Interlude 3: Impact

Indian and Jewish works on ancient public law shared many similar traits. The works produced in India and Palestine were based on the assumption that political institutions and public law were not universal but were particular to each nation and that history should be used in their study. Constitutional structures and constitutional law, both Indian and Jewish scholars believed, were a reflection of the "spirit" of the people.

The similarity was not confined to the particularist and historicist approach that Indians and Jews adopted to study their ancient constitutional laws. The two groups made similar claims about their respective systems: that they were characterized by ancient, sophisticated, and secular political institutions and law; that fundamental concepts associated with modern Western political thought (the social contract theory, the separation of powers, the idea of international law) had Indian or Jewish antecedents; and that one could find in these ancient systems the notions of democracy, republicanism, constitutional monarchy (where the power of the ruler to govern and legislate at will was limited), and the idea of the rule of law. Despite evidence to the contrary, both groups of scholars argued that legal and social equality was not a modern invention but could be found (admittedly, with some effort) in Hindu and Jewish law. In both the Indian and Jewish case, one could also find more critical voices: Benoy Kumar Sarkar, Devadatta Ramakrishna Bhandarkar, and, above all, Upendranath Ghoshal adopted a more

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 13 Nov 2026 at 22:03:33, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009699877.010

critical and less celebratory attitude. In Mandatory Palestine, Haim Cohn and Paltiel Dikshtein were similarly skeptical about some of the claims made by their Jewish counterparts.

There were, of course, also differences between Hindu and Jewish authors. The Hindu polity literature was mostly the product of a specific time and place. It was created by scholars mainly affiliated with the University of Calcutta in the first decades of the twentieth century. The Jewish public law literature, in contrast, was more diverse. Temporally, the roots of this literature go back to traditional medieval Jewish thinkers and to the early-modern Humanists. Its geographical scope in the early twentieth century was also broader as it was produced in multiple locations and written by Jewish authors based in Europe, North America, and Palestine.

Professionally, the Hindu polity authors were academics affiliated with law, history, archaeology, and the social sciences departments. The Jewish authors belonged to a more heterogeneous group. Some were linked to Jewish higher education institutions such as the Hebrew University in Jerusalem or the Tel Aviv School of Law and Economics, but many had other non-academic occupations: rabbis, practicing lawyers, and politicians. As a result of their university affiliation, the ideas of the Hindu polity scholars mostly appeared in academic monographs. In the Jewish case, academic works were accompanied by popular books and articles aimed at lay readers (for example, Berman's 1944 book) and halakhic texts.

Linguistically, the Jewish works were also more diverse. While the Indian works were written in English, the Jewish works were written in a variety of languages, including English, German, and Hebrew.[1] The linguistic differences also reflected the different audiences that the Indian and Jewish authors were endeavoring to address. In the case of Jewish scholars, the works written in Hebrew were meant to convince skeptical Jewish readers that the study of Jewish legal institutions could inspire and contribute to modern constitutional

[1] The Hindu polity authors also published works in other languages. For example, Kashi Prasad Jayaswal had a sizeable body of works in Hindi. See Ratan Lal, *Kashi Prasad Jayaswal: The Making of a "Nationalist" Historian* (Delhi: Aakar Books, 2018), 57–101. However, based on bibliographies that are available on many of the Indian scholars, it seems that their works on constitutional history were primarily or exclusively written in English.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 13 Nov 2026 at 22:03:33, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009699877.010

law. When writing in other languages, the audience that Jewish scholars were addressing was not necessarily Jewish. Therefore, the contemporary relevance of Jewish public law (whether it was fit for revival or not) was not necessarily one of the main goals of the non-Hebrew works.

The comparative framework used by the authors of the Hindu polity literature was based on the notion of an "Aryan legal family" or, in a few cases, on pan-Asianism. These comparative frameworks did not play an important role in the Jewish case. Instead, Jewish scholars sometimes compared Jewish public law to Roman law and sometimes argued that Jewish law shaped major public law notions found in Christianity.

The Indian and Jewish works were based on different primary sources. In the Indian case, the use of ancient texts was sometimes augmented by including archaeological evidence. For example, Radhakumud Mookerji's book on local government referred to ancient coins, seals, and inscriptions. The Jewish works relied only on manuscripts and published texts. Another difference was found in the periods examined. In the Indian case, the major turning point in the history of Hindu political independence only occurred in the Middle Ages when Islamic states were established in India. In the Jewish case, the pivotal shift occurred earlier with the Roman conquest of Palestine, followed by the Second Temple's destruction in 70 AD. Consequently, the Indian sources used were often connected to the actual political reality of the time in which they were created, while the post-Biblical Jewish sources were divorced from practical political concerns, and were describing ideal rather than actual polities. The difference in the periods examined was related to a substantive difference. At least for some of the Hindu polity authors, Islam, representing, according to Radhakumud Mookerji, the "Semitic" model of a society governed by a single absolute ruler, was the "other" against which they defined themselves. In the Jewish case, Islam was almost totally absent from the discussion.

