among them the development of a unique judicial culture during the seventy-three years of Israel's existence as an independent state. Referencing legal systems of other countries was key to the development of Israel's legal system from two main standpoints: first, the basis of Israeli law derives from the laws of the Ottoman Empire and the British Mandate<sup>60</sup> and, second, the Israeli legal community during the founding years consisted primarily of lawyers who acquired their legal education abroad. The influence of the founding generation of Israel's legal system can be found not only in academic circles, but in practice as well—namely, in both legislative and judicial frameworks.<sup>61</sup>

One of the most prominent examples demonstrating the attempt to incorporate components of foreign law into Israeli legislation can be found in Uri Yadin's efforts, supported by the academic writings of local legal scholars such as Gad Tedeschi and Yoel Zussman.<sup>62</sup> The use of comparative law is typically a product of professional teams within the Israeli Parliament (the Knesset) and the Israeli government. The more comprehensive the tools for comparative legal research are, the higher the probability that the arrangement under legislation will match comparative law. In effect:

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59. See Rabello & Lerner, *supra* note 21, at 90. According to Rabello and Lerner, this contradiction demonstrates the flaw and the growing interest in comparative law studies, which should be encouraged to reconcile it. Lerner, *supra* note 29, at 143, claims that although one can see signs indicating a transition to a codification system through the preparation of a civil code, the existence of a real comparative approach within the Israeli doctrine is doubtful. Lerner is convinced that the Israeli system leans in favor of Anglo-American common law. *See id.* For a review of the advantages of comparative law for researchers and practitioners, see an in-depth discussion in Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT'L L. J. 331 (1998).

60. See Law and Administration Ordinance, 5708-1948, § 11, SH No. 1 p. 12 (Isr.); Barak-Erez, *Comparative Law in Practice*, *supra* note 20, at 85.

61. See Lerner, *Comparative Law in the Era of Harmonization*, *supra* note 29, at 143. Lerner states that the founding fathers of Israeli law were primarily of European descent and brought with them European attitudes regarding intellectual discipline. These immigrants contributed to the transformation of Israeli law from a common law system to a combined system with components drawn from civil law. Their influence dissipated over the years, *inter alia*, due to the fact that the next generation did not continue this tradition. *See id.*; see also Assaf Likhovski, *Legal Education in Mandatory Palestine*, 25 IYUNEI MISHPAT 291 (2002) (Isr.); ELYAKIM RUBINSTEIN, JUDGES OF THE LAND (1981) (Isr.); Barak-Erez, *Comparative Law in Practice*, *supra* note 20, at 85.

62. See Rabello & Lerner, *supra* note 21. For a more comprehensive review of Uri Yadin's work, see Yoram Shahar, *יומנו של אורי ידין* [*The Diary of Uri Yadin*], 9 IYUNEI MISHPAT 537 (1991) (Isr.).

Comparative law is more important to the legislative arena than to the judicial arena. The adoption of legal arrangements drawn from other countries that depart from the prevailing arrangement in Israel can only be affected through legislation . . . [however] the differentiation between the judicial and legislative dimensions is not complete. Sometimes, reforms instilled in other countries via case law are adopted into Israeli law through legislative means, or *vice versa*, as the courts can adopt solutions which came to fruition through legislation in other countries.<sup>63</sup>

Similarly, Amichai Magen analyzed the many avenues in which legislative and institutional systems in Israel are affected by EU principles, rules, standards, norms, and policies—whether directly through EU mechanisms or indirectly through diffusion and emulation.<sup>64</sup> According to Magen, Israel is a selective, sophisticated, and cautious player in the global arena, given the manner it adjusts and incorporates European principles and standards into its institutions and laws in specific areas of policy as it deems fit.<sup>65</sup> Indeed, with regards to the Israeli legislation that has been influenced by EU legislation in past decades, Magen states:

More prevalent are instances of lesson-drawing, involving adaptation to local needs, sometimes in hybrid form, combining American, Australian, Canadian, English, and German legislative models. Leading examples are found in the 2006 Class Action Law . . . , certain aspects of environmental legislation . . . , anti-money laundering rules . . . , and animal protection standards. . . . Emulation of this type appears to be completely independent of EU efforts to promote its rules, and does not seem to involve socialisation per se—here domestic actors are engaged in voluntary policy transfer, motivated primarily by dissatisfaction with existing policies, rather than the seeking of international social acceptability.<sup>66</sup>

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63. Barak-Erez, *Comparative Law in Practice*, *supra* note 20, at 87. More specifically, numerous factors affect the frequency by which legislators refer to legal arrangements common in other countries: a) the resources available for Knesset Members and their professional staffs to receive and collect information regarding the legal arrangements of other countries; b) the professional staff of the Prime Minister's Office and the resources available to it regarding legal arrangements of other countries; c) the innovative nature of the matter at hand: the more innovative the topic, such as technology or medicine, the greater the tendency to reference and learn from other legal systems; and d) the competitive implications of legal arrangements: some legal arrangements, such as taxation, can affect Israel's competitive standing in the world economy. Learning from other countries is unavoidable today due to the need to compete in international markets. *See id.*

64. Amichai Magen, *Israel and the Many Pathways of Diffusion*, 35 W. EUR. POL. 98 (2012).

65. *See id.* at 99 ("While there is little evidence that direct EU influence mechanisms – manipulation of utility calculations, socialisation, or persuasion – have produced substantial impact, Israelis emerge as sophisticated emulators of EU institutions, adapting and implementing EU standards in carefully selected policy realms, typically as the result of two distinct mechanisms of emulation: competition and lesson-drawing.")

66. *Id.* at 111.

Guy Harpaz argues that the proximity between Israeli and EU Law can be advantageous to Israel and its economy. The fact that Israel is in the midst of the process of adopting various international norms from a variety of international organizations, such as the World Trade Organization (WTO), shows that the growing alignment of Israeli law with EU law is but a natural evolutionary step in Israel's path to adjusting its laws to international standards.<sup>67</sup>

When analyzing the cultural influence on the institutional development of Israeli law, specifically within the Supreme Court, one can assume that the justices' country of birth or legal education will also probably affect their judicial opinions, how they perceive their judicial role, and their use of comparative law. From its establishment until the 1970s, the ISC mainly followed English case law.<sup>68</sup> During this period, one justice, who later became the president of the ISC, stood out in this regard. Justice Shimon Agranat was born, raised, and studied in the United States and leaned toward anti-formalism.<sup>69</sup> This anti-formalism tendency is also embedded *inter alia* in Zionism, as Agranat was bred on Zionist values from a young age; his father was an intellectual leader in the Jewish community, a "Renaissance man," whose intellectual curiosity bore no limits and embraced the entire world.<sup>70</sup> During his service on the bench, Justice Agranat stood out for his uniqueness, drafting comprehensive judicial opinions with a decidedly didactic tone that laid the foundation for future rulings, similar to the way British judges wrote their rulings.<sup>71</sup> Agranat's comparative analysis was primarily and broadly based on Anglo-American legal systems, which not only referenced case law but the opinions of legal scholars as well, materials essential to Agranat as an interpreter of law.<sup>72</sup> Today, this comprehensive style of writing, which

67. Guy Harpaz, *מדיניות השכנות האירופית של האיחוד האירופי והשפעותיה האפשריות על תבנית הנוף המשפטית, הכלכלית, החברתית והפוליטית של מדינת-ישראל* [*The EU's European Neighborhood Policy and the Possible Impact on the State of Israel's Legal, Political, Social and Economic Landscape*], 4 L. & BUS. 448–56 (2006) (Isr.).

68. Moshe Landau, *מגמות בפסיקתו של בית המשפט העליון* [*Trends in Supreme Court Caselaw*], 8 IYUNEI MISHPAT 500, 502 (1981) (Isr.).

69. Pnina Lahav, *קווים להשקפת העולם המשפטית של השופט אגראנט* [*Guidelines to Justice Agranat's Legal Perspective*], in VALOR FOR SHIMON AGRANAT 13 (1986) (Isr.) [hereinafter *Lahav – Agranat*]; Pnina Lahav, *העוז והמשרה: בית המשפט העליון בעשור הראשון לקיומו* [*Valor and the Calling: The Supreme Court in its First Decade of Existence*], 14 IYUNEI MISHPAT 479 (1989) (Isr.) [hereinafter *Lahav – Valor and the Calling*].

70. Lahav – *Agranat*, *supra* note 69.

71. Landau, *supra* note 68.

72. See Lahav – *Valor and the Calling*, *supra* note 69, at 500–01 (“In the years 1952–1953, Justice Agranat, who has acquired the status of legal scholar within the Supreme Court, writes a series of important rulings, in which he attempts to introduce into Israeli law an analytical model of rights, a liberal concept of governance that is designed to preserve human rights and a more active court involvement regarding the discretionary powers of the government.”).

seeks to entirely encompass an issue while placing it on theoretical foundations, has become a guiding principle for Israeli judges engaged in the articulation of important rulings and judicial opinions.<sup>73</sup>

The Anglo-American common-law system, however, was not the only covert and overt influence on Israel's Supreme Court justices during the court's formative years. Fania Oz-Salzberger and Eli Salzberger studied the influence of German law on Israeli jurisprudence. Their research analyzed the background of the justices that were born or had studied law in the Weimar Republic, who came to Palestine during the 1930s and served on the Supreme Court in its initial decades.<sup>74</sup> Of the first twenty-five justices appointed to the Supreme Court until 1978, 36 percent were born in Germany. Thirty-six percent of the Justices (not necessarily the 36 percent that were born in Germany) studied law in German universities, 28 percent graduated from law schools in the United Kingdom or in the United States, 12 percent graduated law schools in Eastern Europe, and 20 percent studied law locally.<sup>75</sup> Justice Alfred Witkon, who was born in the Weimar Republic, described the lives of well-established and affluent German Jews as "paradise." Both Justice Witkon and Justice Haim Cohen stated that they did not encounter anti-Semitism in German universities.<sup>76</sup>

In Justice Cohen's letter to the researchers, he wrote that "[p]ractically all of us [i.e., the justices] were enthusiastic patriots of the Republic and avid devotees of its Constitution."<sup>77</sup> Justice Cohen also emphasized that most German judges in the 1920s performed their duties faithfully, and if there were some, primarily in the lower courts, who were lenient with right-wing offenders, while being tough

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73. Landau, *supra* note 68, at 503.

74. Eli Salzberger & Fania Oz-Salzberger, *The German Roots of the Israeli Supreme Court*, 21 IYUNEI MISHPAT 259 (1998) (Isr.); Yoram Shohar, *Criminal Law and Culture in Israel*, 7 PLILIM 77, 104–05 (1998) (Isr.) ("A values-based analysis of the profile of a German-Jewish jurist extends far beyond personal gossip, and it is important for understanding the Israeli legal system during its formative period... the struggle between cultures, at least as seen by German immigrants, was not merely a struggle between political cultures, but rather between cultures of interpersonal relationships as well. At least in their own eyes, German immigrants saw themselves as a model for honesty, fairness and reliability relative to the Eastern European model of practical cunning, evasiveness and improvisation. I believe that English common law, as a casuistic and pragmatic approach, was perceived by them, whether consciously or subconsciously, an ally of the Eastern European model of behavior." (translated by the authors)).

75. Salzberger & Oz-Salzberger, *supra* note 74, at 266.

76. See Alfred Witkon, *Remembering the German Exodus – Why Did the Jews Not See the Writing on the Wall?*, DAVAR, Feb. 11, 1983, at 20 (Isr.) ("From the 1920s to mid-1931, Germany was paradise for thousands of Jews. And I dare say, for most of the Jews that lived there for a long time. While one cannot speak in generalizations, and I stress that this article is not historic research but rather the simple recollections and impressions of an individual that was there at the time." (translated by the authors)).

77. Salzberger & Oz-Salzberger, *supra* note 74, at 269 (describing a letter written by Justice Cohen to the authors on July 8<sup>th</sup>, 1995).

with left-wing offenders, this fact does not necessarily lead to conclusions regarding the Republic as a country governed by the rule of law.<sup>78</sup> Oz-Salzberger and Salzberger conclude that the years Witkon and Cohen spent studying at German universities of the Weimar Republic were not traumatic for either of them.<sup>79</sup>

In their study, Oz-Salzberger and Salzberger also examined the seminal *Yeredor* case.<sup>80</sup> The following justices sat on the bench during this case: Justice Haim Cohen, depicted in their study as “one of the more blatant ‘*Yekim*’ (of German descent) on the court,” President Justice Shimon Agranat, influenced, as aforementioned, by Anglo-Saxon values, and Justice Yoel Zussman, depicted as “the most overt Germanophile on the Court, born in Kraków, Poland and a student of the universities Heidelberg, Frankfurt, Berlin, London and Cambridge.”<sup>81</sup> Oz-Salzberger and Salzberger argue that:

In the *Yeredor* case, the personal and collective German background of the justices on the bench echoed more loudly than in any other case before the Supreme Court. However, the German dictum was more complex than meets the eye, and the Germaness of those involved on the case—and in the Supreme Court in general—is multifaceted. Without a doubt, the failure of the Weimar Republic shaped the outlook of the ISC justices, and not only those of German descent, regarding the role of the judicial branch in a democratic country.<sup>82</sup>

Justice Cohen, who wrote a dissenting opinion, referenced (for the first time, according to Oz-Salzberger and Salzberger) the Constitution of the Federal Republic of Germany, which restricts the freedom of election for political parties aiming to impair the foundations of a free democracy or endanger the existence of the Republic, in examining rules pertaining to democracies at war.<sup>83</sup> Justice Zussman, who sided with Justice Agranat in the majority, also cited German case law.<sup>84</sup> Hence, the German legacy of the ISC justices was present in full force in one of the most formative cases the Israeli legal system has known.

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78. *Id.*

79. *Id.* at 270.

80. *See* HCJ 1/65 *Yeredor* v. Head of the Cent. Elections Comm. for the 6th Knesset 19(3) PD 365 (1965) (Isr.).

81. Salzberger & Oz-Salzberger, *supra* note 74, at 279.

82. *Id.* at 281.

83. *Id.* at 280; *see also* *Yeredor* 19(3) PD at 384 (“That is, in my opinion, through legislation that can provide an example for our legislator.” (translated by the authors)).

84. *See* Salzberger & Oz-Salzberger, *supra* note 74, at 281 (“Justice Zussman agrees with Agranat’s opinion, but his reasoning is different. Like Justice Cohen, he refers to case law from the Federal Republic of Germany but specifically the cases that recognized the existence of a law superseding written law and even the constitution.” (translated by the authors)); *Yeredor* 19(3) PD at 390 (Zussman, J., concurring) (“Whether we call these rules ‘natural law’ which is learnt naturally upon creation of a state of law, or by another name, I believe that life experience requires us not to repeat the same mistake to which we all bore witness.” (translated by the authors)).

