COMMUNICATIONS

Dear Sirs,

In his illuminating Comment on the judgment of the Supreme Court in *Spector* v. *Tsarfati* (14 Is.L.R. 104), Professor Uri Yadin deems it necessary to devote almost a full page to the phenomenon of the Court's "Reliance on Learned Writings" (pp. 112–113). He seems to deplore the fact that the Court failed to adopt "the English attitude to legal literature", but deigns to have recourse to "such materials more easily and more frequently", and—beware and behold!—is "prepared to cite as authoritative, opinions of writers who are still alive or who may not perhaps be considered to have attained eminent scientific authority" *(ibid.)*. May I request the hospitality of your pages to enter a plea in defence of the Court?

In his Comment Professor Yadin makes reference to a Report submitted by him to the Ninth Congress of Comparative Law (1974) on the question, "To What Extent Are Judicial Decisions And Legal Writings Sources of Law?". He writes there that there is nothing in Israeli law by which the standing of legal writings as a legal source could be determined (p. 35), and that however much Israeli judges refer to or even rely on such writings, they have not thereby necessarily elevated them to a source of law: "On this issue it seems too early to proffer any conclusions . . . Nevertheless, what a supreme tribunal does, ought to be fairly indicative of what the law 'is'. All the more in a country like Israel in which the law reports are of such paramount importance for the study of the law" (p. 36). Investigating in more detail into the output of the Court in one particular year, he finds that "in some cases legal writings have been directly relied upon, thereby elevating them to a status corresponding to that of binding judicial precedents" (p. 38), whereas "in the great majority of instances, legal writings did not serve as direct basis for the decision, but as authorities of various and hard-to-define degrees" (p. 39). He also found some instances of legal writings being adduced by way of comparison, "with a view to elucidate the local law", and a few "as a sort of 'negative authority': the court refutes what is said in them in order to support its own contrary opinion" (p. 40). I have no quarrel with this attempt at classification; but the practical application thereof in the Comment under review, where Yadin classifies "five recent Israeli law review articles . . . all written by junior members of the teaching community", as "academic endeavours" which "have thus been elevated to the status of source material directly applicable to the determination of judicial questions" (p. 113), calls for a rejoinder.

Before I come to the "junior members of the teaching community", let me have a glance at their betters and elders. The examples which Yadin adduces from our law reports for cases in which legal writings were resorted to as if they were binding on the court, concern such renowned and venerable text-

books as Buckley on *Companies Law,* MacGillivray on *Insurance Law,*—and quite a few more could be added to the list, such as Chitty on *Contracts,* Clerk & Lindsell on *Torts,* Linley on *Patnerships,* Williams on *Bankruptcy,* Phipson—and Wigmore—on *Evidence,* Dicey on *Conflict of Laws,* and—for a living author—Glanville Williams on *Criminal Law:* not to speak of Halsbury's *Laws of England,* both the Hailsham and the Simmonds editions, which is the book perhaps most often resorted to. It goes indeed without saying that wherever English law is still applicable, or where it has to be probed into as the original or former law, these textbooks and their likes are regarded by the Court as the most reliable depositories of the common law, and the reference to them simply saves, more often than not, further searches into law reports. But the binding "source of law", even here, is not the textbook as such, nor it is its learned author, who—however, celebrated he may have become—has never attained the status of a lawgiver: what the court has resort to as a "source of law" is the common law of England which it finds accurately and adequately set out in those well-established textbooks.

The same applies to textbooks written by eminent Israeli authors. Sussmann's books on *Civil Procedure,* on *Bills of Exchange,* and on *Arbitration,* for instance, are generally regarded and accepted as true and reliable statements of Israeli law and judicature: and when quoted as authority, they are relied upon not for the—however weighty—personal opinions of their author, who is, in his literary no less than in his judicial capacity, vulnerable to dissent, but for the law as it has been established by precedent and custom and as it is there accurately described.

This is no innovation on the part of our Court, but, it is submitted, in the best English and American tradition. We find already Blackstone writing that besides the statutes and the law reports there are also "authors to whom great veneration and respect is paid by the students of common law . . . whose treatises are cited as authority and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles" *(Commentaries on the Laws of England* (1765) vol. 1, p. 72). It is true that he lists there only authors of past generations, and it may indeed be justifiable that only such books be invested with the force or fiction of ancient or immemorial tradition. But that does not mean that any "authority" attributable to textbooks of English law is confined, as popular myth has it and as Professor Yadin hints, to authors who are no longer alive. It is reported that Sir Edward Coke did not live to see the last three parts of his *Institutes of the Laws of England* in print, because King Charles ordered the Lord Keeper to halt publication for fear that the all too liberal views there propounded might weigh too heavily with parliament and the judges, "and they may be misled by anything that carries such an authority as all things do that he [Coke] either speaks or writes" (from a quotation by Catherine Drinker Bowen in her biography of Coke, *The Lion and the Throne* (1956) p. 516). And Sir William Holdsworth

assures us that Hale's *Pleas of the Crown* "has been regarded as a book of the highest authority" ever "since its first publication" (*Sources and Literature of English Law* (1925) p. 153), and since then, he reminds us, has "the revival of the teaching of English law . . . naturally and automatically revived the authority of books written by lawyers who set out to teach law" (*ibid.*, p. 161).