It is not always clear what the exact political affiliations of the Hindu polity authors were, although some of them certainly had links with Hindu nationalism. A few scholars, such as Radhakumud Mookerji and Hemchandra Raychaudhuri, also expressed some affinity to socialist ideas, but socialism was not a major factor

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 13 Nov 2026 at 22:03:33, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009699877.010

influencing the Hindu polity works per se. In the case of the Jewish writers, as we have seen, three groups could be distinguished based on their commitment to religion and nationalism (Orthodox rabbis, Jewish scholars in the Diaspora writing in Western languages, and Cultural Zionists). Another possible way to subdivide the Jewish authors would have been to distinguish between anti-nationalists (such as the anti-Zionist Breuer) and Zionists of different sorts: Religious Zionists (such as Federbusch), socialists (such as Livneh), and even communists (such as Eisenstadt). Thus, while the main Western ideology that shaped the Indian works was nationalism, in the Jewish case, nationalism was certainly the main ideology but Marxism, too, played a role.

Regarding motivation, both Indians and Jews sought to prove that Western images of their political institutions and thought were erroneous. However, in the Indian case, the motivation of the authors seems to have been mainly to foster pride in a national past (although one can also sometimes find calls for the practical application of ancient Indian constitutional history in the design of contemporary constitutional arrangements). In the Jewish case, too, one can discern a desire to refute Western images of Judaism and its political institutions, implicitly driven by a wish to drum up pride in the past. Arguably, though, the vision of reviving Jewish public law was an even stronger motivation. Such motivation can be found in the works of Religious Zionist scholars, including Berman and Federbusch, and secular scholars, such as Eisenstadt. As a consequence, while the Hindu polity literature was not part of the law school curriculum in colonial India, Jewish students, at least at the Tel Aviv School, were required to study not only modern constitutional and international law but also ancient Jewish public law.

Turning to the details of the substantive content of the Indian and Jewish works, it seems that, while similar themes appeared throughout these works, there were also some differences in emphasis. For example, the Indians were greatly concerned with the "Oriental despotism" image. This image also appeared in Jewish works (in Israel Friedlaender's writings, for instance), but the main problem that concerned Jewish authors was not that of strong despotic political institutions but the opposite: how to refute the image of weak Jewish states and institutions, and the image of Jewish public law as antiquated and therefore irrelevant. Similarly, while Indians

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 13 Nov 2026 at 22:03:33, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009699877.010

invested much effort in discussing democracy and the existence of republics to counter Western views of ancient Indian states as absolute monarchies, the Jews, though sometimes discussing these topics, were less concerned with them.

There were other substantive differences in emphasis. In discussions of equality, Indian scholars devoted effort to the problematic category of caste, which had no parallel in Jewish society. Jewish scholars, meanwhile, endeavored to prove that Gentiles were not subject to discrimination, while the topic of the legal rights of foreigners was of little concern to Indian scholars. Another difference between Indian and Jewish authors had to do with economic equality. Perhaps because of the greater influence of socialist ideology on certain Jewish scholars, they took great pains to prove that Jewish law sought to further workers' rights and economic equality. In the Indian writings, economic equality was a minor theme.

Finally, there seems to have been a difference in how law was presented in the works of the two groups. While many of the Indian scholars were lawyers by training, the Hindu polity works were primarily historical and devoted to describing political ideas and institutions rather than detailing the rules governing them. In the Jewish case, legal topics were more prominent. This, perhaps, resulted from the different nature of the sources used. In the Indian case, the sources used (such as the *Arthashastra*) were government manuals, not legal codes. In the Jewish case, the oldest source used, the Bible, was also not primarily a legal code. However, later sources were mainly legal (the Talmud, or the section of Maimonides' code dealing with the rules about kings and wars (*hilkhot melakhim*)). Another reason for the more legal orientation of the Jewish works had to do with the motivation of the authors. As noted earlier, the Indian works were mostly driven by the desire to instill pride in the national past. In the Jewish case, this motivation existed side by side with the vision of harnessing the ideas and institutions found in Jewish constitutional history as building blocks for the constitutional law of the future Jewish state.