Nevertheless, the manner in which this legacy affects the results from a practical standpoint varies among justices.<sup>85</sup>

Other life experiences also tend to influence judicial opinions in some manner, albeit not always overtly. Justice Barak mentioned his past as a Holocaust survivor only once in his judicial opinions.<sup>86</sup> The case discussed a petition against the Council for Films and Theater Plays Certification, which banned a play that compared the Israeli administration to the occupying-Nazi administration. Despite this personal reference in his opinion, it is interesting to note that his personal background did not affect his legal decision to accept the petition; rather, he invoked the doctrines of freedom of speech and essence of democracy. It might be argued that Justice Barak's personal background even reinforced his decision. In his opinion, Barak wrote, "I myself was a child during the Holocaust and crossed gates and borders secured by the German army while carrying contraband. The equivalency drawn between a German soldier detaining a child and an Israeli soldier detaining an Arab youth scorches my heart."<sup>87</sup>

The ISC justices' growing tendency to refer to foreign law can also be attributed, *inter alia*, to the international legal academic education received by the generations of justices succeeding the founding generation. The international legal education of ISC justices spans a vast array of academic degrees, ranging from LLB to JD and LLM, and including SJD, PhD, and post-doctorate studies. Most of the justices combined Israeli and foreign education. Justice England, for example, completed his PhD in Law at the University of Paris.<sup>88</sup> President Justice Grunis completed his doctoral studies at the Osgoode Hall Law

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85. See Barak Medina, *Forty Years to Yeredor: The Rule of Law, Natural Law, and Restrictions on Political Parties in a Jewish and Democratic State*, 22 MECHKARI MISHPAT 327 (2005) (Isr.) (discussing the status of case law throughout the years).

86. NAOMI LEVITZKI, HIS HONOR: AHARON BARAK – BIOGRAPHY 82 (2001) (Isr.).

87. HCJ 14/86 Laor v. Counsel for Film and Play Review 41(1) PD 421, 428 (1987) (Isr.); see also AHARON BARAK, JUDICIAL DISCRETION 121 (1987) (Isr.) ("Every judge has a complex human experience which influences his approach to life and, as a result, his approach to law. A judge who lived through the Weimar Republic will not share the same attitude toward the activity of undemocratic political parties as someone who did not experience it."). In another instance, Justice Barak stated that, "My takeaway is positive rather than negative. It is not a lesson of human hatred; it is not a lesson of distrust of human beings and despair – on the contrary . . . this lesson, my other takeaway, is a lesson based on human trust, on trusting all beings – Jews and non-Jews alike. This is where the core of my thinking of the legal concept and legal outlook regarding the dignity of man as created in the image of god, the right to liberty of each and every individual; the same human dignity that the Germans trampled in the Holocaust; the same liberty denied us during the Holocaust. My second takeaway is the imperative to uphold, to strengthen, to convey, as much as possible, that same respect to all individuals as human beings, and the same liberty to all individuals as human beings." See Justice Aharon Barak, Remarks at the Survivors' Heritage Conference (Nov. 4, 2002) (Isr.) (translated by the authors).

88. See *Retired Judges*, STATE OF ISR., JUDICIARY: SUP. CT. (2017), <https://supreme.court.gov.il/Pages/JudgesRetired.aspx> (last visited Sept. 28, 2020) [<https://perma.cc/2H62-L7VS>] (archived Sept 28, 2020) (Isr.).

School of York University in Toronto.<sup>89</sup> Justice Barak-Erez completed her post-doctorate studies at Harvard University and has taught in institutions around the world, including European research institutions, prior to her appointment to the bench.<sup>90</sup> Justice Grosskopf also earned an LLM from Harvard Law School.<sup>91</sup> Justice Elron earned his LLB from the University of Buckingham.<sup>92</sup> Justice Stein completed his PhD at University College London and was a faculty member at both Yeshiva University and the Brooklyn Law School.<sup>93</sup> Indeed, international legal education today wields great importance in deciphering the reasons justices reference foreign law—by way of course, for understanding the building blocks found in the bodies of foreign law with which they are familiar, and allowing them to find creative solutions for the legal issues brought before them.

The personal and educational experiences that characterized the ISC justices during the court's formative decades, who came to the bench with different backgrounds which had an impact on their judicial outlook, is not the exclusive domain of the Israeli legal system. One can find similar influences, for example, on judges serving in international tribunals. As opposed to national courts, where most judges come from similar cultural and educational backgrounds, international tribunals comprise judges from different countries, carrying different cultural baggage, speaking different languages, having different educational backgrounds, and even hailing from altogether different legal systems.<sup>94</sup> Some go as far as to argue that judges in international tribunals represent the political rather than legal interests of their home countries.

Indeed, judges serving on the CJEU are understandably not “immune” from the extensive influence of the legal culture and tradition of their home country.<sup>95</sup> Although CJEU decisions are published as a single opinion, this disparity in the judges' backgrounds

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89. *Retired Supreme Court Presidents*, STATE OF ISR., JUDICIARY: SUP. CT. (2017), <https://supreme.court.gov.il/Pages/RetiredPresidents.aspx> (last visited Sept. 28, 2020) [<https://perma.cc/XJH3-SLWL>] (archived Sept. 28, 2020) (Isr.).

90. *See Judges on the Bench*, STATE OF ISR., JUDICIARY: SUP. CT. (2017), <https://supreme.court.gov.il/Pages/Judges.aspx> (last visited Sept. 28, 2020) [<https://perma.cc/4CH6-KK9T>] (archived Sept. 28, 2020) (Isr.).

91. *See id.*

92. *See id.*

93. *See id.*

94. Examples of this can be found in the International Court of Justice (ICJ), the International Criminal Court (ICC), and the ECHR. For a further discussion on these influences, see generally Leigh Swigart, *The National Judge: Some Reflections on Diversity in International Courts and Tribunals*, 42 MCGEORGE L. REV. 223 (2010).

95. *See generally* GUNNAR BECK, *THE LEGAL REASONING OF THE COURT OF JUSTICE OF THE EU* (2012).

occasionally creates basic disputes between the judges.<sup>96</sup> Karen Alter argues that CJEU judges rule without bias and sometimes even against the interests of their own country in order to strengthen the legitimacy of the court, at times incurring criticism from other international tribunals.<sup>97</sup> It is important to remember that when Israeli judges refer to foreign law, they are not only affected by legal considerations, but also by the cultural relations between Israel and the countries from which Israel draws inspiration. Israeli law is both applied and implemented in a multicultural society, which, taken alone, is enough to warrant the multicultural predisposition of Israeli law.<sup>98</sup> However, there are many other factors explaining the salience of the ISC's propensity to engage in comparative law, specifically in light of the diverse character of the Israeli legal system.<sup>99</sup>

### C. *The Use of Comparative Tools by Israeli Justices*

Now that Israel's judicial culture has been discussed, the Article moves on to introduce the empirical evidence collected from existing studies on the use of comparative law by Israeli justices. The Article points out the main trends identified in these studies and their differences from this Article. The first comprehensive empirical quantitative research completed in Israel about the sources of ISC referencing was conducted in 1996 by Yoram Shachar, Ron Harris, and Meron Gross.<sup>100</sup> This study analyzes the argumentation and references used by the ISC from 1948 to 1994, covering all types of cases brought before the court. The data was based on 7,147 ISC rulings delivered during the period, which constitute a broad random sample of cases published during the studied timeframe.<sup>101</sup> The results of the study

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96. Lior Zemer & Sharon Pardo, *Thoughts on Judicial Activism: The Case of the European Court of Justice*, 7 L. & BUS. 213–15 (2007) (Isr.). Despite the numerous fundamental disagreements between judges, the independence of the CJEU judges is not doubted by the governments of the member states that appointed them. The CJEU judges and their teams show a supranational loyalty to the Union's core values, with some arguing that this court is the most "European institution of them all." See TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 59, 71–72 (6th ed. 1994).

97. See Karen J. Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 INT'L ORG. 121, 121–23 (1998).

98. See generally AMNON RUBINSTEIN, *THE TRIBES OF ISRAEL: TOGETHER AND SEPARATELY – LIBERALISM AND MULTICULTURALISM IN ISRAEL* (2017) (Isr.).

99. See Aharon Barak, *The Tradition and Culture of the Israeli Legal System*, 40 HAPARKLIT 197, 209 (1981) (Isr.); Daniel Friedmann, *The Effect of Foreign Law on the Law of Israel: Remnants of the Ottoman Period*, 10 ISR. L. REV. 192 (1975); Barak-Erez, *Comparative Law in Practice*, *supra* note 20, at 85 ("This practice affects the entire legal community in that it encourages legal argumentation based on comparative analysis and bolsters the legitimacy of using comparative arguments") (translated by the authors).

100. Yoram Shachar, Ron Harris & Meron Gross, *Citation Practices of Israel's Supreme Court: Quantitative Analysis*, 27 MISHPATIM 119 (1996) (Isr.).

101. *Id.* at 126–28.

show that during the examined period, 21 percent of the references by the ISC were to foreign normative sources.<sup>102</sup>

When analyzing the foreign sources referenced by the ISC, the researchers found that the use of sources from the civil law countries decreased from roughly 2 percent in 1954 to 0 percent in 1994.<sup>103</sup> Shachar, Harris, and Gross also found that, during the period examined, despite the dominance of sources from the common law jurisdictions in the ISC, there was a decline in references to English law in Israeli courts, particularly since the 1980s.<sup>104</sup> The researchers found that the major development during the research period is the rise in references to US rather than UK law; this trend contrasts the early years of the ISC, when there were significantly more references to British jurisprudence than to that of America.<sup>105</sup> One can conclude from the study's findings that the connection between the Israeli and English legal systems derived from Israeli law itself, and not only from the interest or desire of the court and its jurists. After all, if the British sources comprised 40 percent of total ISC references in 1956, one can ask why that percentage decreased to 2.3 percent in 1980. Can one argue that this decrease was due to the "release" of the Israeli legal system from the shackles of the English legal system, or is there a completely different explanation? Shachar, Harris, and Gross argue that the answer to this question is "no." Their findings do not reveal a set of events reflecting the disengagement of compulsory and optional links between Israeli and English law that have a statistically significant effect on the declining status of English sources in ISC referencing.<sup>106</sup>

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102. *Id.* at 152.

103. *Id.* at 154–56. According to the researchers, "the common law system contributes close to 100% of the foreign references made throughout the research period" (translated by the authors). This conclusion is supported by the finding that during the period studied, 0.5% of all references came from the civil law system, 0.1% from international law and 20.9% from common law (17.69% of which originated in England. *See id.*

104. *Id.* at 157–59 ("The fact that this trend is taking place at a time when the overall status of foreign referencing is in decline . . . in Supreme Court rulings relative to Israeli sources stands out." (translated by the authors)).

105. *Id.* at 157.

106. *Id.* at 158–59 ("It can be concluded that the history of the linkage between English and Israeli case law was forged both by necessity and choice. If in 1956, the Supreme Court referenced the English system in 40% of the cases in which reinforcement of the decision was deemed warranted, it did not do so out of necessity. If it does so in only 2.3% of the cases today, this is not because following 1980 it is no longer necessary to refer to any sources from the common law system. The reasons for changes in the Supreme Court's tastes can be found elsewhere." (translated by the authors)); *see also id.* at 167 ("[I]t can be assumed that the willingness of Supreme Court justices to live on a diet of primarily English jurisprudence, forsaking other foreign sources, derives mainly from the decidedly English identity of most of the legal material inherited virtually unamended by the Israeli system, from the British Mandate Period, including the

To explain this gradual disengagement from English law sources, Shachar, Harris, and Gross ask why there was an increase in references to American legal sources specifically in the early 1980s, and provide the following answer:

The study's data do not provide a reason to believe the emergence of American references in the early 1980s arose from the fall of obligatory linkage to English jurisprudence around that time. Also, here, one must assume that the "meeting" of American reasoning and English reasoning within Israeli referencing trends of the 1990s emanates other causes, such as the availability and quality of sources, the legal education of the judge and the general rise of American influence on Israeli culture overall.<sup>107</sup>

Thus, according to Shachar, Harris, and Gross, both the legal education of judges and the increase in available sources further support the rationale behind justices referencing foreign jurisprudence in ISC decisions. References to EU law can also be included in these explanations. The picture arising from the findings of Shachar, Harris, and Gross reveals that in 1996, and probably today as well, Israeli jurisprudence commanded a central position in the universe of sources available to ISC justices for referencing. However, while it is easy to speak in terms of American differentiation within the context of Israeli jurisprudence, it is also possible to discern the consistent crowding out of foreign sources from the findings regarding ISC referencing practices.<sup>108</sup>

In a 2008 update to the original study, Shachar examined the ISC's range of references between 1950 and 2004 from both a geographical and source-type (judgements, legislation, or academia) perspective.<sup>109</sup> The study's database was based on the original Shachar, Harris, and Gross 1998 study and added another 1,331 ISC

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accessibility of English sources, the significant legal and professional education – and, to a large degree, pure habit." (translated by the authors)).

107. *Id.* at 159 (translated by the authors).

108. *Id.* at 167 ("[I]t can be assumed that the future relationship between Israeli and foreign case law as a source of referencing is significantly contingent on the influence of American case law. English case law seems to have exhausted its impact on Israeli case law. Its relative weight over recent years has leveled off at around 5% of the total sources referenced and is not showing any signs of perceptible change. American jurisprudence, however, is sharply fluctuating in the margins of case referencing reserved for foreign sources . . . and in certain years has reached a relatively high levels . . . despite the implied above . . . it seems to us that there is a need to segment the relationship between Israeli and foreign references, to differentiate between English and American referencing. We assume that the process of establishing Israeli-source references as the most significant raw material for the Israeli referencing 'industry' does not derive, at least for now, from the origins of the foreign supply, but rather, from the Israeliness of the local product." (translated by the authors)).