Another great exponent of the English system of jurisprudence, Professor Dicey, has opined that "Courts are affected, as Parliament never is, by the ideas and theories of writers on law. A Court, when called upon to decide cases which present some legal difficulty, is often engaged—unconsciously it may be—in the search for principles. If an author of ingenuity has reduced some branch of the law to a consistent scheme of logically coherent rules, he supplies exactly the principles of which a Court is in need. Hence the development of English law has depended, more than many students perceive, on the writings of the authors who have produced the best text-books" (*Law and Public Opinion in England During the Nineteenth Century* (2nd paperback ed., 1962) p. 365). By way of example he lists there a number of authors, some of whom were still alive at the time of his writing. In another context, he went so far as to assert that there is no real difference between French and English courts insofar as reliance on learned writings is concerned: "the authority exercised in every field of English law by . . . eminent writers" is the same as that exerted in France by French authors (*Law of the Constitution* (8th ed., 1931) p. 370).

Opinions are divided among English jurisprudents as to the exact kind of "authority" that is wielded by learned writings: some scholars thought that they were binding only in "the absence of direct precedents" (Vinogradoff, *Common Sense in the Law* (3rd ed., 1959) p. 142); some held that they were to be regarded in the same way as *obiter dicta* in otherwise binding precedents (Holland, *Jurisprudence* (13th ed., 1924) p. 65); and others attributed "persuasive efficacy" not only to the "English and American textbooks of the better sort", but also, *nota bene,* to "articles in legal periodicals" (Salmond on *Jurisprudence* (11th ed., 1937) p. 166). But no writer of substance would deny to legal publications, whether of living or of dead authors, the right of entry into and audience before the English courts.

The story goes that Judah Philip Benjamin, the Confederate Minister who went into exile to England and there dedicated himself to legal writing, had an immediate and spectacular success with his textbook on the *Law of Sale*. When, shortly after its publication, counsel quoted from the book before Sir George Jessel M.R., that great judge is reported to have looked up in consternation and anxiously enquired whether Mr. Benjamin had died. Learned counsel had apparently sung the praise of the author and evoked in the judge's ear obituary associations. It is this innocent but misguided judicial enquiry which seems to lie at the root of the spurious rule that only authors who have already departed this life may be quoted in court. However that

may be, the abstinence from quoting living authors has in some places become a kind of would-be forensic etiquette. Even Israel, in purported imitation of English habits, had its share, and Professor Yadin is wrong in believing, all too optimistically, that the "idea that a scholar had to be dead before he could aspire to become an authority has naturally never occurred to an Israeli judge" (Report, p. 36). When I myself, arguing a case before the late Mr. Justice Goitein, of blessed memory, relied on the leading (and, indeed, the only) textbooks on monetary law, the one by Professor Nussbaum and the other by Dr. Mann, who were at that time both still very much alive, I was sternly queried as to how and why could books like those properly be mentioned in court. It is true we have gone a long way since then: no longer do we wait for learned authors to depart for a better world before we welcome their writings into the halls of justice.

If, in the course of nature, the patience of the courts might not be too grievously taxed in the case of authors whose years are full and whose names resounding and whose *opera magna* may be predicted to run into many *post mortem* editions, judges cannot fairly be expected to possess their souls in patience until "the junior members of the teaching community" reach mature age and high academic stature. Courts should be enabled to benefit from the research and industry of these juniors now—as and when the need and opportunity arise. The regular writings of legal academicians, as well as the extra-curricular writings of legal practitioners, ought to find admittance and appreciation in the courts not because of any "authority" they can—or would pretend to—boast, but rather notwithstanding their total lack of "authority". They are not, and do not pretend or aspire to be, in the nature of "sources" of the law: they are, in truth, but part and parcel of legal *argument*.