Was there any interaction between the scholars of Mandatory Palestine and India? The authors of the Hindu polity literature did not mention Jewish political traditions (apart, perhaps, from a reference found in Sarkar's work to the biblical roots of Western conceptions of equality). Jewish authors seem to have been equally oblivious to the

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 13 Nov 2026 at 22:03:33, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009699877.010

Indian works. They did not allude to India except, perhaps, for passing references contrasting Jewish egalitarianism and the "Aryan" hierarchical concept of society expressed in the Indian caste system.[2]

Although there was no direct dialogue between the Indian and Jewish scholars, there are subtle indications of an indirect and circuitous constitutional exchange between them. At the beginning of Chapter 5, I mentioned a 1949 article by B. N. Rau, one of the leading drafters of the Indian Constitution, in which he turned to the Hindu polity literature to bolster an argument about the choice between a presidential and a parliamentary system in the future constitution of India. Rau then published a subsequent article that same year on the future of the Indian constitution. This later article appeared in the journal of the Indian Council of World Affairs, *India Quarterly*.[3]

In 1953, another article dealing with the constitution of a newly established postcolonial state, Israel, appeared in the same journal, *India Quarterly*. This piece was written by the drafter of Israel's would-be constitution, Leo Kohn, and it described the constitution-making efforts of the State of Israel after independence in 1948.[4] At one point in the article, Kohn described his draft constitution and

[2] Abba Hillel Silver, *Where Judaism Differed: An Inquiry into the Distinctiveness of Judaism* (New York: Macmillan, 1956), 224, 225–7; Paltiel Dikshtein, "Hukey Moshe ve-Hukey Hammurabi," in *Professor Paltiel Daykan (Dikshtein): Mivhar Monografyot, Mehkarim u- Ma'amarim*, ed. Yitzhak Orren (Tel Aviv: Yavneh, 1975), 150, 153–4. The only citation of Indian scholarship by a Jewish scholar writing on Jewish public law that I found was in Norman Bentwich's work. See Norman Bentwich, *The Religious Foundations of Internationalism: A Study in International Relations through the Ages* (London: Allen & Unwin, 1933), 181–203, 160n1, 184n2, 287 (discussing Hinduism, Buddhism, and the religions of China and Japan, and citing S. V. Viswanatha 's book, *International Law in Ancient India* (Bombay: Longmans, 1925), and Ameer Ali 's book, *The Spirit of Islam* (Calcutta: S. K. Lahiri & Co., 1902)).

[3] B. N. Rau, "The Indian Constitution," *India Quarterly* 5 (1949): 293.

[4] Leo Kohn, "The Constitution of Israel," *India Quarterly* 9 (1953): 78, 80. It is interesting to note that the issue in which this article was published (which only contained four articles) was opened by another article written by a Zionist author, Joseph B. Schechtman. Schechtman was a right-wing Revisionist Zionist political activist. He was also a leading expert on the topic of forced population transfers. He published many works on the topic, including one on the India–Pakistan population transfer which followed the partition of India. This, perhaps, is the reason the editors of the *India Quarterly* were interested in his work. On Schechtman, see, generally, Antonio Ferrara, "Eugene Kulischer, Joseph Schechtman and the Historiography of European Forced Migrations," *Journal of Contemporary History* 46 (2011): 715.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 13 Nov 2026 at 22:03:33, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009699877.010

noted that, in the chapter dealing with human rights, "an effort was made to embody some of the characteristic spiritual traditions of the Jewish people."[5] Kohn then affirmed that "the sanctity of human life and the dignity of man were postulated as major objects of the State's solicitude. The death penalty was to be abolished." This remark, perhaps, did indeed indicate the influence of Jewish traditions on the draft Israeli constitution since one can find post-biblical Jewish sources expressing a hostile attitude to capital punishment.[6] However, following these words, Kohn continued to list many other constitutional rights that seem to have stemmed from modern constitutional and human rights discourse rather than from Jewish law (habeas corpus, prohibition of preventive detention and military courts, right to form trade unions, and so on). As Kohn himself later noted, "Western parliamentary democracy" was the actual model he had followed in drafting the Israeli Constitution; and, while Kohn himself was well aware of the literature on Jewish constitutional traditions, his Indian readers could learn little from his article about them, or about their potential influence on Israeli constitutional drafting, because Kohn did not describe these traditions in detail.[7]

Both Rau's and Kohn's articles paid lip service to the literature analyzed in Chapters 5 and 6. Yet, when the moment came to actually use constitutional traditions, the mid-century drafters of the (successful) Indian constitution and the (failed) Israeli constitution opted not to use them. As a result, the actual impact of the scholarly works discussed here proved more limited than it might have otherwise been, and in this respect, too, India and Israel were similar.

[5] Kohn, "Constitution of Israel," 80.

[6] See, e.g., Nathan J. Diament, "Judaism and the Death penalty: Of Two Minds but One Heart," *Tradition: A Journal of Orthodox Jewish Thought* 38 (2004): 76. The death penalty, except in rare cases such as those of former Nazis, was indeed abolished by the Israeli Parliament in 1954. See Amihai Radzyner and Rivka Brot, "Masa' u-Masa le-Vitul 'Onesh ha-Mavet 'al 'Averat ha-Retsah," *'Iyuney Mishpat* 47 (2024): 475.

[7] Kohn, "Constitution of Israel," 81.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 13 Nov 2026 at 22:03:33, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009699877.010