109. Yoram Shachar, *Reference Practices of the Supreme Court, 1950–2004*, 50 HAPARKLIT 29 (2008) (Isr.).

decisions rendered in the second half of 1994 through the end of 2004, filtered in the same manner as in the original study.<sup>110</sup>

Shachar's findings indicate that, in the current period, the ISC has set a stable dose of foreign law as deemed absolutely necessary for comparison for the development and establishment of a small, centralized, and insulated Israeli legal system. They also suggest that the ISC is simultaneously gradually abandoning the historical connection with foreign legal systems.<sup>111</sup> According to Shachar, the erosion of foreign jurisprudence in the ISC case law is largely based on the replacement of foreign case law with Israeli case law.<sup>112</sup> The study indicates that between 1995 and 2004, 85 percent of references made by the ISC were to its own rulings, 4 percent referenced Israeli case law from lower courts, and 11 percent referenced foreign law, which consisted predominantly of Anglo-American sources.<sup>113</sup> European civil law, however, was referenced annually in about 2 percent of the cases during the fifty-five years researched.<sup>114</sup> International jurisprudence, treaties, literature, and international law reviews constituted, on average, 0.6 percent of all annual foreign sources referenced.<sup>115</sup>

Another interesting empirical study, published in 2013, was conducted by Suzie Navot.<sup>116</sup> In contrast to both of Schachar's studies, Navot's study was smaller in two main respects. First, the period examined (1994–2010) was more confined. Second, the study focused on the ISC's references to foreign precedents solely in constitutional cases.<sup>117</sup> Navot's study examined all of the cases published during the research period,<sup>118</sup> thus Navot's database consisted of hard copies of the decisions published from 1994 to 2005 and digital copies of the

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110. *Id.* at 30.

111. *Id.* at 41.

112. *Id.* at 42–43. The findings of Shachar's study reveal that in 1950, foreign jurisprudence contributed 30% of all references and sources mentioned. Foreign jurisprudence experienced a consistent and continuous decline until the mid-1990s, which has since tapered off and remained relatively stable. *See id.*

113. *Id.* at 63, 65–67.

114. *Id.* at 46. This estimate includes most references from EU law during the period studied. *See id.*

115. *See id.* (stating that these references are experiencing a slight increase in the later years of the study period).

116. Suzie Navot, *Israel: Creating a Constitution—The Use of Foreign Precedents by the Supreme Court (1994–2010)*, in *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* 129 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

117. One of the challenges encountered by Navot in her study is that of classifying a case as a “constitutional” case; given the absence of a complete constitutional text and dedicated constitutional court proceedings, one must pay special attention to the classification of cases comprising the database. *See id.* On classification, see also *id.* at 139–40.

118. *See id.* at 139.

decisions published from 2006 to 2010.<sup>119</sup> The findings of Navot's study reveal that the number of constitutional cases deliberated following the ISC's constitutional revolution of the early 1990s was relatively steady, with no dramatic increase in numbers over the years.<sup>120</sup> Navot also found a similar steadiness regarding the citation of foreign law in ISC constitutional adjudications, and noted that the rate of referencing foreign law even subsided a bit towards the end of the research period.<sup>121</sup> Around 74 percent of foreign law citations were found in majority opinions. According to Navot, these findings reveal a widespread and familiar situation regarding foreign law citations, which supports the desire of judges to underscore the fact that countries with similar judicial values support their judicial conclusions, lending greater legitimacy to those local decisions backed by foreign law.<sup>122</sup> The legal systems cited in ISC constitutional cases were predominantly from the American system (64 percent of all foreign citations studied). Additional common law systems cited, such as Canada, constituted 13 percent of all foreign citations examined;<sup>123</sup> notably, England accounted for only 9.54 percent of total foreign citations. Germany, with 5 percent of total citations, was the civil law system most often cited. However, most civil law jurisdictions did not account for more than 0.5 percent of citations. This finding coincides with the two previous studies conducted by Shachar, Harris, and Gross and Shachar.

One of Navot's conclusions, in light of her findings, was that Israeli constitutional law underwent and is still undergoing a process of Americanisation.<sup>124</sup> Navot states that there are a number of reasons for this, including, but not limited to, the so-called constitutional revolution and its impact on the dialogue on constitutional and human rights. The process of "Americanisation" that took place within Israeli law schools regarding teaching methods, as well as the increasing number of law students travelling to the United States for graduate

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119. See *id.* However, the study includes all the cases published as part of the PD hardcopy between 1994–2005, and the decisions that appear in the electronic database between 2006–2010.

120. See *id.* at 141.

121. *Id.*

122. *Id.* at 148–51.

123. Israel's "limitations clause" is similar to the one appearing in the Canadian Charter, and hence we are able to assess the reason for this referencing rate. The referral to Canadian precedents, however, can be found independent of the "limitations clause," as it is intertwined with other constitutional jurisprudence. See *id.* at 147. See also, for example, HCJ 4112/99 Adalah – The Legal Center for Arab Minority Rights v. City of Tel Aviv-Jaffa 56(5) PD 393, 464–70 (2002) (Isr.), which discusses the obligation of the Tel Aviv Municipality to use Arabic throughout city road signs in areas where Arab residents live. The entire ruling—both majority and minority opinions—contains nine references made to foreign law, mostly Canadian law, while the justices' respective opinions focused on cases in which the importance of language as a major attribute of society was discussed. See Navot, *supra* note 116, at 147.

124. Navot, *supra* note 116, at 145.

studies, influenced the students' research once back in Israel.<sup>125</sup> Navot explains that this is reflected in a decline in formalism on the one hand, and an increase in judicial activism on the other.<sup>126</sup> In her opinion, this decline, in part, explains the abandonment of English law in favor of ISC's new linkage with American law. However, it is important to state that, from its early days, the ISC developed and defended a series of human rights decisions. The ISC did so despite the absence of a constitutional text on which to rely—which is directly related to the extensive use of foreign precedents in constitutional cases in Israel.<sup>127</sup> The cornerstone of Israel's human rights adjudication was the 1953 *Kol Ha'am Co. v. Minister of Interior* case, in which President Justice Agranat addressed the special status that freedom of expression enjoys, a basic freedom without which a democratic state cannot survive.<sup>128</sup> Agranat adopted the "balancing" and "certainty" tests, which only together can justify the prevention, or limitation, of the freedom of expression. This significant decision cited numerous classic American free speech cases.<sup>129</sup> The *Kol Ha'am* decision demonstrates how "judges turned to foreign precedents to acknowledge the need to defend human rights, even in the absence" of an explicit written constitutional protection.<sup>130</sup>

Navot believes that:

Though the ISC [Israeli Supreme Court] makes extensive use of foreign precedents and references, we feel that Israeli constitutional law is an original Israeli development, based on the unique culture and special nature of the State of Israel as a Jewish and democratic state. . . . The fact that ever since the State was established, and regardless of changes it underwent in recent years, citations of foreign law remain stable, indicates that after all, the ISC still establishes its rulings mainly on Israeli law.<sup>131</sup>

It is important to emphasize that American law was cited most frequently in human rights cases. Further, American precedents on constitutional-institutional issues, which discuss the duties of democratic institutions, are almost never mentioned in Israeli case law, likely due to the inherent distinctions between the Israeli and the American political systems.<sup>132</sup>

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125. For a more extensive discussion, see *id.* at 145–48.

126. *Id.* at 137; Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law*, 17 IYUNEI MISHPAT 503 (1993) (Isr.).

127. Navot, *supra* note 116 at 131–32.

128. See HCJ 73/53 *Kol Ha'am Co. Ltd. v. Minister of Interior* 7(2) PD 871 (1953) (Isr.).

129. *Id.*; see also, e.g., *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616 (1919).

130. Navot, *supra* note 116, at 131–32.

131. *Id.* at 152.

132. *Id.* at 147.

Based on these studies, Iddo Porat concludes that the “Israeli constitutional culture is traditionally receptive to the use of foreign law,” and one can expect this to continue in the future.<sup>133</sup> Interestingly, Porat states one explanation for the increasing use of foreign law in Israeli constitutional jurisdiction “is the adoption of the European-based model of constitutional adjudication” into Israel’s basic laws in 1992.<sup>134</sup> Accordingly, there is a similarity to the broader European constitutional system, not necessarily pertaining to EU law—which highlights the similarities between Israeli law and European law, to the detriment of American law:

Hand-in-hand with adopting the methodology of European constitutionalism, Israel may have also gotten closer to the substantive commitment of the European model that differs from the American one . . . In addition, the European model is more expansive in terms of the concept of rights, and allows for a positive rather than only negative rights, and for rights to have effect in the private sphere and not only in the public one. These developments characterize Israeli constitutional law, and further promote and ease the use of foreign law in it.<sup>135</sup>

According to Porat, four key factors contribute to the understanding as to why the Israeli law and legal system are designed to cite and be shaped by foreign law: (a) the non-textual nature of Israeli constitutional law; (b) the watershed “constitutional revolution” of 1992; (c) the adoption of a European-based, universalistic model of constitutional adjudication; and (d) the non-formalistic character of the legal system, particularly since the 1980s.<sup>136</sup>

The history of Israeli constitutional law can be roughly divided into two main phases: from 1948 to 1992 and from 1992 (the “constitutional revolution”) onwards.<sup>137</sup> Porat explains that in the wake of the 1950 Knesset decision called “the *Harrari* Decision” and because of the Israeli decision not to adopt a formal constitution, prior to the constitutional revolution, Israeli law was primarily based on the English system, and the Israeli legal system was considered to be a system without a formal constitution. The lack of a formal written

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133. Iddo Porat, *The Use of Foreign Law in Israeli Constitutional Adjudication*, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING 151, 151 (Gideon Sapir, Daphne Barak-Erez & Aharon Barak eds., 2013) (Isr.). However, Porat states that “regarded as part of a global trend in which constitutional courts compete over leadership and innovation in rights protection, and taking into account Israel’s shaky ground for its ‘Constitutional Revolution’, the use of foreign law may raise some valid concerns.” See *id.*

134. *Id.* at 160. (“The two Basic Laws of 1992 have a limitation clause framed after the Canadian Charter of Rights and Freedoms, which is based on a European model and a model that exists in international human rights Conventions.”).

135. *Id.* at 161.

136. *Id.* at 151–52.

137. For additional reading on the history of Israeli constitutional law, see Ruth Gavison, *The Constitutional Revolution – Reality or Self-Fulfilling Prophecy?*, 28 MISHPATIM 21 (1997) (Isr.).

constitution in Israel left the door wide open for jurists to use foreign law, although there is usually resistance to the use of foreign case law and legislation in the adjudication of constitutional issues—due to the desire to remain loyal to the letter of the law and its original intent. The Israeli method of constitutional interpretation is based on decrypting the original intent of its drafters. The manner in which a particular country interprets and applies its constitution is rarely relevant to other countries. But, for a country with neither a written constitution nor a sustained history of case law, such as Israel, the aforementioned obstacle is nonexistent, paving the way to use foreign legislation and jurisprudence in various court rulings.<sup>138</sup> Israel's numerous basic laws comprise a quasi, unfinished Israeli constitution, and one could argue that the foundation for a bill of rights in Israel is incomplete.<sup>139</sup> The gap between the group of rights granted under a narrow, literal interpretation of the law was bridged on numerous occasions by the ISC, which rendered a broader interpretation of these basic laws.

Consequently, in many respects, Israeli constitutional law following the constitutional revolution continued the tradition of building up the basic laws. The ISC did so not by basing the court's interpretations on texts and a narrow interpretation of the letter of the law, but rather by referring to laws and case law rooted in foreign law.<sup>140</sup>

Support for interpreting law broadly to protect basic human rights to the greatest extent possible can be drawn from foreign law. One can view the constitutional revolution itself as significantly based on comparative law. Prior to 1992, Israel was one of only a few Western democratic countries without a clear constitutional regime or judicial review process, and therefore, there was a strong desire to “close the constitutional-democratic gap” with other countries.<sup>141</sup> Through comparative law, the court bestowed and still bestows legitimacy to recognize a bold step of judicial review without the backing of a domestic constitutional document. In the *Mizrachi Bank* case, President Justice Barak based his arguments on the landmark

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138. Porat, *supra* note 133, at 157–58.

139. On the scope of the constitutional revolution regarding the completeness of a bill of rights and the critical approach to the application of Basic Laws beyond the rights explicitly mentioned therein, see Hillel Sommer, *The Unlisted Rights – On the Scope of the Constitutional Revolution*, 28 MISHPATIM 257 (1997) (Isr.); Barak Medina & Ashor Weitzman, *The Constitutional Revolution or The Human Rights Revolution? On Constitutional Referencing of Institutional Norms*, 40 IYUNEI MISHPAT 662 (2017) (Isr.); see also, on the need to establish a preamble to the constitution, Amnon Rubinstein & Liav Orgad, *Preamble to the Constitution and Its Legal Status – The Israeli Case*, 11 HAMISHPAT 69 (2007) (Isr.).

140. Porat, *supra* note 133, at 162.

141. *Id.* at 160.

American case, *Marbury v. Madison*,<sup>142</sup> in which the court used constitutional interpretation to establish the judicial review power of the Supreme Court. Thus, Arnon Gutfel and Yoram Rabin stated:

[T]his is how the theory of judicial review of constitutionality, a cornerstone of the American constitutional system, a condition underlying the very existence of the constitutional structure was established. President Justice Barak concluded that the American experience regarding constitutional judicial review broke through America's borders. It has influenced constitutional thinking around the world. It dominates constitutional arrangements put into place after World War II. It was accepted as a guideline for all countries in the Eastern bloc following the fall of the Soviet Union. **Similarly, this is the main contribution of America's constitutional theory to universal constitutional theory.** . . . even in countries lacking explicit provisions in their constitution—and as part of the legal culture developed in England (“common law”)—the outlook that unconstitutional laws are null and void and that the court is authorized to declare this.<sup>143</sup>

The main and the most frequently used test adopted from foreign law is the proportionality test, which is based on the European approach. In adopting this test, the ISC entered the large family of constitutional courts that use proportionality in their rulings. This allowed the ISC to form a set of relationships and to create dialogues with foreign courts, and in so doing extended the accessibility to foreign law and the legitimization of its use in Israel.<sup>144</sup> In his book, Justice Barak discusses proportionality in constitutional cases and presents a comparative analysis of the concept in German, Canadian, European, English, and Irish law, and explains how the concept of proportionality was exported to the entire world.<sup>145</sup>

Since the 1980s, the ISC has continued to develop the approach of broad interpretation. This approach is more closely intertwined with public life and is better able to meaningfully oversee administrative decisions through the interpretation of key terms, such as justice and standing. Accordingly, there has been a rise in the trend towards adopting an informal stance in legal interpretation.

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142. See *Marbury v. Madison*, 5 U.S. 137 (1803).

143. Arnon Gutfeld & Yoram Rabin, *Marbury v. Madison and Its Impact on Israeli Constitutional Law*, in EDMUND LEVY'S BOOK 75, 87 (2017) (emphasis in original) (translated by the authors). For an overview of the critique on the comparison of the Israeli case to the American case and referencing *Marbury v. Madison* by the former President Justice Landau, Ruth Gavison, and Daniel Friedman, see *id.* at 88–91.