Our system of adjudication is based on the notion that the legal material relevant to and necessary for the decision in a case, is—or ought to be—brought before the court by the argument of counsel. It is traditionally one of the most serious shortcomings of a judgment if it is rendered *per incuriam,* that is, without proper argument, and, in particular, where a binding precedent or an applicable statute has been overlooked, whether for lack of argument or because of its deficiency. *Incuria* in fact amounts to *ignorantia* (see Allen, *Law in the Making* (5th ed., 1956) p. 237), the court giving judgment in ignorance of the legal material pertaining to the case. It is, of course, the primary responsibility of counsel to see to it that the whole of such pertinent material is duly brought to the attention of the court; but however learned and erudite the particular counsel may be, he will always be well advised to fortify his argument by having some legal publications vouch for it. Not that the argument changes its character as such by being so vouched for: but instead of being heard in the single voice of the arguer, it is now put forward in unison with *opinio doctorum,* and the court is legitimately sought to be impressed by the fact that the point made by the practitioner was not just of his own ingenuity but also blossomed in the Elysian fields of the campuses.

But however impressed the court may be, it will of course reject any argument which does not commend itself on its merits—whether or not so academically fortified.

In the same way as the court normally deals with counsel's arguments, first describing and then either accepting or rejecting them, the court will normally deal also with legal publications relied on in argument, either accepting or rejecting their propositions. And in the same way as the court may, in exceptional cases, raise and deal with a legal argument of its own motion, so it may refer to and quote from a legal publication even though it had not been referred to in argument. Many judges do not only not rely any longer blindly and exclusively on the resourcefulness of counsel, but are moreover themselves involved to some extent in academics, and are familiar with the published academic output. It would be folly indeed to muzzle the judge when he treadeth out his corn. As an astute American observer put it: "Any effort at limitation to legal literature has . . . been growing into something so arbitrary and inept as to verge on farce. Look at today's legal literature, the law reviews especially, but the modern good text as well, and you find the footnotes and the argument shot through with social discipline material like double-coloured silk. No workable rule can keep such material out of the brief. It becomes a case close to the policy of the best evidence rule . . ." (Llewellyn, *The Common Law Tradition Deciding Appeals* (1960) p. 234).

In actual practice, law review articles and also the more "authoritative" textbooks, are nowadays freely referred to and made full use of by all English and American courts, as a matter of course. Instead of browsing through contemporaneous law reports for examples, let me unearth a reference dated fifty years ago: it was Mr. Justice Holmes (dissenting) who cited a Student's Note in the Harvard Law Review, describing it as an "examination by a most competent hand" (*Black and White Taxicab Co.* v. *Brown and Yellow Taxicab Co.*, 276 U.S. 518 at 532).

In jurisdictions such as ours, where we are not bound by our own precedents, it is all the more important to open the doors and the minds to academic cristicism, even *arguendo post factum*. It happened to myself once that a young instructor by the name of Englard (whose name I had never heard before) wrote in a comment on one of my judgments that I had overlooked a pertinent statutory provision: he thus enabled me to correct the mistake (and express my indebtedness) upon the very next opportunity. No judge is immune from error; and the conscientious judge looks to his academic critics to detect and expose any errors that may have crept into his work. Like between bench and bar, so also between the judiciary and the academic, there exists a mutual interdependence—and it is by no means the case that the judiciary supplies research material to the academician, while the latter does not give the judge anything in return. On the contrary: judicial endeavour would suffer greatly from lack of response and of criticism and of stimulus,

were it not for the writers, young and old, who shower legal literature upon the judges.

I can only humbly associate myself with that great master of our craft, Mr. Justice Cardozo, who wrote in 1927 that he counted it "a happy thing that the bar today has so many organs of expression by which it can make vocal, thoughts and sentiments that might otherwise be uncommunicated and hidden. There are the law journals, increasing year by year alike in number and in power . . . All those organs of expression have a message for the judge who has the ear and the will to listen. The law reviews give him some hint of the unplumbed abysses of his ignorance" (Law and Literature" in *Selected Writings of Benjamin Nathan Cardozo* (1947) p. 425).

Yours sincerely,
Haim Cohn
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Professor Yadin replies:

I was delighted to see that my modest remarks on the subject of "reliance on learned writings" provoked Justice Cohn to elaborate on that theme, employing his vast erudition and quoting from eminent authority of many lands and eras in the common law world. I was also delighted to see how he succeeded in putting the local approach to learned writings into perspective in relation to that adopted in England and America. Particularly enlightening for me was his idea that learned writings serve not as a source of law, but as "part and parcel of legal argument".

What, however, caused me surprise and regret was that he thought my remarks "called for a rejoinder". I may have been mistaken in my assumption that Israeli judges rely on legal literature more liberally than their English colleagues, and I am grateful to Justice Cohn for correcting this error. But neither in my note on the *Spector* v. *Tsarfati* case nor in my Report to the International Congress of Comparative Law did I intend to convey anything critical of the Israeli attitude. On the contrary, far from "deploring" it, I considered it praiseworthy and encouraging, and tried, on my part, to encourage its further development. It never occurred to me that my words, written in perfect good faith, might be misunderstood and evoke a different, let alone contrary impression and bring Justice Cohn to a request, "to enter a plea in defence of the Court".