144. For a discussion on the extension of the proportionality test in constitutional law in various legal systems around the world, and the dialogue that this test facilitates, see generally Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008); David Schneiderman, *Global Constitutionalism and Its Legitimacy Problems: Human Rights, Proportionality, and International Investment Law*, 12 L. & ETHICS HUM. RTS. 251 (2018); ALEC STONE SWEET & JUD MATHEWS, *PROPORTIONALITY BALANCING AND CONSTITUTIONAL GOVERNANCE: A COMPARATIVE AND GLOBAL APPROACH* (2019).

145. See generally Aharon Barak, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (Doron Kalir trans., 2012) (Isr.).

Menachem Mautner explains that courts have become less formalistic for numerous reasons. First, the transition in Israeli society from a collective to individualist society, which is more willing to cast doubts and distrust the state.<sup>146</sup> Second, due to the decline in power of the center-left political parties in Israel and the complementary rise of right-wing parties since 1977, there has been a need to achieve a balance. This need has been manifested through liberalism and through a judicial system that has broadly interpreted the law in order to defend civil rights in Israel.<sup>147</sup>

Another possible explanation for the use of foreign law in Israel relates to Israel's geopolitical isolation.<sup>148</sup> Israel is surrounded by hostile countries and entities and therefore has naturally sought legitimization and acceptance from Western Europe and the United States. Citation of foreign jurisprudence and legislation is one way to deepen cooperation, cultural exchange, and integration. In addition, and of no less importance, Israel is legally isolated. The United States, for example, holds a depository of fifty states to compare legal materials, while, given the European integration project, there are twenty-seven legal systems with which to draw comparisons. Israel does not have such a privilege and therefore must borrow constitutional materials from foreign countries.<sup>149</sup> The increasing importance of the American culture to Israel includes also its legal culture.<sup>150</sup>

The empirical studies presented here analyze the influence of foreign law on the development of Israeli law from different perspectives. These studies focused mostly on the natural legal systems also known as "the large systems"—namely, the common law and the civil law systems. The historical reasons for this are clear and intrinsic to the Israeli legal system, which is based on changes made in accordance with the spirit of these legal systems. Over the years, however, Israeli law has blossomed into a multifaceted mosaic that incorporates various legal sources and yet still remains understudied. A key normative source that is still missing from the existing literature is the contribution of EU law to the mosaic, which is the focus of this study. The next part provides a brief overview of Israeli-EU relations, which plays an important role in the emergence of EU law in comparative law in Israel.

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146. See Mautner, *supra* note 126.

147. See Porat, *supra* note 133, at 162.

148. See *id.* at 164.

149. See *id.* at 168.

150. See generally Haim Sandberg, *Legal Colonialism – Americanization of Legal Education in Israel*, 27 HAMISHPAT 52 (2009) (Isr.).

## III. A BRIEF OVERVIEW OF ISRAEL-EU RELATIONS

Israel's engagement with the European Economic Community (EEC) began even before the EEC was officially established. On May 1, 1957, less than two months after the Treaty Establishing the EEC was signed, the document was already translated into Hebrew. In fact, in mid-1957, senior Israeli officials explored the possibility of obtaining full EEC membership<sup>151</sup> on behalf of Israel's first prime minister, David Ben-Gurion. One year later, in 1958, Israel displayed a greater degree of political realism and started to advocate for "associate member" status.<sup>152</sup> In April 1958, Israel became the third country in the world, following Greece and the United States, to request the establishment of a diplomatic mission accredited to the EEC, and in February 1959 Israel was the fourth country in the world to establish full diplomatic relations with the European Communities.<sup>153</sup>

Israel signed its first legal instrument with the EEC in 1964.<sup>154</sup> This non-preferential trade agreement reduced the EEC's most favored nation tariff on about twenty industrial and commercial products of special interest to Israel.<sup>155</sup> In June 1970, the EEC and Israel signed a new five-year preferential trade agreement, which allowed a 50 percent reduction in Community tariffs on Israeli-manufactured exports and a 40 percent reduction on a limited number of Israeli agricultural exports.<sup>156</sup> In May 1975, the parties upgraded their relationship and

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151. See generally Sharon Pardo, *The Year that Israel Considered Joining the European Economic Community*, 51 J. COMMON MKT. STUD. 901 (2013).

152. See generally Gadi Heimann, *The Need to Be Part of Europe: Israel's Struggle for an Association Agreement with the EEC, 1957–1961*, 20 ISR. STUD. 86 (2015); Gadi Heimann, *The EEC Commission and the Negotiations for a Trade Agreement with Israel, 1958–1964*, 38 J. EUR. INTEGRATION 775 (2016); GADI HEIMANN & LIOR HERMAN, *ISRAEL'S PATH TO EUROPE: THE NEGOTIATIONS FOR A PREFERENTIAL AGREEMENT, 1957–1970* (2019).

153. See SHARON PARDO & JOEL PETERS, *UNEASY NEIGHBORS: ISRAEL AND THE EUROPEAN UNION* (2010) [hereinafter PARDO & PETERS, *UNEASY NEIGHBORS*]; SHARON PARDO & JOEL PETERS, *ISRAEL AND THE EUROPEAN UNION: A DOCUMENTARY HISTORY 14* (2012) [hereinafter PARDO & PETERS, *DOCUMENTARY HISTORY*].

154. *Accord Commercial Entre la Communauté Économique Européenne et l'État d'Israël* [Trade Agreement Between the European Economic Community and the State of Israel], June 4, 1964, 1964 J.O. (1518).

155. Yaacov Cohen, *Israel and the EEC, 1958–1978: Economic and Political Relations*, in *THE ECONOMIC INTEGRATION OF ISRAEL IN THE EEC: TEL AVIV CONFERENCE 13*, 13–37 (Herbert Giersch ed., 1980); Guy Harpaz & Gadi Heimann, *Sixty Years of EU-Israeli Trade Relations: The Expectations-Delivery Gap*, 50 J. WORLD TRADE 447, 454 (2016); HEIMANN & HERMAN, *supra* note 152.

156. Daphna Kapeliuk-Klinger, *A Legal Analysis of the Free Trade Agreement of 1975 Between the European Community and the State of Israel*, 27 ISR. L. REV. 415, 417 (1993).

signed their first FTA agreement,<sup>157</sup> which abolished all trade barriers on Israeli-manufactured goods by the end of 1979.<sup>158</sup>

Israel's relations with the EU and European Community (EC) reached their lowest point ever following the June 1980 Venice Declaration, in which the nine EC member states gave notice of their aspirations to play a greater role in the Middle East conflict.<sup>159</sup> The Venice Declaration outlined a number of principles that have defined the EC's vision towards the resolution of the Israeli-Arab/Palestinian conflict ever since.<sup>160</sup> Israel's response to the Venice Declaration was furious and uncompromising. For Israel, the Venice Declaration meant that the EC member states were ready to sacrifice Israel's safety in order to protect its oil supplies and commercial dealings with the Arab world.<sup>161</sup> The Venice Declaration probably signaled the lowest point ever in Israeli-EC/EU relations "from which it has never fully recovered."<sup>162</sup>

Venice cast a large shadow over Israeli-EC relations throughout the 1980s. From the issuance of the Declaration in 1980 to the convening of the Madrid Peace Conference in 1991, Israel vigorously opposed any EC attempt to play a significant role in the Middle East Peace Process (MEPP). Israel denounced the EC's approach to the Middle East conflict for its impartiality. With the end of the first Gulf war in the summer of 1991, the United States turned its attention to the Arab-Israeli conflict. The EC expected to play its part in the diplomatic efforts initiated to revive the MEPP. These hopes were short-lived. At the insistence of Israel, the EC was excluded from playing any significant role in the proceedings of the Madrid Peace Conference.<sup>163</sup>

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157. Agreement Between the European Economic Community and the State of Israel, May 11, 1975, 1975 O.J. (L 136) 3.

158. RICHARD W.T. POMFRET & BENJAMIN TOREN, *ISRAEL AND THE EUROPEAN COMMON MARKET: AN APPRAISAL OF THE 1975 FREE TRADE AGREEMENT* (1980).

159. The Declaration of Venice, June 12–13, 1980, as reprinted in PARDO & PETERS, *DOCUMENTARY HISTORY*, supra note 153, at 136–38.

160. Key elements of the Venice Declaration discuss: (i) the "Palestinian problem," (ii) the "question of Jerusalem" and (iii) the Israeli settlements. See *id.*

161. See 796 Government Resolution, Israel Ministry of Foreign Affairs (Aug. 15, 2011), as reprinted in PARDO & PETERS, *DOCUMENTARY HISTORY*, supra note 153, at 138–39.

162. Joel Peters, *Europe and the Arab-Israeli Peace Process: The Declaration of the European Council of Berlin and Beyond*, in BOUND TO COOPERATE – EUROPE AND THE MIDDLE EAST 156 (Sven Behrendt & Christian-Peter Hanelt eds., 2000).

163. See generally SOREN VON DOSENRODE & ANDERS STUBKJÆR, *THE EUROPEAN UNION AND THE MIDDLE EAST* (2002); COSTANZA MUSU, *EUROPEAN UNION POLICY TOWARDS THE ARAB-ISRAELI PEACE PROCESS: THE QUICKSANDS OF POLITICS* (2010); PARDO & PETERS, *UNEASY NEIGHBORS*, supra note 153; Patrick Müller & Sharon Pardo, *Israel and Palestine and the European Neighbourhood Policy*, in *THE ROUTLEDGE HANDBOOK ON THE EUROPEAN NEIGHBOURHOOD POLICY* 347, 349 (Tobias Schumacher,

The 1993 and 1995 Oslo Accords between Israel and the Palestinians led to a qualitative change in the nature of EU-Israeli relations, and negotiations for a revised trade agreement between the parties started immediately. At the December 1994 Heads of State and Government Summit held in Essen, EU leaders gave impetus to these discussions by deciding “that Israel, on account of its high level of economic development should enjoy a *special status* in its relations with the [EU] on the basis of *reciprocity* and common interests.”<sup>164</sup>

#### A. *The 1995 EC-Israel Euro-Mediterranean Association Agreement*

In November 1995, the EU and Israel signed a new trade agreement, which entered into force in June 2000.<sup>165</sup> The 1995 Euro-Mediterranean Association Agreement (AA) significantly upgraded the 1975 FTA, which had governed economic ties between the EC/EU and Israel for the previous two decades. The 1995 AA marks an important milestone in Israeli-EU relations.<sup>166</sup>

The signing of the 1995 AA made Israel the Euro-Mediterranean Partnership (EMP/the Barcelona Process; currently known as the Union for the Mediterranean (UfM))<sup>167</sup> partner country, aside from Turkey, with the closest ties to the EU. Israel is the only EMP Mediterranean partner that reached an industrial standard comparable to that of the EU members, if not even a higher standard, allowing it to cooperate with all EU member states within the terms of the AA on the basis of full reciprocity.<sup>168</sup>

The AA aimed, *inter alia*, to intensify scientific and technological cooperation. In October 1995, the EU and Israel concluded a Research and Development Agreement through which Israel became the first non-European country to be fully associated with the Union’s Research

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Andreas Marchetti & Thomas Demmelhuber eds., 2018); ANDERS PERSSON, THE EU AND THE ISRAELI–PALESTINIAN CONFLICT 1971–2013: IN PURSUIT OF A JUST PEACE 110–11 (2014); ANDERS PERSSON, EU DIPLOMACY AND THE ISRAELI–ARAB CONFLICT, 1967–2019 71–73 (2020).

164. European Union, *Conclusions of the Essen European Council*, 12 BULL. EUROPEAN CMTYS. (1994), as reprinted in PARDO & PETERS, DOCUMENTARY HISTORY, *supra* note 153, at 169 (emphasis added).

165. EC-Israel Association Agreement, Nov. 20, 1995, 2000 O.J. (L 147) 3, as reprinted in PARDO & PETERS, DOCUMENTARY HISTORY, *supra* note 153, at 194.

166. PARDO & PETERS, UNEASY NEIGHBORS, *supra* note 153, at 48–57.

167. The EMP was launched in November 1995 with the aim of redefining the EU’s relationship with the Mediterranean countries on the Union’s Southern periphery and of developing a new framework for peaceful and cooperative relations in the Mediterranean region. See generally Barcelona Declaration, adopted Nov. 27–28, 1995, EUROPEAN COMM’N, BARCELONA DECLARATION (1995), [https://ec.europa.eu/research/iscp/pdf/policy/barcelona\\_declaration.pdf](https://ec.europa.eu/research/iscp/pdf/policy/barcelona_declaration.pdf) [https://perma.cc/XT7U-7W4W] (archived Sept. 28, 2020).

168. Peter Malanczuk, *The Legal Framework of the Economic Relations Between Israel and the European Union*, in ISRAEL AMONG THE NATIONS 263, 263–79 (Alfred E. Kellermann, Kurt Siehr, & Talia Einhorn eds., 1999).

Framework Programs (FP).<sup>169</sup> Since 1996, Israel has been a very active member in successive calls for research projects and has become an important source of innovation in both basic and applied research conducted in the European Research Area (ERA).<sup>170</sup> The EU is currently Israel's largest source of research funding, larger even than the Israel Science Foundation (ISF). For its part, Israel has contributed more than €1,277 million to the Union's FPs between 1996 and 2017,<sup>171</sup> and it is expected to contribute €1,000 million to the Horizon 2020 program (2014–2020).<sup>172</sup>

The AA is more than just a free trade agreement. Rather, it has allowed for both a continuous dialogue and the emergence of a vast degree of cooperative ventures between the EU and Israel on a wide array of issues. This agreement established the institutional framework for a dialogue between the two parties. The EU and Israel established an Association Council that meets annually at the foreign minister level to examine major issues arising within the AA, as well as other bilateral and international issues of mutual interest.<sup>173</sup> Any disputes between the parties that the Association Council fails to resolve are settled by a special arbitration mechanism that was set up by the Association Council. The AA also called for the establishment of an Association Committee, which meets at an official level and consists of representatives of the EU Council, the European Commission, and senior Israeli officials. In addition, the AA also created ten subcommittees and one informal working group at the expert level for the discussion of professional matters. The subcommittees usually meet annually.<sup>174</sup>

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169. See EC-Israel Scientific and Technological Cooperation Agreement, Mar. 25 1996, 1996 O.J. (L 209) 23, as reprinted in PARDO & PETERS, DOCUMENTARY HISTORY, *supra* note 153, at 174.

170. The ERA is a unified research area “open to the world, in which scientific knowledge, technology and researchers circulate freely.” See *European Research Area*, EUROPEAN COMM'N, [https://ec.europa.eu/info/research-and-innovation/strategy/era\\_en](https://ec.europa.eu/info/research-and-innovation/strategy/era_en) (last visited Oct. 14, 2020) [<https://perma.cc/G68N-D7HY>] (archived Oct. 14, 2020).

171. Delegation of the European Union to the State of Israel, EU Commissioner for Research, Science and Innovation Visits the Start-Up Nation (May 17, 2017), [https://eeas.europa.eu/delegations/israel/26342/eu-commissioner-research-science-and-innovation-visits-start-nation\\_en](https://eeas.europa.eu/delegations/israel/26342/eu-commissioner-research-science-and-innovation-visits-start-nation_en) [<https://perma.cc/5RYR-WM8K>] (archived Sept. 28, 2020).

172. Roei Goldschmidt, *Israel's Participation in the European Union Framework Program for Research and Development*, KNESSET – RES. & INFO. CTR. (2014) (Isr.).

173. While the Association Council ostensibly meets annually, due to political tensions between the EU and Israel, the last Association Council meeting was held in July 2012. See *Parliamentary Questions: Re-establishment of the EU-Israel Association Council Under the New EU Leadership*, EUROPEAN PARLIAMENT (Feb. 7, 2020), [https://www.europarl.europa.eu/doceo/document/E-9-2020-000760\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-000760_EN.html) [<https://perma.cc/XSU5-KKLV>] (archived Mar. 10, 2020).

174. The ten EU-Israel subcommittees are dedicated to the following issues: Industry trade and services; internal market; research, innovation, information society,

Although the preamble to the AA refers to the traditional links between the EU, its member states, and Israel as well as the common values shared by all, the agreement itself fails to articulate which values are shared or how these shared values affect relations. In Article 2 of the AA, the parties simply state their relations, “as well as all provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement.”<sup>175</sup> The AA reveals the lack of any systematic thinking in either Israel or the EU about the nature of their relations beyond the need for closer economic ties. The document is decidedly apolitical.<sup>176</sup> There is a lack of any sense of a grand strategy by either Israel or the EU on ideas or policies that could govern their future relationship.<sup>177</sup>

### B. *The EU-Israel Rules of Origin Dispute*

While the MEPP served as a positive inflection point in Israel-EU relations, the EU’s unease with Israel, voiced in the Venice Declaration, remained not far beneath the surface. One important point of contention has been the entry of goods produced in Israeli settlements established in Gaza and the West Bank to EU markets under the AA. This issue has led to a protracted dispute between Israel and the EU over the terms of the “rules of origin” (ROO) within the 1995 AA.<sup>178</sup> The Fourth Protocol to the AA defines the concept of “originating products” and outlines the methods of administrative cooperation between the parties to the agreement. While the Protocol articulates specific origin criteria for various product categories, it fails to provide a specific definition of what constitutes the territory of the State of Israel.

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education and culture; transport, energy and environment; political dialogue and cooperation; justice and legal matters; economic and financial matters; customs cooperation and taxation; social and migration affairs; agriculture and fisheries; and international organizations. The parties also conduct a regular dialogue on human rights issues of common concern under an Informal Working Group on Human Rights. *See Proposal for a Council Decision on a Community Position in the Association Council on the Implementation of Article 73 of the Euro-Mediterranean Agreement Establishing an Association Between the European Communities and their Member States, on One Part, and the State of Israel, of the Other Part*, Annex I, COM (2005) 258 final (July 8, 2005).

175. EC-Israel Association Agreement, *supra* note 165, at 194.

176. PARDO & PETERS, *UNEASY NEIGHBORS*, *supra* note 153.

177. Yehezkel Dror & Sharon Pardo, *Approaches and Principles for an Israeli Grand Strategy Towards the European Union*, 11 EUR. FOREIGN AFF. REV. 17, 18–19 (2006).

178. In 2020, 39% of Israel’s imports (excluding diamonds) came from the EU and 29% of its exports (excluding diamonds) were directed to the European market. *See* Cent. Bureau of Stats., *Media Release – Israel’s Foreign Trade in Goods by Country – 2020*, CENTRAL BUREAU OF STATS. (Jan. 20, 2021) (Isr.), [https://www.cbs.gov.il/he/mediarelease/DocLib/2021/024/16\\_21\\_024e.pdf](https://www.cbs.gov.il/he/mediarelease/DocLib/2021/024/16_21_024e.pdf) [https://perma.cc/X4DP-H2WY] (archived Mar. 10, 2021).

Based on past EC/EU declarations on the Arab-Israeli conflict, the EU considers the territory of the State of Israel as the area within the borders determined by the 1949 Armistice Agreements.<sup>179</sup> The EU subscribes to UN Security Council Resolutions 242 and 338, which, for EU member states, serve as the basic contours for any future agreement pertaining to the Occupied Territories (OT) and the creation of a Palestinian state.<sup>180</sup> In January 2016, the EU unequivocally clarified its position on this question of the territory of the State of Israel, and the Union's Foreign Affairs Council (FAC) declared:

The EU and its Member States are committed to ensure continued, full and effective implementation of existing EU legislation and bilateral arrangements applicable to settlements products. The EU expresses its commitment to ensure that—in line with international law—all agreements between the State of Israel and the EU must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967.<sup>181</sup>

Israel, on the other hand, prefers to leave the exact demarcation of its borders ambiguous, since it considers the Jewish settlements in the West Bank an integral part of the state.<sup>182</sup>

The question regarding the product origin of goods produced in the OT was raised by the European Commission in the midst of an unrelated investigation.<sup>183</sup> In 1993, the European Commission suspected that Israeli orange juice producers were using Brazilian juice concentrate in products labeled “Israeli juice” in order to enjoy tax benefits. Although the European Commission was not able to find conclusive evidence of fraud, in November 1997 it informed European importers that there were grounds to doubt the validity of the origin certificates for Israeli orange juice and that EC importers would be

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179. Neve Gordon & Sharon Pardo, *The European Union and Israel's Occupation: Using Technical Customs Rules as Instruments of Foreign Policy*, 69 MIDDLE E. J. 74, 78, 82 (2015).

180. UN Security Council Resolution 242 calls for the withdrawal of Israeli armed forces from territories Israel occupied in 1967; for the termination of the state of belligerency; for mutual “acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area, and their right to live in peace within secure and recognized boundaries free from threats or acts of force”; and for achieving a just settlement of the refugee problem. See S.C. Res. 242, ¶¶ 1–2 (Nov. 22, 1967). UN Security Council Resolution 338 reiterates the importance of Resolution 242, and calls upon the sides to begin negotiations with the aim of achieving a just and durable peace. See S.C. Res. 338, ¶¶ 2–3 (Oct. 22, 1973).

181. Council of the European Union Press Release 14/16, Council Conclusions on the Middle East Peace Process, Brussels European Council (Jan. 18, 2016).

182. NEVE GORDON, ISRAEL'S OCCUPATION 26 (2008).

183. EU First Notice to Importers Concerning Customs Benefits Accorded to All Israeli Products, 1997 O.J. (C 338) 12, as reprinted in PARDO & PETERS, DOCUMENTARY HISTORY, *supra* note 153, at 186.

liable for recovering duties.<sup>184</sup> This investigation served as the impetus for challenging the origins of goods exported to the EC from the OT since, at the same time, the EC further informed European importers of problems relating to Israel's implementation of the ROO regarding products from Israeli settlements in the OT.

In May 1998, the EC concluded that, according to UN General Assembly and Security Council resolutions, no Israeli settlement in the OT could be considered part of the territory of the State of Israel. Thus, exports originating from Israeli settlements in the OT did not qualify for preferential treatment under the terms of the AA, and, consequently, any origin certificate issued by Israel for goods produced in Jewish settlements contravened the AA's Fourth Protocol on ROO and should be considered null and void.<sup>185</sup>

The discussions surrounding the ROO dispute were fractious and, for several years, the two sides failed to reach any satisfactory solution. Eventually, Israel had to succumb to EU pressure, and, in December 2004, the parties reached a "Technical Arrangement" to settle this dispute. In January 2005, the European Commission issued a new memorandum to European customs operators, informing them that "products coming from places brought under Israeli Administration since 1967, are not entitled to benefit from preferential treatment" under the AA and, therefore, full customs duty should apply to those products.<sup>186</sup>

Under the terms of the Technical Arrangement that entered into force in February 2005, Israeli products from the OT continue to be labeled Made in Israel. However, Israel was now obligated to indicate on all origin certificates the precise name of the place, with its relevant postal code, where production conferring originating status had taken place. In August 2012, the European Commission issued a New Notice to Importers along with an updated list of non-eligible locations.<sup>187</sup> European customs operators were reminded that "preferential

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184. *See id.*

185. *Communication from the Commission to the Council and the European Parliament on Implementation of the Interim Agreement on Trade and Trade-Related Matters between the European Community and Israel*, at 7–8, SEC (1998) 695 final (May 12, 1998), as reprinted in PARDO & PETERS, DOCUMENTARY HISTORY, *supra* note 153, at 189; Lior Zemer & Sharon Pardo, *The Qualified Zones in Transition: Navigating the Dynamics of the Euro-Israeli Customs Dispute*, 8 EUR. FOREIGN AFF. REV. 51, 51–52 (2003) [hereinafter Zemer & Pardo, *The Qualified Zones in Transition*]; Sharon Pardo & Lior Zemer, *Bilateralism and the Politics of European Judicial Desire*, 17 COLUM. J. EUR. L. 263, 275–78 (2011) [hereinafter Pardo & Zemer, *Bilateralism and Politics*].

186. EU Final Notice to Importers Concerning the Technical Arrangement Reached Between Israel and the Commission on the Rules of Origin Dispute, 2005 O.J (C 20) 2, as reprinted in PARDO & PETERS, DOCUMENTARY HISTORY, *supra* note 153, at 319.

187. The list of non-eligible locations has been updated further in 2013, in 2015, in 2018, and in 2019. The full list is available at [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/technical\\_arrangement\\_postal\\_codes\\_2019\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/technical_arrangement_postal_codes_2019_en.pdf) (last visited Sept. 28, 2020) [<https://perma.cc/6XXD-XUJB>] (archived Sept. 28, 2020).

treatment will be refused to the goods for which the proof of origin indicates that the production conferring originating status has taken place in a location within the territories brought under Israeli administration since June 1967.”<sup>188</sup>

In this context, it should also be mentioned that, in February 1997, the EC had signed an interim AA with the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority (PA). In its Third Protocol, the interim AA defines the concept of originating products and methods of administrative cooperation.<sup>189</sup> The existence of parallel AAs with Israel and the PLO on behalf of the PA and the fact that both agreements include ROO clauses is vital. If the EU failed to implement the ROO clause in the 1995 AA it had signed with Israel, it would be in violation of the interim AA it had signed with the PLO in 1997. Indeed, in 2010 the CJEU held in the *Brita GmbH v. Hauptzollamt Hamburg-Hafen* case<sup>190</sup> that each of the two AAs has its own territorial scope, and there is no overlap between the two. For the CJEU, the Israeli and the Palestinian customs authorities should have exclusive competence within their territorial jurisdiction to issue origin/movement certificates. The CJEU emphasized that, consequently, the 1995 EC-Israel AA cannot be interpreted in such a way as to compel the Palestinian authorities to waive their right to exercise the authority conferred upon them by virtue of the 1997 EC-PLO interim AA.<sup>191</sup> The CJEU concluded that the 1995 EC-Israel AA “must be interpreted as meaning that products originating in the West Bank do not fall within the territorial scope of that agreement and do not therefore qualify for preferential treatment under that agreement.”<sup>192</sup>

In its November 2015 Interpretative Notice on Indication of Origin of Goods from the OT, the EU further clarified that Made in Israel labels used for products originating from Israeli settlements in the OT

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188. Notice to Importers: Imports from Israel into the EU (EC), 2012 O.J. (C 232) 5.

189. Euro-Mediterranean Interim Association Agreement, tit. II, June 5, 1997, 1997 O.J. (L 187) 3.

190. Case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, 2010 EUR-Lex LEXIS 63 (Oct. 29, 2009).

191. Pardo & Zemer, *The Qualified Zones in Transition*, *supra* note 185, at 67–68; Pardo & Zemer, *Bilateralism and Politics*, *supra* note 185, at 283–89.

192. Compare Case C-386/08, *Brita GmbH*, 2010 EUR-Lex CELEX LEXIS 63, with Case C-104/16, *Council of the European Union v. Front Polisario*, 2016 EUR-Lex CELEX LEXIS, ECLI:EU:C:2016:677 ¶ 319 (Sept. 13, 2016) (where the Court rejected the applicability of the EU-Morocco Association Agreement to Western Sahara and limited the legal application of the EU-Morocco Association Agreement and the Liberalisation Agreement between the parties to the internationally recognized territory of the Kingdom of Morocco), and Guy Harpaz, *The Front Polisario Verdict and the Gap Between the EU's Trade Treatment of Western Sahara and Its Treatment of the Occupied Palestinian Territories*, 52 J. WORLD TRADE 619 (2018).

would mislead European consumers and were therefore inconsistent with EU law.<sup>193</sup> This Interpretative Notice was challenged in 2019 in the CJEU in the *Vignoble Psagot v. Ministre de l'Économie et des Finances* case,<sup>194</sup> in which the Court ruled that foodstuff originating in Israeli settlements in the OT must bear the indication of their territory of origin.

The ROO dispute is reflective of an important underlying shift in the long-term dynamics of Israeli-EU relations. For Israel, the 2004 Technical Arrangement was a clear sign of Israel's recognition of the EU's importance to Israel, from both an economic and political standpoint. The EU's continuous refusal to accept Israel's arguments over the geographical scope of the AA was a sign of the EU's growing global role and its self-confidence as a key normative player in the MEPP.<sup>195</sup>

### C. The European Neighbourhood Policy

In 2004, the EU launched another iteration of the Barcelona-inspired cooperation process with outlying non-EU member states. The new program, entitled the European Neighbourhood Policy (ENP), included non-EU countries from Eastern Europe as well as the Mediterranean region. Additionally, in a departure from previous programs, the ENP was based on bilateral rather than regional engagement. Israel responded enthusiastically to the possibility of developing a closer relationship with the EU and, in December 2004, the EU-Israel Action Plan (AP)<sup>196</sup> became the first ENP instrument to be approved by the European Commission. Although the AP is based on the 1995 AA, it lays out a much wider and more comprehensive set of jointly developed Israeli-EU priorities and opens up the possibility for Israel to progressively participate in key elements of EU policies and programs. The AP places a special emphasis on an "upgrade in the scope political cooperation" by calling for a renewed political dialogue

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193. Interpretative Notice on Indication of Origin of Goods from the Territories Occupied by Israel since June 1967 (EC), 2015 O.J. (C 375) 5.

194. Case C-363/18, *Vignoble Psagot Ltd. v. Ministre de l'Économie et des Finances* [Minister of Economy and Finance], 2019 EUR-Lex CELEX LEXIS, ECLI:EU:C:2019:954 ¶ 1 (Nov. 12, 2019). For a discussion of the *Psagot* case, see Guy Harpaz, *Labelling Settlement Products: When EU Consumer Law Meets Public International Law (But Ignores International Trade Law)*, 55 J. WORLD TRADE 359 (2021).

195. Gordon & Pardo, *supra* note 179, at 1421–24; Anders Persson, "EU Differentiation" as a Case of "Normative Power Europe" (NPE) in the Israeli-Palestinian Conflict, 40 J. EUR. INTEGRATION 193, 193–96 (2018); Patrick Müller & Peter Slominski, *The Role of Law in EU Foreign Policy-Making: Legal Integrity, Legal Spillover, and the EU Policy of Differentiation Towards Israel*, 55 J. COMMON MKT. STUD. 871, 872–73 (2017).

196. EUROPEAN COMMISSION, EU-ISRAEL ACTION PLAN (2010), as reprinted in PARDO & PETERS, DOCUMENTARY HISTORY, *supra* note 153, at 293.

“based on shared values, including issues such as the promotion and the protection of human rights and fundamental freedoms; improving the dialogue between cultures and religions; promoting effective multilateralism in the framework of the UN; combating anti-Semitism, racism, xenophobia and Islamophobia.<sup>197</sup>

The AP further calls for an enhanced dialogue on efforts to resolve the MEPP, contain the spread of weapons of mass destruction and their means of delivery including ballistic missiles, combat illicit trafficking of military equipment, and strengthen the efforts to fight terrorism. In the economic sphere, the AP goes farther than the previous agreements. It speaks not only of enhancing economic integration through economic dialogue, trade, and investment in general, but also includes elements that could serve as a prelude for the fuller, albeit incremental, inclusion of Israel in the integrated EU economy. The measures articulated in the AP include: liberalizing trade and services, in particular financial services, with a view to prepare Israel for participation in the EU market, deepening and identifying areas relevant for regulatory approximation with EU legislation.

The AP also details a range of programs and common initiatives which cover the following four broad issues: (a) strengthening cooperation on migration-related issues, such as combating organized crime and human trafficking and furthering police and judicial cooperation; (b) promoting cooperation in science and technology, research and development, the information society, transport, energy, and telecom networks; (c) strengthening the environmental dimension of public policy; and (d) strengthening links and cooperation in people-to-people contacts in education, culture, civil society, and public health.

Since its adoption in 2004, the AP has enabled Israel and the EU to intensify political and security ties, significantly raise the degree of economic integration, and boost sociocultural and scientific cooperation. Institutional cooperation through the EU-Israel Association Council, the EU-Israel Association Committee, and the thematic sub-committees and working groups have brought Israeli and EU experts together to oversee the implementation of the AP. From an Israeli standpoint, upon adoption, the joint AP undeniably confirmed both the growing significance of the EU to the Israeli economy and society and the importance of the EU as an emerging political actor that Israel could no longer ignore.<sup>198</sup>

As of the 2015 “ENP Review Process,” the EU and its partner countries, Israel among them, had been working to promote stabilization, focusing on the key priorities identified in the Process. During the ENP Review negotiations, Israel stated that its new

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197. *Id.*

198. PARDO & PETERS, *UNEASY NEIGHBORS*, *supra* note 153.

priorities for cooperation with the EU are in the fields of energy, transportation, and security.<sup>199</sup> These priorities have yet to be discussed between the parties in the next unscheduled meeting of the EU-Israel Association Council, the last of which convened in July 2012.

#### *D. Key Trade, Services, and Financial Agreements*

Over the years, Israel and the EU have developed and deepened different areas of cooperation and signed additional agreements. Several of these agreements that are worth noting are mentioned below.

##### *Mutual Recognition Agreement on Good Laboratory Practices (GLP)*

In October 1999, Israel and the EU signed an Agreement on Good Laboratory Practices (GLP), which entered into force in May 2000. Under this agreement, both Israel and the EU undertake to ensure the quality and the validity of data generated in the testing of chemicals by adhering to OECD principles of good laboratory practice. The agreement includes mutual recognition of the equivalence of the other's compliance monitoring programs. It further facilitates the exchange of information between Israel and all the EU's member states. Additionally, it eliminates a potential non-tariff barrier to trade, while contributing to the protection of human health and the environment.<sup>200</sup>

##### *Agreement on Conformity Assessment and Acceptance of Industrial Products (ACAA)*

In December 2009, Israel was the first Euro-Mediterranean partner country to sign an Agreement on Conformity Assessment and ACAA with the EU.<sup>201</sup> The agreement entered into force in January 2013 and it constitutes a major step towards Israel's integration into the European Single Market. The agreement recognizes Israel's industrial standards as equivalents to European standards, and it allows pharmaceutical products for human or veterinary use to be marketed without delay or further inspection in the EU, and vice versa.

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199. Interview with Two Senior EEAS Officials, Tel Aviv, Israel (July 2, 2018).

200. See *Good Laboratory Practice*, EUROPEAN COMMISSION, [http://ec.europa.eu/growth/sectors/chemicals/good-laboratory-practice\\_en](http://ec.europa.eu/growth/sectors/chemicals/good-laboratory-practice_en) (last visited Sept. 28, 2020) [<https://perma.cc/2H3T-GDWM>] (archived Sept. 28, 2020).

201. See generally *Proposal for a Council Decision on the Conclusion of an Additional Protocol to the Euro-Mediterranean Agreement Establishing an Association Between the European Communities and Their Member States and the State of Israel on an Agreement Between the European Community and the State of Israel on Conformity Assessment and Acceptance of Industrial Products (ACAA)*, COM (2009) 559 final (Oct. 22, 2009).

*A Euro-Mediterranean Aviation Agreement and Cooperation with EUROCONTROL*

In June 2013, Israel and the EU signed a Euro-Mediterranean Aviation Agreement (EMAA—the so-called “Open Skies Agreement”), which replaced previous bilateral air-services agreements between Israel and EU member states. With this agreement—which was ratified in June 2020—as of 2018, the aviation markets of both Israel and the EU have become fully open with no restrictions placed on the number of flights.<sup>202</sup> All EU airlines are now able to operate direct flights to Israel from anywhere in the EU and Israeli airlines are equally able to operate flights to airports throughout the EU.<sup>203</sup>

The agreement not only opened up the respective markets, but it further integrated Israel into a Common Aviation Area that operates under EU rules. The agreement is nothing less than a game changer in Israeli-EU relations, as it has qualitatively transformed ties between the countries and brought Israelis and Europeans closer together.<sup>204</sup>

Finally, in June 2016, Israel was the second country in the world, after Morocco, to sign a Comprehensive Agreement with the European Organisation for the Safety of Air Navigation (EUROCONTROL). The agreement deepens the relationship between Israel and Europe by allowing Israel to benefit from the full range of services provided by EUROCONTROL. The Comprehensive Agreement builds on the Open Skies Agreement and “is a logical step to implement Single European Sky procedures.”<sup>205</sup>

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202. Euro-Mediterranean Aviation Agreement Between the European Union and Its Member States of the One Part and the Government of the State of Israel of the Other Part, 2013 O.J. (L 208) 3.

203. European Commission Press Release IP/13/519, Aviation: EU and Israel Sign Agreement (June 10, 2013), [https://ec.europa.eu/transport/sites/transport/files/modes/air/international\\_aviation/country\\_index/doc/ip-13-519\\_-\\_en.pdf](https://ec.europa.eu/transport/sites/transport/files/modes/air/international_aviation/country_index/doc/ip-13-519_-_en.pdf) [https://perma.cc/AD8H-FRLA] (archived Sept. 28, 2020).

204. Civil Aviation Authority of Israel – Department of Economics and International Relations, *Air Transport Sector of Travellers to and from Israel Demand Side, Supply Side and the Level of Competition Between the Airlines – Annual Report*, CAA (Jul. 2018), [http://caa.gov.il/index.php?option=com\\_docman&view=download&alias=7604-2018-8&category\\_slug=2015-10-13-06-39-13-3&Itemid=669&lang=he](http://caa.gov.il/index.php?option=com_docman&view=download&alias=7604-2018-8&category_slug=2015-10-13-06-39-13-3&Itemid=669&lang=he) (last visited Sept. 25, 2020) [https://perma.cc/DL6X-DB3H] (archived Sept. 25, 2020) (Isr.).

205. EUROCONTROL, *Press Release – State of Israel and EUROCONTROL Sign Comprehensive Agreement*, EU OFFICE IN KOSOVO (June 2, 2016), [https://eeas.europa.eu/delegations/kosovo/10262/eurocontrol-israel-comprehensive-agreement\\_en](https://eeas.europa.eu/delegations/kosovo/10262/eurocontrol-israel-comprehensive-agreement_en) [https://perma.cc/SYV7-QWCE?type=image] (archived Dec. 27, 2020); *State of Israel and EUROCONTROL Sign Comprehensive Agreement*, AVIATIONPROS (June 2, 2016), <https://www.aviationpros.com/airports/airports-municipalities/press-release-12215900/state-of-israel-and-eurocontrol-sign-comprehensive-agreement> [https://perma.cc/GM95-4GPR] (archived Dec. 27, 2020).

### E. Upgrading and Updating Israeli-EU Relations

In June 2008, the EU-Israel Association Council decided to intensify Israeli-EU relations, within the framework of the ENP, in three areas: increased diplomatic cooperation; Israeli participation in European agencies, working groups, and programs; and Israel's integration into the European Single Market. In this context, while the EU emphasized its commitment to developing a closer relationship with Israel, it also stressed that "such a partnership will imply a stronger involvement of the [EU] in the peace process and in the monitoring of the situation on the ground."<sup>206</sup> The EU underscored that "the process of developing a closer EU-Israeli partnership needs to be, and to be seen, in the context of the broad range of our common interests and objectives which notably include the resolution of the Israeli-Palestinian conflict through the implementation of the two-state solution."<sup>207</sup> In December of that year, the EU reiterated its determination to upgrade its relationship with Israel and issued guidelines for strengthening the political dialogue structures with Israel (the so-called "Brussels Guidelines").<sup>208</sup>

Two weeks after the EU issued these guidelines, however, Israel launched a military operation in the Gaza Strip. The EU was outspoken in its criticism of the operation and its outcomes, and tensions between Israel and the EU were further exacerbated by the refusal of the new Israeli government to support the establishment of an independent Palestinian state. In response to these new tensions, talks of upgrading Israeli-EU relations and negotiations of a more ambitious AP have effectively been frozen, and the 2004 AP, which technically expired in 2008, has been extended on an annual basis ever since. At the June 2009 meeting of the EU-Israel Association Council, the EU emphasized that the upgrade process needed to be seen in the broader context of sustained progress towards a resolution of the

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206. Statement of the European Union Following the Eighth Meeting of the EU-Israel Association Council ¶ 5 (June 16, 2008), *as reprinted in* PARDO & PETERS, DOCUMENTARY HISTORY, *supra* note 153, at 398.

207. *Id.* ¶ 6, *as reprinted in* PARDO & PETERS, DOCUMENTARY HISTORY, *supra* note 153, at 398–99.

208. The Brussels Guidelines call for the following: convening ad hoc bilateral summits at the level of heads of state and government, as well as three meetings a year at foreign ministers level; allowing for each EU Presidency to invite, on an ad hoc basis, the Director General of the Israeli Ministry of Foreign Affairs to one of the meetings held during its term of office; providing for hearings of Israeli experts by Council working parties and committees; organizing systematic and broader informal strategic consultations; intensifying exchanges on human rights and anti-Semitism; encouraging Israel to remain in line with Common Foreign and Security Policy (CFSP) positions; enabling cooperation in the context of the European Security and Defense Policy (ESDP); encouraging Israeli integration and involvement in multilateral fora; and intensifying inter-parliamentary dialogue. *See* Conclusions of the External Relations Council on Guidelines for Upgrading EU-Israel Relations (The Brussels Guidelines) (Dec. 8–9, 2008), *as reprinted in* PARDO & PETERS, DOCUMENTARY HISTORY, *supra* note 153, at 408.

Israeli-Palestinian conflict.<sup>209</sup> Still, in July 2012, European foreign ministers updated Israeli-EU relations in sixty concrete activities within the 2004 AP,<sup>210</sup> but the launch of over twenty new initiatives for future EU-Israeli cooperation has remained on hold since 2012, contingent on progress in the MEPP.<sup>211</sup>

Finally, in December 2013, the EU FAC outlined the prospect of a higher status by offering Israel a “Special Privileged Partnership” (SPP).<sup>212</sup> The EU will provide a package of European political, economic, and security support to both Israelis and Palestinians in the context of a final status agreement. Should such a peace agreement ever come to fruition, the EU “will offer Israel and the future state of Palestine a [SPP] including increased access to the European markets, closer cultural and scientific links, facilitation of trade and investments, as well as promotion of business to business relations.”<sup>213</sup> According to the former High Representative Catherine Ashton, the SPP will “create huge opportunities in transport, energy, water, environment [and] people.”<sup>214</sup> The SPP will assist Israelis and Palestinians in achieving “market integration, trade and investment facilitation, research and innovation [and] security cooperation . . . with a special emphasis on young people.” Ashton promised that the Union’s “approach will be tailor-made and will be negotiated with both partners.”<sup>215</sup> For its part, Israel never officially reacted to the SPP offer, and it refuses to discuss this potential raise in status with the EU. Israel is “reluctant to accept the direct link between the development of bilateral relations and progress in the MEPP.”<sup>216</sup>

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209. Statement of the European Union Following the Ninth Meeting of the EU-Israel Association Council (June 15, 2009), as reprinted in PARDO & PETERS, DOCUMENTARY HISTORY, *supra* note 153, at 416.

210. Council of the European Union, *Eleventh Meeting of the EU-Israel Association Council* ¶ 2 (July 24, 2012).

211. European Union Delegation to the State of Israel, *EU-Israel Trade Briefing*, NEDERLANDS PALESTINA KOMITEE 9 (May 2017), <https://palestina-komitee.nl/wp-content/uploads/2017/11/EU-Israel-Trade-Briefing-EU-May-2017.pdf> (last visited Dec. 27, 2020) [<https://perma.cc/SFW7-XYGF>] (archived Dec. 27, 2020).

212. European Commission, Guidelines on the Eligibility of Israeli Entities and Their Activities in the Territories Occupied by Israel since June 1967 for Grants, Prizes and Financial Instruments Funded by the EU from 2014 Onwards, 2013 O.J. (C 205) 9.

213. *Id.*

214. Catherine Ashton, EU High Representative, Remarks Following Meeting of the Foreign Affairs Council (Mar. 17, 2014).

215. *Id.*

216. See European Union Delegation to the State of Israel, *supra* note 211. For a discussion of the SPP offer, see Bruno Oliveira Martins, *Interpreting EU-Israel Relations: A Contextual Analysis of the EU's Special Privileged Partnership Proposal*, 29 CAMBRIDGE REV. INT'L AFF. 151–70 (2016).

### F. Prohibiting EU Funds to Israeli Entities in the Occupied Territories

In July 2013 the EU published guidelines prohibiting the allocation of funds to Israeli companies, public bodies, and non-governmental organizations (NGOs) working within the Israeli settlements in the OT.<sup>217</sup> The prohibition included, *inter alia*, the EU research program Horizon 2020.<sup>218</sup> A tug of war between Israel and the EU ensued, ultimately leading to a compromise on the implementation of the guidelines and to an agreement regarding Israel's participation in Horizon 2020.<sup>219</sup>

According to the guidelines, as of January 2014, EU bodies (as opposed to the member states themselves) can no longer fund or dispense awards and grants to Israeli entities residing within Israeli settlements in the OT. National public agencies, individuals, and Israeli NGOs working in the OT with the aim of benefiting Palestinians and/or aiming at promoting the MEPP are excluded from the guidelines.<sup>220</sup> In keeping with the 2010 CJEU *Brita* ruling, which was reaffirmed in 2019 in the *Psagot* case—the guidelines made it clear that the EU does not recognize Israel's sovereignty over the OT irrespective of their legal status under Israeli law, adding concrete conditions to any ongoing public funding of Israeli entities.

Israel's official response to the guidelines was one of fury. It interpreted the guidelines as an integral part of the broader context of mounting external criticism, including the Palestinian boycott, divestment, and sanctions (BDS) campaign and other so-called international "delegitimization" efforts.<sup>221</sup>

### G. Israel and the EU as the Ultimate "Others"?

Israel and the EU have shared an uneasy relationship for several decades. Numerous conflicting trends have contributed to both the relationship and the lack of ease. The result has been the emergence of a highly problematic and volatile dynamic—one characterized by a strong and ever-increasing network of economic, cultural, and personal ties scarred at the geopolitical level by disappointment, bitterness, and anger. On the one hand, Israel has displayed a genuine desire to

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217. European Commission, Guidelines on the Eligibility of Israeli Entities, *supra* note 212, § C.

218. State of Israel and the European Union, Agreement Between the State of Israel and the European Union on the Participation of Israel in the Union Programme, Horizon 2020 – The Framework Programme for Research and Innovation (2014–2020), art. I, 2015 O.J. (L 177) 1.

219. *See id.*

220. Krassimir Y. Nikolov, *Ashton's Second Hat: The EU Funding Guidelines on Israel as a Post-Lisbon Instrument of European Foreign Policy Making*, 11 DIPL. 167 (2014) (Bulg.).

221. Neve Gordon & Sharon Pardo, *Normative Power Europe and the Power of the Local*, 53 J. COMMON MKT. STUD. 416, 422 (2015).

strengthen its ties with the EU and to be included in the European integration project. On the other hand, Israelis are deeply suspicious of EU policies, and are untrusting of its intentions regarding the Arab/Palestinian-Israeli conflict and to the region as a whole. As a result, Israel has been determined to minimize Europe's role in the MEPP.<sup>222</sup>

The EU displays an equally ambivalent attitude towards Israel. While the EU talks of its desire to develop a Special Privileged Partnership with Israel, it has failed to articulate what such a status might actually entail. The EU and its member states want Israel to embrace the European integration project, to adopt its values, and act to further its goals. At the same time, however, in its policies the EU treats Israel as the ultimate "Other."<sup>223</sup>

#### IV. PRELIMINARY DESCRIPTIVE AND EMPIRICAL FINDINGS

Traditionally, the volume of qualitative studies far outweighs that of quantitative studies in the legal literature. This Study, as elaborated in the sequel Article, joins the body of quantitative legal studies, which has perceptibly grown in recent decades. Over the years, legal scholars have conducted theoretical studies, which analyze social norms, discuss philosophical issues, and develop legal theories to vet these norms. While this Article seeks to lay down the theoretical infrastructure of comparative sources in the development of Israeli jurisprudence and discusses the framework and dynamics of Israeli-EU relations, the sequel Article demonstrates and analyzes how these trends are reflected in ISC rulings.

This Part focuses on the Study's preliminary findings. This brief overview discusses several aspects of the impact of EU law on the various branches of public law and private law in Israel. It also presents additional trends affecting the status of EU law as a foreign law of reference in Israel. These preliminary findings, together with other key findings, will be examined in greater depth in the sequel Article.

The Study uses the methodology referred to in the literature as Citation Analysis.<sup>224</sup> Citation analysis gauges the relative importance

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222. PARDO & PETERS, *UNEASY NEIGHBORS*, *supra* note 153, at 113.

223. Iver Brynild Neumann, *Self and Other in International Relations*, 2 *EUR. J. INT'L REL.* 139 (1996); see Müller & Pardo, *supra* note 163.

224. See generally Richard A. Posner, *The Theory and Practice of Citations Analysis, With Special Reference to Law and Economics* (John M. Olin Program in L. and Econ. Working Paper No. 83, 1999); Zaring, *supra* note 36 (using this method in his research which sought to analyze the scope of referring to foreign law in the federal

of a source or author primarily by tracking the frequency which he/she/it is cited in other works. Analyzing the citations found in high court rulings can assist in understanding the sources of the legal system and, consequently, can provide quantitative estimations of influence, which are considered to be less subjective than other research methodologies.<sup>225</sup> References to legal excerpts can be found in almost every court ruling, and therefore when employing citation analysis to legal research, it is crucial to categorize references with the utmost accuracy.<sup>226</sup> The data gathered enables scholars to empirically track the development references to these normative sources over years, and identify various trends regarding the scope and nature of citations within a given legal system. A detailed discussion of citation analysis and its limitations appears in the sequel Article.

In the case of *Adallah Legal Ctr. v. Minister of the Interior*,<sup>227</sup> which is one of the most significant precedents in the field of constitutional law in Israel, the ISC was petitioned to declare the 2003 Citizenship and Entry into Israel Law (Temporary Provision) unconstitutional on the grounds that it violated the rights to equality and family life. The case was discussed by an expanded panel of eleven justices, and the ruling serves as an example of the broad use of various normative sources by the ISC, which include EU legal sources.

In his minority opinion, President Justice Barak wrote: “The right to family reunification is also recognized as a component of the right to family life in international law and in the constitutional law of many countries.”<sup>228</sup> Justice Barak references several rulings, which determined that immigration regulations that harm the relationship between spouses or between parents and their children potentially violate rights under Article 8 of the European Convention for the

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circuits of the U.S. legal system). Our methodology is similar to that employed by Zaring, *mutatis mutandis*. See *id*.

225. Russell Smyth, *Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court*, 17 U. TAS. L. REV. 164, 169 (1998); Erin H. Kao, Chuan-Hao Hsu, Yunlin Lu & Hung-Gay Fung, *Ranking of Finance Journals: A Stochastic Dominance Analysis*, 42 MANAGERIAL FIN. 312, 313 (2016); Karen Schultz, *Backdoor Use of Philosophers in Judicial Decisionmaking? Antipodean Reflections*, 25 GRIFFITH L. REV. 441, 454 (2016).

226. See Filippo Galgani, Paul Compton & Achim Hoffman, *LEXA: Building Knowledge Bases for Automatic Legal Citation Classification*, 42 EXPERT SYS. WITH APPLICATIONS 6391, 6405 (2015); see also Olga Shulayeva, Advait Siddharthan & Adam Wyner, *Recognizing Cited Facts and Principles in Legal Judgements*, 25 ARTIF. INTELL. L. 107, 107–12 (2017).

227. HCJ 7052/03 Adallah Legal Ctr. for Arab Minority Rights in Israel v. Minister of the Interior 62(2) PD 202 (2006) (Isr.). For a translation by the Cardozo Israeli Supreme Court Project, see <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Adalah%20Legal%20Centre%20for%20Arab%20Minority%20Rights%20in%20Israel%20v.%20Minister%20of%20Interior.pdf> (last visited Sept. 25, 2020) [<https://perma.cc/J7S2-5XR6>] (archived Sept. 25, 2020).

228. *Id.* ¶ 36 (Barak, President J., minority opinion).

Protection of Human Rights and Fundamental Freedoms.<sup>229</sup> The ECJ *Carpenter v. Secretary of State for the Home Department* case is one of the rulings cited by Barak.<sup>230</sup> This citation, which was mentioned but not elaborated, was used for the purpose of interpreting local provisions; it also provided comparative perspective as to the status of recognition of the right of family unification in European law and, specifically, in EU law. President Justice Barak also cites the 1999 Treaty of Amsterdam,<sup>231</sup> and mentions that, as a result of the treaty, issues of immigration were also transferred to the competence of the European Community. Barak continues to note that the Council of the EU issued a directive<sup>232</sup> that binds all EU member states (except for Denmark, the UK, and Ireland) and is based on Article 8 of the European Convention on Human Rights and Fundamental Freedoms.<sup>233</sup> The directive provides that family reunification is a necessary way of making family life possible.<sup>234</sup> President Justice

229. European Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, E.T.S. 5, 213 U.N.T.S. 221, [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf) (last visited Oct. 14, 2020) [<https://perma.cc/B3PY-5YRC>] (archived Oct. 14, 2020) [hereinafter ECHR]. This convention is not part of EU law. The *Adallah* judgment made extensive use of normative ECHR sources. See generally *Adallah Legal Ctr.* 62(2) PD 202. These normative sources are not a part of EU law and are discussed here, along with the use of the normative sources of EU law, *inter alia*, as an illustration of the broad reference made to European law as a whole.

230. Case C-60/00, *Carpenter v. Sec'y of State for the Home Dep't.*, 2002 E.C.R. I-6279.

231. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.

232. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States Amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L 158) 77 [hereinafter Directive 2004/38/EC].

233. See ECHR, *supra* note 229, art. 8; *Adallah Legal Ctr.* 62(2) PD 202 ¶ 36.

234. See Directive 2004/38/EC, *supra* note 232. As noted, the European Convention for the Protection of Human Rights and Fundamental Freedoms is not a normative source of EU law, and the use of this reference is presented here as an illustration of the in-depth use of European legal sources as a whole. In addition, within the context of invoking the convention, President Justice Barak mentions three ECHR rulings in which it was determined that immigration decisions affecting the relationship between spouses or the relationship between parent and child may violate rights under Article 8 of the Convention: *Berrehab v. Netherlands*, App. No. 10730/84, (June 21, 1988) <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57438%22%5D%7D> (last visited Sept. 25, 2020) [<https://perma.cc/Z8BZ-MDQ6>] (archived Sept. 25, 2020); *Moustaquim v. Belgium*, App. No. 12313/86, (Feb. 18, 1991) <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22%5C%20OF%20MOUSTAQUIM%20v.%20BELGIUM%22%5D%7D%2C%22languageisocode%22:%5B%22ENG%22%5D%7D%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%5D%7D%2C%22itemid%22:%5B%22001-57652%22%5D%7D> (last visited Sept. 25, 2020) [<https://perma.cc/4GDK-YDKK>]

Barak remarks that the directive “grants a broad right to the reunification of families for all citizens of the [EU], whether the foreign spouse is a citizen of a member state in the Union or not.”<sup>235</sup>

Two other Justices on the panel deliberating the *Adallah* case also referenced normative sources of EU law. Vice-President Cheshin mentioned, as a side note, that

incidentally, following the rule in international law, the [EU] enacted a directive in 2004, in which some of the states of the Union took upon themselves the obligation to enact internal—qualified—arrangements according to which the foreign spouses of residents would be allowed to immigrate into the state. Before the directive existed, the spouses had no such right other than under the internal law of each individual state.<sup>236</sup>

This citation, which did not reference any specific directive, but clearly refers to the directive that is discussed throughout the ruling, was categorized in this Article as a passing reference.

Justice Naor refers to Rubenstein and Orgad<sup>237</sup> and their conclusions regarding the 2004 directive:

Rubenstein and Orgad discuss in their article the work of Arturo John, which was devoted to a survey of this issue in international and European law. They pointed out that “the author gives examples of how any international document that *prima facie* grants this possibility immediately qualifies it or provides conditions and restrictions that empty it of content. It is the prerogative of states and within the framework of their sovereignty. It is an ideal and humanitarian aspiration more than a legal duty.” . . . With regard to the European directive of 2004, which is mentioned in the opinion of the president, it is stated that it admittedly increased the possibility of immigrating to the [EU] for the purposes of marriage, but at the same time it allowed “broad discretion for states to determine conditions and restrictions around this possibility.”<sup>238</sup>

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(archived Sept. 25, 2020); *Ciliz v. The Netherlands*, App. No. 29192/95 (July 11, 2000) <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22%3A%5B%5Ciliz%22%2C%22languageisocode%22%3A%5B%5CENG%22%2C%22documentcollectionid%22%3A%5B%5CGRANDCHAMBER%22%2C%5CCHAMBER%22%2C%22itemid%22%3A%5B%5C2001-59160%22%5D%7D>; (last visited Sept. 25, 2020) [<https://perma.cc/9Y5X-LUTF>] (archived Sept. 25, 2020); see also *Adallah Legal Ctr.* 62(2) PD 202 (2006). These are not counted as references in this study.

235. *Adallah Legal Ctr.* 62(2) PD 202 ¶ 37. For a translation by the Cardozo Israeli Supreme Court Project, see <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Adalah%20Legal%20Centre%20for%20Arab%20Minority%20Rights%20in%20Israel%20v.%20Minister%20of%20Interior.pdf> (last visited Sept. 25, 2020) [<https://perma.cc/J7S2-5XR6>] (archived Sept. 25, 2020).

236. *Id.* ¶ 53 (Cheshin, Vice-President J., majority opinion).

237. See generally Amnon Rubenstein & Liav Orgad, *כניית אדם, ביטחון המדינה ורוב יהודי-המקור של הגירה לצורכי נישואין [Human Rights, State Security and a Majority of Jews - The Case of Immigration for Marriage]*, 48 HAPRAKLIT 315 (2006).

238. *Adallah Legal Ctr.* 62(2) PD 202 ¶ 5 (Naor, J., majority opinion). For a translation by the Cardozo Israeli Supreme Court Project, see <https://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-interior> (last visited Oct. 14, 2020) [<https://perma.cc/3R82-B29Q>] (archived Oct. 14, 2020).

It can be seen that the manner in which Justice Naor, who concurred with the majority, compares EU law to Israeli law is contrary to the interpretation and accompanying conclusions of President Justice Barak with relation to that normative source. The references to European law are prominent in the court ruling and were made with the aim of interpreting local law, while comparing Israeli and European laws. Despite this, the petition was rejected, and it was stated that if the law violates the right to family life, the infringement is reasonable. It seems that despite the importance accredited to the right to family life in both Israeli law and European law, the divergent geopolitical, social, and security realities tipped the scale in this case.

The sequel Article will analyze how in the *Galon* case,<sup>239</sup> that also dealt with similar questions to those at the heart of the *Adallah* case, Justice Naor examined the developments and the changes that have taken place in European law as a whole and specifically in EU law since she wrote her opinion in the *Adallah* case.<sup>240</sup> Indeed, Justice Naor's extensive discussion of EU law sources is yet further testimony to Israeli attentiveness to the European dialogue, and it shows that the ISC pays close attention to EU legislation and CJEU rulings that are deemed relevant to Israeli jurisprudence.

The findings, which will be presented and analyzed in the sequel Article, also reveal a growing interest of the ISC in EU law sources in the field of private law. One of the most prominent ruling in this context is the *Suissa* ruling,<sup>241</sup> which deals with trademarks and parallel import. In this case, the petitioners imported clothing products belonging to an international clothing company, even though they did not hold the rights to the registered trademark of the company in Israel and did not contract with them in a direct agreement that confers the status of an official importer on them. Importation is carried out through purchases from suppliers in third countries, where the company's products are marketed at lower prices. The appellants operated their business activities, emphasizing the fact that they sell name brand items at lower prices. Justice Barak-Erez refers to no less than twelve EU pieces of legislation and rulings, all of which aim to interpret local law through a comparison with European law. Justice Barak-Erez dedicates paragraphs thirty-seven to forty-one of her opinion to citations from EU law. These paragraphs focus on the parallel import phenomenon and on the manner in which European law relates to it. Justice Barak-Erez notes that parallel importation to European markets is prohibited, but no restrictions are placed on

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239. HCJ 466/07 Galon v. The Attorney General 65(2) PD 44 (2012) (Isr.).

240. *Id.* at 215–16.

241. CA 7629/12 Suissa v. Tommy Hilfiger Licensing LLC (Nov. 16, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

parallel imports between European countries, which, in practice, enhances competition, at least within the European single market.<sup>242</sup> She notes that Article 101 of the Treaty on the Functioning of the European Union (TFEU)<sup>243</sup> prohibits action to prevent, reduce, or distort competition within the framework of trade between EU member states. Justice Barak-Erez also notes that the ECJ had already ruled in 1966 that trademarks could not be used to bar parallel imports between EU countries.<sup>244</sup> Article 101 of the TFEU allows import restrictions designed, *inter alia*, to protect industrial and commercial property, but prohibits arbitrary discrimination or covert restrictions on trade between EU members. It states that this Article also serves as the basis for the European “exhaustion doctrine”—that is to say that holders of intellectual property rights cannot prevent the sale and distribution of their goods after they have already been distributed with consent in one of the Union’s countries. In this context, Justice Barak-Erez refers to the landmark judgment in the matter of *Deutsche Grammophon*.<sup>245</sup> Later, she refers to the 2008 European Directive on Trademarks,<sup>246</sup> in which the doctrine of regional exhaustion is explicitly defined. Justice Barak-Erez refers to sections 7(1) and 7(2) of the Directive and explains their significance in relation to the legality of parallel imports. In the commentary to Article 7 (2) of the Directive issued by the ECJ, the Court recognized that parallel importation between EU member states may, in certain circumstances, damage the reputation of the trademark owner. These remarks were underscored in the ECJ’s main ruling regarding the marketing of Christian Dior perfumes<sup>247</sup> within the framework of parallel importation. Justice Barak-Erez added that the ECJ has refrained thus far from determining that the marketing activities of parallel importers did in fact damage the reputation of a trademark. She refers to the *Bristol-Myers Squibb v. Paranova* ruling to show that the main consideration guiding the ECJ ruling regarding parallel imports was whether the products marketed in the format of parallel imports were sold while

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242. *Id.* (Barak-Erez, J. ¶ 37).

243. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 101, Dec. 13, 2007, 2007 O.J. (C 306) 1.

244. See CA 7629/12 *Suissa*; see also Joined Cases 56 & 58/64, *Établissements Consten, S.á.R.L. v. Comm’n*, 1966 E.C.R. 299.

245. CA 7629/12 *Suissa*.

246. Council Directive 2008/95/EC art. 7, 2008 O.J. (L 299/25) (EU).

247. See Case C-337/95, *Parfums Christian Dior SA v. Evora BV*, 1997 E.C.R. I-6013, ¶ 59. In this case, it was determined that as a rule, a marketer of parallelly imported goods is entitled not only to sell the goods with the attached trademark, but to use the trademark to inform the public of the fact that it is marketing the goods. The ruling also held that even when the products are luxury brands, the trademark owner cannot rely on section 7(2) of the Directive to block parallel imports of its products or advertising, unless it proves that the use of the trademark causes serious damage to the trademark’s reputation. In addition, it was determined that examining the question of whether the marketing method damages a trademark necessitates scrutiny of all the circumstances, including the type of goods and the market in question. See *id.*

introducing changes to packaging or labeling.<sup>248</sup> Justice Barak-Erez summarizes the approach adopted in European law regarding this issue and recalls the 1998 ECJ ruling, according to which the “exhaustion of rights” doctrine applies only when a product is first sold in one of the EU member states. It has subsequently been determined that EU member states are not entitled to determine in their national law that intellectual property rights are exhausted even when the goods were initially sold outside EU countries.<sup>249</sup>

Justice Barak-Erez moves on to refer to another ECJ ruling, which rejected the British court’s position that when a manufacturer agrees to market a product in one of the EU member states, it exercises its rights even if the product had previously been marketed outside the EU.<sup>250</sup> On the subject of the trademark dilution through brand overexposure, which was also discussed in the ruling, Justice Barak-Erez notes that the European legal approach to the “dilution doctrine” is more extensive than the one used in Israel.<sup>251</sup> This approach reflects a cautionary approach to applying this doctrine to the marketing of “genuine” products of the trademark owner. While referencing the *Dior* affair<sup>252</sup> again, Justice Barak-Erez explains that in European law, the trademark owner has the right to object to parallel imports of trademarked products, as the parallel importer’s marketing efforts severely impair the reputation of the trademark. In another context, Justice Barak-Erez notes the ECJ’s determination that, for the purpose of accepting a claim based on the “dilution doctrine,” the trademark owner must prove that the consumer’s economic behavior has changed following the alleged dilution, or at least that there is a high probability that such a change will occur.<sup>253</sup> Justice Barak-Erez concluded by arguing that the European ruling has placed an additional hurdle in the way of trademark owners arguing “dilution doctrine.”<sup>254</sup> A final reference was made to two ECJ rulings. In these two judgments, it was

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248. *Id.* ¶¶ 35, 38. *See generally* Case C-427/93 Bristol-Myers Squibb v. Paranova, 1996 E.C.R. I-3457.

249. Case C-355/96, *Silhouette International Schmied GmbH v. Hartlauer Handelsgesellschaft mbH*, 1998 E.C.R. I-4799, I-4800–01. The Court held that the holder of a trademark may block parallel imports from Bulgaria (which was not an EU member state at the time), and effectively close the door to parallel imports from outside EU countries. *See id.* This approach, known as the “Fortress of Europe” (since it became the EU block for any external parallel import), has been widely criticized in the literature.

250. Case C-414/99, *Zino Davidoff SA v. A & G Imports Ltd.* 2002 E.C.R. I-8731, ¶ 55.

251. *See* CA 7629/12 *Suissa v. Tommy Hilfiger Licensing LLC* (Nov. 16, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (Barak-Erez, J. ¶ 48).

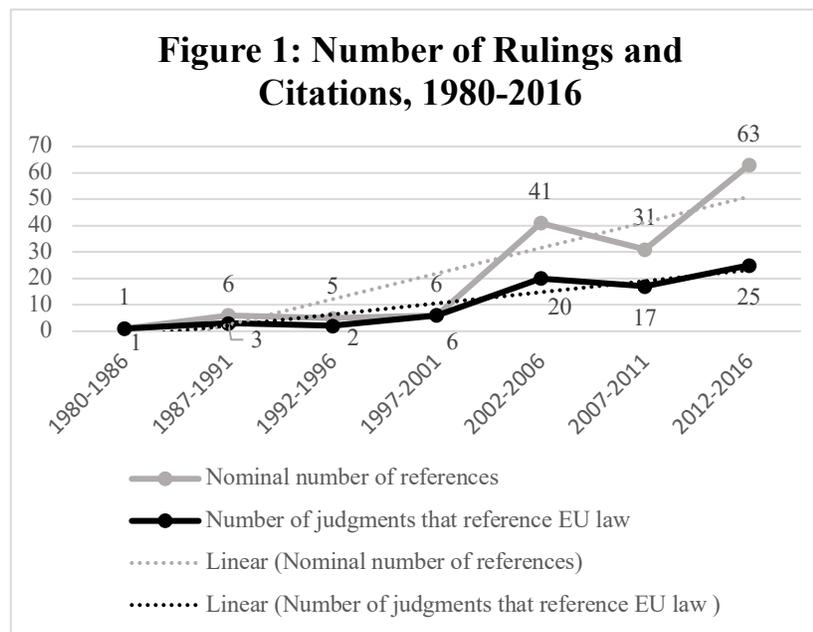
252. *Id.* (Barak-Erez, J. ¶ 59)

253. *See id.* (Barak-Erez, J. ¶ 59); *see also* Case C-252/07, *Intel Corp. v. CPM United Kingdom Ltd.* 2008 E.C.R. I-8823, ¶¶ 30–32, 86.

254. *See* CA 7629/12, *Suissa* (Barak-Erez, J. ¶ 59).

determined that the use of a trademark as a “keyword” in sponsored content is not in itself sufficient to violate the trademark, provided that there is no deception as to the identity of the seller.<sup>255</sup>

A similar descriptive analysis of issues discussed in the current Article will follow in the sequel Article, which will chronologically track the impact of EU law on the branches of public law and private law in Israel and provide an overview of ISC references to additional European sources. The Study, as laid out in the two Articles, demonstrates a salient increase in both the frequency and quality of references in ISC judgments to EU law, indicating that Israeli judges increasingly consider the EU legal system as a source for legal interpretation and inspiration. Nonetheless, the Study finds that EU law is not yet well known in Israel and has not received the place it deserves in the ISC rulings. This is the result of the historical perception regarding the origins of the Israeli legal system, as well as the Israeli focus on the two paradigmatic and most studied and recognized legal systems—common law (the Anglo-American system) and civil law (the Continental system). The EU, which incorporates sovereign member states representing both of these systems, is distinct from either while including elements of each system.



255. See Case C-236/08, *Google France Google Inc. v. Louis Vuitton Malletier*, 2010 E.C.R. I-2417, ¶155(1); Case C-558/08, *Portakabin Ltd. v. Primakabin BV*, 2010 E.C.R. I-6963, ¶93.

Figure 1 presents the development of the ISC references to EU law as it has developed over the years, ranging from 1980 to 2016. The year 1980 marks the first time the ISC referred to a normative source of EU law in the *Qawasmeh* case. Figure 1 shows that there has been a clear upward trajectory in the ISC citations, both in terms of the number of citations and the number of cases in which these citations are made. However, as will be analyzed in the sequel Article, both the number of cases and frequency of citations began to spike only in the early 2000s, coinciding with a growing general interest on Israel's part to be intimately involved in all things "global" and take a seat at the table of developed western nations. The spike in EU law citations also coincides with the growing number of justices who completed graduate studies abroad, as well as with the development and rising prominence of the EU itself as a regional and international power.

## V. CONCLUSION

This Study, which is laid out in two complementary Articles, provides an extensive description and analysis of the influence of EU jurisprudence on Israeli Supreme Court rulings. This, the first of the two Articles, examines the theoretical and historical infrastructure underlying the descriptive and the empirical findings that will be presented and analyzed in the sequel Article. Part II of this Article briefly presents the development of comparative legal research worldwide. It outlines the ideas underlying this discipline and traces the rise of its prestige in recent decades in light of growing global judicial discourse. It later describes how judicial culture has developed in Israel and its impact on Israeli legislation. It discusses the impact of the justices' origins and legal education on their rulings, as articulated in the local research literature. Part II then introduces the empirical evidence collected from the existing literature on the use of comparative law by Israeli justices, pointing out the main trends identified in these studies and how they differ from this Study.

The uniqueness of the perspective taken by this Study relates to the fact that, unlike previous studies, it focuses on a supranational legal system rather than a national legal system. This supranational system has become a growing source of inspiration for the ISC rulings. The sequel Article introduces both the quantitative and qualitative spike in EU citations while arguing that the presence of EU law in ISC rulings is still highly limited. Be that as it may, the Study sheds light on this limited approximation between the Israeli legal system and EU law, as evidenced in ISC rulings.

Part III of this Article chronicles the bilateral relationship between Israel and the EU. This primarily historical discussion presents the complexity of the relations from their inception to recent times. It points out the centrality of economic, financial, political, scientific, and cultural ties and cooperation, as well as the EU's role in the MEPP, to EU-Israeli relations. The European involvement in the Arab/Palestinian-Israeli conflict has a heavy impact on what has developed into an uneasy relationship. Over the years, EU activities and political statements and declarations never deviated from the official position that Israel's internationally recognized economic borders were the 1967 lines. Israeli-EU relations also have a regional dimension with a Euro-Mediterranean depth. This Article argues that the presumption that in recent years Israeli-EU relations have been frozen is inaccurate, and it presents a vital relationship that continues to develop despite contentions between the two sides.

The growth in the referencing of sources of EU law in ISC rulings is not occurring in a vacuum, and it is part and parcel of a broader rapprochement in Israeli-EU relations. The critique articulated in the sequel Article regarding the limited number of references to EU law in Israeli jurisprudence emanates precisely from this point. Since many Israeli justices have origins in European countries, and in light of the unique relationships between Israel, the EU, and all its member states, it is expected that EU law would enjoy a higher status in Israeli rulings and that it would have a more profound impact on Israeli jurisprudence. These issues are discussed at length in the sequel Article, together with the Study's descriptive and empirical findings.